IN THE HIGH COURT OF NEW ZEALAND
TAURANGA REGISTRY

CIV 2008-463-809

BETWEEN	OHOPE POINT APARTMENTS LIMITED Plaintiff
AND	SHARARD HOLDINGS LIMITED Defendant

Hearing: 8 June 2009

Appearances: R E Kettelwell for plaintiff
No appearance for defendant

Judgment: 8 June 2009

ORAL JUDGMENT OF ALLAN J

Solicitors:
Sharp Tudhope Private Bag 12020 Tauranga richardkettelwell@sharptudhope.co.nz

[1] The plaintiff in this proceeding, Ohope Point Apartments Ltd, carries on business as a developer. In the course of its business it undertook an apartment development in Harbour and Ocean Roads, Ohope. It engaged Hinton Partners Ltd as the main contractor. Hinton in turn entered into a subcontract with the defendant for the supply of glass panels for the deck balustrades. The glass panels proved unsatisfactory. They required replacement at significant cost. The plaintiff suffered other consequential losses as well. Ultimately it issued this proceeding seeking damages for the losses so incurred.

[2] The proceeding first came before Doogue AJ in the course of a case management conference on 23 February 2009. The time for filing a statement of defence had expired, but the defendant had taken no step. The plaintiff sought judgment by default, but the Judge took the view that the appropriate course was to set the proceeding down for a formal proof hearing.

[3] On 4 March 2009 the proceeding was called before Lang J for formal proof, but by then the defendant had been placed in liquidation. The Judge further adjourned the hearing to enable the plaintiff to obtain the necessary leave, or alternatively to obtain the consent of the liquidators. The liquidators have now consented in writing, and the proceeding is once more before the Court for formal proof.

[4] In brief, the plaintiff says that the glass panels were unsatisfactory in various material respects. They did not comply with certain prescribed standards. Further, they were poorly finished, showing both poor workmanship and subsequent damage suffered prior to installation. In the result, the plaintiff found that successive panels had shattered after installation. The plaintiff obtained an expert's report, and acting on advice, decided to replace the whole of the panels.

[5] The statement of claim pleads three causes of action: negligence and ss 13 and 30 of the Fair Trading Act. For present purposes Mr Kettelwell is content to rely on the first cause of action, in negligence.

[6] The plaintiff claims a total of $441,719.35. This sum falls under several heads. First there is the cost of replacement of the defective glass amounting to $192,957.75. Next there is the cost of removal and disposal of the faulty glass at $35,000. Then there is the cost of procuring and considering the expert engineer's report, which was $6,387.58. Both liability and the quantum of the plaintiff's losses are sufficiently established by the sworn evidence of Mr G Bowater, a director of the plaintiff.

[7] Two further items of loss are less direct. The first is the claimed loss in value of one of the apartments in the development; unit HTGO3, which was the subject of an agreement for sale and purchase that was unconditional, save for the right of the purchaser to cancel it if a code of compliance certificate was not available by a stipulated date. By reason of the delays arising from the faulty balustrade, the plaintiff was unable to procure a certificate by that date, and the purchasers subsequently cancelled the agreement. The unit remains unsold.

[8] There is evidence as to value from a Ms A E Williams, a real estate agent at Ohope. The sale price of the apartment under the original contract was $440,000. Ms Williams says it is currently worth no more than $330,000. She compares the apartment concerned with another in the development that was slightly more desirable and which has recently sold.

[9] I accept Ms Williams' evidence as to loss in value, and agree with Mr Kettelwell that the appropriate approach to damages in the circumstances of this case, is simply to allow the difference between the earlier sale price and the current market value.

[10] The final item of claimed loss relates to the cost of finance on the lost apartment sale. From the time at which the sale fell through, the plaintiff was obliged to continue to pay interest on its loan, which would otherwise have been reduced by the sale price, namely $440,000. The interest rate, although initially higher, was 14% until February 2009, when it reduced to 11%. The plaintiff claims interest at 14% per annum on $440,000 from 1 August 2007 until 1 February 2009.

The total claimed is $97,374.52, a sum which I am satisfied is recoverable from the defendant in that it represents loss of a type that was sufficiently foreseeable.

[11] I am satisfied on the evidence placed before the Court that the plaintiff has established its cause of action in negligence against the defendant, and that the sums claimed by it are recoverable at law.

[12] Accordingly, there will be judgment in favour of the plaintiff against the defendant in the sum of $441,719.35, together with scale costs calculated in accordance with category 2B.

C J Allan J