CA224

NZCA

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

27/5

HC 117/92

NOT RECOMMENDED

641

BETWEEN SIDNEY FRANCIS GARDINER and MEREDITH BEVIN GARDINER

Appellants

A N D MAURICE JACOB HOWLEY of Auckland, Chartered Accountant, and MARGARET ANN HOWLEY his wife

Respondents

Hearing: 16 May 1994

Counsel: Mr J.H. Wiles for Appellants
Mr G.A. Howley for Respondents

Judgment: 17 May 1994

ORAL JUDGMENT OF TEMM J.

Solicitors: J.H. Sanders, Papatoetoe for Appellants

Rice Craig, Papakura for Respondents

The appellants, who were the defendants in the Court below, appeal against the judgment delivered on 29 October 1992 in which District Court Judge Elliott held them liable in damages in negligence to the respondents who were the plaintiffs in the Court below. By agreement between the parties the amount of the judgment was not fixed, the argument being based on a question as to whether there was liability.

BACKGROUND FACTS

In 1981 the appellants decided to build themselves a house in Redoubt Rd, Wiri and did so by engaging staff on a labour only basis with some contractors for particular kinds of work. I put the matter deliberately in a general way because a central question arising in the argument on appeal was whether or not the appellants could properly be regarded as the head contractors for the purposes of liability.

The appellants lived in the house for about five years and sold it to the respondents. Soon after the purchasers moved into possession they found defects of various kinds, mainly with inadequate waterproofing and other matters which caused them, as I discern it, growing concern. They put up with the situation for a time but eventually, on 8 January 1990, the respondents wrote to the appellants listing what they described as the "major faults" they had found and asking for some recompense. The appellants took the view that the sale having taken place on an arm's length basis the principle *caveat emptor* applied and they refused to acknowledge any responsibility. As a result these proceedings were issued.

THE DISTRICT COURT JUDGMENT

This being an appeal it is necessary to mention that the obligation on the appellants, in order to succeed, is to satisfy me either that the findings of fact in the Court below, or the principles of law which the Judge applied, were wrong. Dealing with the question of fact an issue at an early stage in the argument was whether or not the appellants could be regarded as the contractors in respect of this house building project. As one can see from the background, if they had simply contracted some builder to construct the premises for them, then the respondent's cause of action, if it existed at all, would exist only against that builder. It was a central part of the dispute in the Court below as to whether the appellants could properly be described as "head contractors" but the evidence in the record shows that they took a very active part in controlling the whole of the construction.

The District Court Judge reached a conclusion of fact (p.6) that the appellants were in effect head contractors and based himself principally upon the judgments in ***Mersey Docks and Harbour Board v Coggins and Griffith*** [1947] AC 1 and ***Hargreaves v Mayhead Brothers Ltd*** [1971] 559. He expressed his finding of fact in the following way:

> "For the above reasons it seems to me to be incontrovertible that the defendants on the facts placed themselves in the position of head contractors, that they paid for labour only, that although the various tradesmen were to use their own skill, it was the defendants who assumed and took control and had the power of "hire or fire" over the work which the various tradesmen did, e.g. as evinced by the substitution of the various tradesmen."

That is a primary finding of fact which the appellants have to disturb if they are to succeed on this appeal, but reading the evidence as I have, I come to the conclusion that there was a foundation in the facts for this finding to be made and I cannot hold that it was wrong.

A DUTY OF CARE

The next issue which the learned Judge in the Court below isolated as being the next matter of importance was the identification as to whether or not a duty of care existed as between the appellants as vendors and the respondents as purchasers. In this part of his judgment he referred to most of the leading cases and contented himself with a comparatively long extract from a judgment just recently delivered in the District Court called ***Willis v Castelein*** which was later subject to appeal in this Court where it was in fact reversed. The mechanics and the details of the facts in that case need not be noticed by me because the conclusions reached depended entirely upon the facts which have no relevance to the evidence on this appeal. Much of what had been written as to the law in the ***Wills v Castelein*** case was, in my judgment soundly expressed.

The leading case on this question is ***Bowen v Paramount Builders (Hamilton) Ltd*** [1977] 1 NZLR 394 in which the Court of Appeal, by a majority, reached the conclusion that a builder who had constructed two flats several years before, could be liable to a subsequent purchaser when the foundations of the building subsided.

