NZLR

IN THE HIGH COURT OF NEW ZEALAND
TAURANGA REGISTRY

2/12

NOT RECOMMENDED

AP 35/93

1809

IN THE MATTER of an Appeal from the Judgment of the District Court at Tauranga in Action No 947/92

BETWEEN DUDLEY WARD MOWLEM and DOROTHY GRACE MOWLEM

Appellants

A N D IAN MURRAY YOUNG

Respondent

Hearing: 20 September 1994

Counsel: A J Bush for Appellants
G J Mercer for Respondent

Judgment: 20 September 1994

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ORAL JUDGMENT OF ROBERTSON J

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Solicitors

A J Bush and C J Forbes, Tauranga for Appellants
Jackson Reeves and Friis, Tauranga for Respondent

This is an appeal against a decision delivered in the District Court at Tauranga on 25 June 1993. It followed a four day hearing. It is a claim for about $20,000. It is clear that as well as a wealth of engineering and professional evidence, the learned District Court Judge was provided with careful and detailed submissions which would have done credit to counsel in a case in which the amount in question was $20 million, not $20 thousand.

In this Court I have had the benefit of similarly detailed and erudite submissions and an invitation to try and resolve some major issues of policy in the law. These have been peppered with firm warnings from the respondent of the dangers of being anything other than mildly conservative in the area of extending duty of care and proximity questions. Counsel can be content that no such possibilities arise.

It is clear that the hearing in the District Court was much influenced by the then recently delivered decision of Williams J in ***Willis v Castelein*** [1993] 3 NZLR 103. The learned District Court Judge's decision relies heavily on that decision and the appellants now contend that the decision is not good law and has not been embraced by the judiciary in its totality. The learned District Court Judge was aware that Williams J had granted leave for the matter to go to the Court of Appeal. By coincidence, I was part of that Court which effectively refused to entertain the appeal on the basis that there were concurrent findings of fact in the two Courts below. The Court of Appeal did not find it necessary to analyse in detail the reasoning or conclusions reached.

On this appeal particular reliance has been placed on two subsequent decisions of the High Court. That of Tipping J in ***Chase v de Groot*** [1994] 1

NZLR 613 and the unreported appeal decision of Temm J in ***Gardiner v Howley*** (HC 117/92, Auckland Registry, 17 May 1994).

In 1982 the respondent, who is a chartered accountant and apparently has had some experiences as a developer, built a house for himself in 5th Avenue in Tauranga. There is no contest but that this was a private residential dwelling for his own use and in which he lived for some 5 years before moving on. The house is to a limited extent a pole house. As that would suggest, it was on a hill above the estuary and there was a not insubstantial slope down to the water. There was a relatively major retaining wall constructed near the residence which provided a flat barbecue area and some less substantial walls as the section ran down the hill towards the water. When the permit was obtained for the house there was some reference to one wall. There has been a divergence of opinion between counsel as to whether the other walls required permits. The learned District Court Judge found that :

> *"There was no requisition by the local authority for any unsatisfactory work subsequent to 1982. By that time all the retaining walls had been completed. No building inspector from the local authority requisitioned or objected to the construction of the retaining walls. A building permit was applied for and granted for at least portion of the top retaining wall constructed as part of the house development. There has been no complaint by the local authority that any of the retaining walls have been erected without a permit or any order issued requiring the retaining walls to be demolished."*

There is not a cre[illegible]hat finding of fact which I accordingly adopt.

In 1987 Mr Young sold his property to the appellants. There was a very standard contract between the parties and sometime thereafter (and largely following a severe pruning and controlling exercise on the bank) the Mowlems say that they became aware that there were major problems with regard to the walls. Eventually having obtained professional advice, substantial remedial work was carried out. The appellants' contention is that they are entitled to $12,573.25 being the costs of labour and materials; a further $3200 for investigation by three separate engineers; almost $3800 for design and supervision by an engineer. Those figures come to over $19,500. There was also a claim for $5000 for inconvenience, distress and other related matters.

The learned District Court Judge commenced his decision by saying :

> *"This case raises the issue whether a home owner who sells his property owes a duty of care in tort to the purchaser for defects of quality."*

With respect to the Judge, that is not quite an accurate summation - at least not as the case has been argued before me. The issue is whether Mr Young as the effective builder or constructor of the walls (which were alleged to be patently defective) had a duty of care to persons who subsequently became owners of the property.