There has been much argument in the course of this appeal as to whether the nature of the damage of which the respondents complain is "qualitative or structural". In the result that I reach it is not necessary for me to make any particular comment on the legal issues raised by those two descriptions because I find that the District Court Judge was right in his ruling that there have been significant structural defects to which the respondents are now subject. But I mention in passing that it seems to me

difficult to justify in logic or in law that if there be damage of this kind which is significant, that the tort feasor should escape liability if someone decides to describe it as qualitative.

I think it appropriate first to refer to the judgment of Woodhouse J. in the ***Paramount Builders*** case where he cited with approval the observation of Sachs LJ in the case of ***Ministry of Housing & Local Government v Sharp*** [1970] 2 QB 223, 373. Commenting upon the observation Woodhouse J. said this:

> "... It would seem only common sense to take steps to avoid a serious loss by repairing a defect before it will cause physical damage; and rather extraordinary if the greater loss when the building fall down could be recovered from the careless builder but the cost of timely repairs could not. Nor do I think it would be logical or right to exclude a claim for the diminution in value of the building which might still remain after every reasonable step had been taken to repair the defect or the damage it had caused. So, with all respect to the contrary opinion of Speight J., I think that in the present case the claim is not for a purely economic loss. Instead, the evidence demonstrates, first that the defect referable to the foundations caused actual physical damage to the building; and, second, that the element of depreciation in the claim by the Bowens is an associated effect of that damage. It now becomes necessary to decide whether a duty of care was owed to the appellants on such a basis." (p.417)

After considering the facts further the learned Judge went on to discuss the question of defective workmanship in a building and made the following pungent comments:

> "The chance that the debt in tort could be wider than the specified contractual duty owed by the builder to the original owner is something different. But I do not consider the Courts need be astute to protect those prepared to undertake jerry-building or shoddy work against the reasonable claims of innocent third parties merely because their bad work was done to a deliberate pattern or by arrangement. The recognition of a duty situation does not depend upon overcoming some initial bias in favour of excluding it. ... I do not regard a private contractual arrangement for an inefficient design or for an unworkmanlike or inadequate type of construction as any sort of "justification or valid explanation" for releasing the builder from his duty to those who otherwise could look to him for relief." (p.419)

The question of whether or not economic loss can be recoverable as damages in tort has bedevilled the law for the last 30 years but the issue now seems to be clear beyond doubt. In the same case Cooke J., as he then was, dealt with this issue by expressing the law to be in the following terms:

> "An objection of a more doctrinal nature is that the loss is economic and that only contract should give a remedy. As to the first branch of this objection, the loss in the instant case is not purely economic. The building has undergone some damage and deterioration, the damages claim being merely the measure. In any event it is clear (from authorities cited) that negligent advice in breach of a duty of care may be actionable though the loss be purely economic; and more generally the House of Lords has at least left open the door to recovery in negligence for purely economic loss..." (p.422-423)

The issue in the ***Paramount Builders*** case concentrated heavily upon the question of the contractual liability of the builders to the home owners and the Court had to make a decision as to whether or not, in the absence of a contractual duty, the builders could be liable in negligence.

In this particular case no question of contractual relationship arises so far as a contract to build the house is concerned. The only connection between the appellants and the respondents is by virtue of their contract of sale and purchase. Had the appellants not been the head contractors, as found by the Judge in the Court below, a different result could have been reached, but my conclusion is that on the authority of ***Bowen v Paramount Builders Ltd*** there was a duty of care owed by the appellants to the respondent as the learned Judge found in the judgment under appeal. (p.20)

INTERMEDIATE INSPECTION

In what I regard as a careful and thorough judgment the learned Judge then investigated the issue raised by the appellants as a defence, that because of the inspection of the property by the respondents as potential purchasers, there was an opportunity for an intermediate inspection which exonerated the appellants from any obligations because whatever defects existed should have been apparent to the respondents on examination.

There was evidence from three witnesses before the learned Judge comprising a Mr Magnusson, a Mr Hinton and a Mr Stevens. Their evidence collectively makes it perfectly plain that the Judge had before him facts deposed to by these experts to show significant deficiencies in the structure of the building, many of which were latent and not patent. For example, in the evidence of Mr Magnusson who filed a report on his examination of the building, there are 17 points which he raises, a number of which relate to the inadequate weatherproofing. But some of them are more structural than that, particularly his reference to the beams of the upper floor being cracked as a result (in his opinion) of being exposed to weather "for an extended period during construction". He also referred specifically to the upper flight of stairs not being correctly or adequately supported because the stringers were standing free and the flight was supported only by the fixing of the upper tread and the bottom riser. There is reference also to some of the floor joists having too much flexibility and much of the rest of what he has to say relates either to weatherproofing or to plumbing.

Part of the evidence in the case was a collection of photographs, one of which showed a three foot, straight-edge ruler being held vertically against a wall with space at the bottom and top of the ruler, demonstrating

clearly the significant bulge that existed. This apparently is because of leakage within the building and these points which one mentions all have a bearing upon the finding as to whether or not there was an opportunity for intermediate inspection. As to the nature of the deficiencies in workmanship the Judge in the Court below said at p.23:

> "In particular the standard of workmanship of the plumbing work was also trenchantly criticised by Mr Stevens a self employed plumber who carried out a full inspection of the plumbing work and installation in the house after being called out by the defendants to effect some work after a flooding episode referred to in the evidence. There are also a series of photographs as exhibits before the Court illustrating the points referred to both in the report of Mr Magnusson and the evidence of Mr Stevens. In particular Mr Stevens also commented on the flashing work standard as being abysmal and disgusting and that he could see no reason other than shoddy workmanship for the problems which have evolved in the house."

The learned Judge reached the conclusion that there was not any opportunity for intermediate inspection by the respondents and in my judgment correctly based himself upon the principle enunciated in ***Jull v Wilson & Horton*** [1968] NZLR 88 as finding that the onus is on the plaintiff

> "to bring himself within the ambit of a legal duty to take care and a person cannot shelter behind a reasonable expectation of intermediate inspection unless the expectation is strong enough to justify him in regarding it as an adequate safeguard to persons who might otherwise suffer harm." (p.25)

The evidence shows that there had been trouble experienced by the respondents through a lack of waterproofing almost throughout the time that they lived in this house and the damage had reached such proportions it appears in one particular room, that the carpet had been severely discoloured. In fact the evidence is that it had rotted. At the time that the respondents were inspecting the property this particular part of the damage was covered by another rug according to the evidence of one of the respondents and the particular feature was not noticed by either of the prospective purchasers.

The District Court Judge referred also to the evidence of certain land agents who had been visiting the premises with the purchasers and, after considering in particular the photographic evidence, as well as the appellants' evidence, he came to the conclusion that the defects in the house were latent and that the appellants could not escape liability under the law of negligence by reason of any application of a doctrine of intermediate inspection.

In the submissions made in part on behalf of the appellants, counsel canvassed all the relevant law with thoroughness and competence but, at the end of the argument, I have to ask myself whether it has been established that the judgment in the Court below was wrong. A good deal of attention was paid to the question as to whether the defects in the house sold to the respondents was qualitative or structural in nature. The District Court Judge found that it was structural and there was evidence on which he was justified in reaching that conclusion. I mention in passing that I add my doubts as to whether the distinction is a valid one but I make no finding on that particular point because the verdict in the Court below was justified on the evidence and I cannot disturb it.

A significant part of the argument before me rested upon the nature of the work done by the appellants when the house was built. It was submitted in argument that the liability of a builder or perhaps an owner/developer is different from the liability of a person who arranges for a house to be built on a labour only basis. There is a fine line to be drawn between the two on the one hand and the one on the other but on the facts of this case that line is not required. Once the Judge decided that the

appellants were in the category of builder for the purposes of this case and once I am satisfied that the evidence was sufficient to justify that conclusion, the argument as to whether there is a difference in liability between the professional builder on the one hand and the home handyman on the other evaporates.

Notwithstanding the careful and thorough way in which the appellant's case has been argued, I have come to the conclusion that it has not been shown to me that the judgment in the Court below was wrong and the appeal must be dismissed.

There will be costs to the respondents in the sum of $1,250.00.