I am of the view that for the purposes of this decision it is helpful to adopt the tripartite approach of Mr Mercer in his submission. Using my own rather less refined approach, the issues are;

Was Mr Young under a duty of care to the Mowlems because he was the contractor in respect of the walls?

Secondly, if he was, does the subsequent contract between the parties for the sale and purchase of the property effect that liability?

If not, was the damage which arose more than a defect in quality which would create liability?

The first issue is in my view, a question of fact on the particular circumstances of the case. Part of the record in the Court below has not been available. This was the subject of a pre-hearing conference before Anderson J. The parties agreed that the appeal should proceed to see whether a Judge could determine the case on the basis of the material which was available.

I am of the view that by reference to the transcript of Mr Young's evidence (and that is the only real evidence on this issue) one can say with confidence that Mr Young did not himself carry out the work but engaged contractors to do it. I do not find the pleading of any particular assistance on this point. The allegation that he "constructed" the walls which is not denied, seems to take us nowhere. It is as consistent with an owner/occupier who employs someone to do the work and then writes out the cheque, as it is with someone who rolls up his sleeves and picks up a shovel and does the work himself. There is no real challenge to the fact that persons were involved in doing the work.

Counsel agreed that the issue which arose was whether on those facts Mr Young fell within the category of a party having a "non delegable"

duty of care as enunciated by the Court of Appeal in ***Mt Albert Borough Council v Johnson*** [1979] 2 NZLR 234. I do not quibble with the sound reasons of policy which underline ***Johnson***. They are enumerated by Cooke P at page 240. I do not overlook the fact that in international terms the extent of this duty has been seen as a high point. I note particularly the comments in the House of Lords in ***D & F Estates Ltd v Church Commissioners for England*** [1989] AC 177. I can see no basis in principle why one would want to extend that duty or its scope.

But applying the existing authority I hold that the position of Mr Young is not such as to create tortious liability. It is a case of weighing the factual position. Tipping J in ***Chase v de Groot*** did not even have to address the point. It was clear that Mr de Groot (and a Mr Miller) had been the actual builders in a real and meaningful way. The tortious obligation which was found to exist was sheeted home to him in that capacity and wearing that hat.

Similarly, in ***Gardiner v Howley*** it is instructive to note that on page 6 of the decision the importance of that relationship is underlined by Temm J when he said :

> *"Had the appellants not been the head contractors, as found by the Judge in the Court below, a different result could have been reached, ..."*

Temm J also referred to ***Bowen v Paramount Builders (Hamilton) Ltd*** [1977] 1 NZLR 394.

So the first issue is, whether in all the circumstances of this case, it has been established that Mr Young falls within that category? It is not a finding which is directly made by the District Court Judge. There is nothing in his finding of the facts which is inconsistent with the view I take of the evidence that such a categorisation cannot arise.

This was nothing more than a professional man building a house and getting appropriate workmen to come in and do the physical jobs which needed to be done. I cannot accept the submission that the evidence discloses that Mr Young was the builder and head contractor and was accordingly the constructor of the retaining wall. I understand why Mr Bush uses those words in his submission. But they lack an air of reality in what was going on. Mr Young needed walls. Mr Young arranged for people to do it. To now say that makes him a contractor or developer, is in my judgment to miss the import of the distinction which the Court of Appeal was drawing in ***Mt Albert Borough Council***.

I mean no disrespect to the detailed and careful argument advanced by Mr Mercer about extension of principle when I neither summarise nor comment upon his analysis of a number of recent decisions. The issue of whether in terms of the Court of Appeal decision in ***South Pacific Manufacturing Co Ltd v New Zealand Security Consultants and Investigations Ltd; Mortensen v Laing*** [1992] 2 NZLR 282, there should be a duty does not arise. This appeal can be decided on its factual position as an application of the existing law. There is nothing novel about what was going on that would lead the Court to have to consider extending boundaries in this case.

That effectively deals with the appeal although on a different basis to that on which it was determined in the District Court. However I turn to the other matters which have been raised. The next is the effect of the existence of the contractual arrangement. Notwithstanding the decision in ***McLaren & Maycroft v Fletcher Development Co Ltd*** [1973] 2 NZLR 100, there is now significant authority for the proposition that there can be concurrent liability in contract and tort. That is certainly the fundamental proposition of Lord Goff in ***Henderson v Merrett Syndicates Ltd*** [1994] 3 All ER 506 (HL). Thomas J (with commendable reliance on ***Christine French*** (1982) 5 Otago LR 236) reached a similar view as a matter of principle in ***Rowlands v Collow*** [1992] 1 NZLR 178. The issue in this case is whether if there was a common law tortious duty it would in any event have been extinguished by the terms of the written contract. The tortious duty would have attached to Mr Young as constructor of the wall whereas in the subsequent contract he was the owner of the land.

Notwithstanding the effective persuasion of Mr Mercer I adopt the position of Thomas J in ***Rowlands v Collow*** page 194 :

> *"The only question which needs to be resolved before accepting that concurrent liability may apply in this case, therefore, is whether the contract negates a duty of care in negligence on Mr Collow's part. For the reasons I have discussed any such exclusion would need to be explicit or at least emerge from the contract as a matter of necessary implication."*

In my view if one takes the circumstances of this current case, a builder or contractor would have a continuing tortious duty towards subsequent owners of the land upon which the walls were erected. If the

contractor happened to be the owner, then in my judgment, it is not to be inferred or implied that in the absence of any specific reference to the matter in a written contract for the sale and purchase of land that the duty has been extinguished.

Mr Mercer was untroubled by the argument that if the builder was also the vendor, then the first purchaser would be denied the benefit of the common law duty of care but that other subsequent purchasers (who were not in a contractual arrangement with the builder/vendor) would enjoy the benefit. Counsel contend that because that first purchaser had an ability to contract, then such a result was not unreasonable.

I do not agree. In my view the common law duty on the builder/contractor is independent and discrete. It is better viewed separately. If a builder subsequently contracts as the owner of land, the pre-existing duty needs to be explicitly excluded if that is intended. It is a distortion to suggest that silence on the point enables a Court to effectively imply a term that the parties intended the responsibility to terminate or go into abeyance. That is not consistent with the high standards which the law requires in respect of any other implied term. I can see no policy reason why there should be something less than consistency of approach.

I would accordingly have been of the view that the fact that there was a written contract for the sale and purchase of the land and the improvements, would have no effect in the circumstances of this case on a duty which otherwise existed.

The third issue relates to the question whether the defect was a defect of quality or a structural matter. This is the principal issue on which the case was decided in the lower Court.

Mr Bush's submission on appeal was that the decision in ***Willis v Castelein*** had not been followed and that there were subsequent decisions which adopt a contrary view. I am not persuaded that his submission is correct on this aspect of the judgment. Tipping J in ***Chase v de Groot*** specifically noted the existence of the distinction which had been drawn by Williams J and said :

> *"This is not a case which can reasonably be characterised as pertaining only to matters of quality. In that respect reference can be made to the decision of Williams J in* ***Willis v Castelein*** *(M 377/92, Auckland Registry (judgment 23/11/92). In the present case the defect went beyond a question of quality."*

Inferentially Tipping J acknowledges that the distinction is valid.

In ***Gardiner v Howley,*** Temm J at page 4 considered the dichotomy between "qualitative and structural". He found it was not necessary to make any particular comment on the legal issue because he agreed with the District Court Judge's finding that there had been significant structural defects, but noted :

> *"... it seems to me difficult 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 would hold that damage which is significant and substantial will not by definition be qualitative. Labelling, as in so many areas of the law, can be dangerous. The issue is the effective degree of damage or defect whatever banner is placed upon it.

I respectively adopt the differentiation as discussed by Williams J which does not appear to have been specifically dissented from. Therefore Mr Bush is faced with findings of fact against him on this issue. Now had the case needed to be determined on this point alone, we may have faced some embarrassment about the absence of a record. Because of the finding which I make in respect of the first issue, it becomes only academic. Accordingly I am not faced with the dilemma of having to decide whether the matter needs to go back for a further hearing on the question of whether the delineation or categorisation which took place was on all the evidence validly made. It does appear from the flavour of the case as I have been able to glean it from the incomplete record, that there was substantial evidential support for the District Court Judge's finding on this point.

There were a number of other issues raised by Mr Bush that go to quantum but accordingly do not call for any further consideration.

Mr Mercer makes an application for costs. He suggests that costs should follow the event. Mr Bush contends that the appeal has been determined principally on a ground which has really only emerged in the course of today's hearing. It is correct that the status of Mr Young is what I have found determinative, and that was not a substantial issue in the Court below. Certainly it does not figure in the decision and I do not think it did in

the argument. The recent emergence of the successful ground can be reflected in the quantum, rather than the right to costs.

There will be an order that the appellants pay a total sum of $1500 in respect of all proceedings in the High Court. I make an allowance of $200 towards counsel's expenses in travelling to Rotorua.