(8) 35/1932

Morrow and Anor

v

Manning

Reasons for Judgment

Delivered 15 Nov 1932.

M O R R O W and another v. M A N N I N G.

JUDGMENT 53 for .@ 6 7616 STARKE, DIXON, AND EVATT JJ.

The respondent employed the appellants as architects to prepare plans and specifications for a large building in Sydney and to supervise its erection. During the course of the work differences arose with the contractor which were ultimately submitted to arbitration. The arbitrators by their award found that in addition to an amount of £49,500 already paid to the contractor under the appellants' progress certificates, there was payable by the respondent to the contractor a balance of £2,806 - 13 - 11d., of which £535-3-2d. might be withheld as retention moneys for a specified period. In the arbitration various claims for allowances were submitted by the respondent on the ground of defective work by the contractor or failure to comply with the specifications, and in arriving at their award these were considered by the arbitrators, who communicated to the parties to the reference their decision upon each item. The respondent however, appears to have been dissatisfied with the condition of the building, and would not pay the architects, the appellants, the unpaid balance of their remuneration. When the appellants sued him in the Supreme Court of New South Wales for their fees, he filed, as well as a plea of never indebted, pleas by way of cross action alleging that the appellants, as architects, had been negligent in the preparation of plans specifications and bills of quantities and in supervision. The action was tried as a commercial cause without a jury by Halse Rogers J., who gave judgment for the appellants upon the action and cross action. Upon appeal to the Full Court consisting of James, Davidson and Stephen JJ., this judgment upon the cross action was reversed as to three items of negligence with respect to which the Full Court entered judgment upon the cross action for the sum of £1,100. The judgment for the appellants upon the claim in the action was affirmed, and also upon other items of negligence in the cross action. From the judgment of the Full Court the appellants, the architects, now appeal to this Court; the respondent also cross appeals in respect of two of the items in reference to which the Full Court upheld the judgment of Halse Rogers J.

There are thus five matters to be dealt with in respect of which the building owner, the respondent, claims that the architects have been guilty of negligence resulting in damage.

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1. It is convenient to consider first a claim for the small sum of £40. The specifications contain the requirement that at the level of each floor a 3 lb. lead damp course should be built in the brick work of the walls. It appears that at the upper floor levels the contractor used 2 lb and not 3 lb.lead. The amount payable to the contractor was fixed in the certificates and award as if he had used 3 lb. lead throughout, because the fact that he had used 2 lb. lead was not discovered until later. It is said that lead of the lesser gauge serves the purpose of a damp course as well as that of the gauge specified . But the cost or value of the higher gauge is greater. The sum of £40 is the amount which should have been deducted from the contract price in respect of all the smaller gauge lead used if the fact of its use had been discovered before the arbitration. This amount, by the judgment of the Full Court, the respondent has recovered from the appellants. Halse Rogers J. found that the failure of the architects to discover the use of 2 lb. lead amounted to negligence in supervision, and this finding has not been challenged. But he was of opinion that the amount over-credited to the contractor had not in fact been paid to him by the respondent and might be deducted from or set ~~aside~~ against the retention moneys which remain in the respondent's hands. The general conditions of the contract provide:

"Any defects shrinkages or other faults which may appear within fifty four (54) weeks from the completion of the building and arising out of defective or improper materials or workmanship shall upon the direction in writing of the architect and within such reasonable time as shall be specified therein be amended and made good by the builder at his own cost, unless the architect shall decide that he ought to be paid for the same, and in case of default the proprietor may recover from the builder the cost of making good the works."

The Specifications contained the following provision:

"Maintenance: For six (6) calendar months after the issue of final certificate the builders are to be responsible for and are to make good all shrinkages ease doors sashes etc overhaul all locks fittings and fastenings and make good any defects that may reveal themselves due to defective workmanship or materials. The architects will at their discretion retain one per cent (1%) of the amount of ~~the~~ contract for the duration of the maintenance period".

In their award the arbitrators said: "we find that of the above sum...the sum of £535-3-2 may be retained by the proprietor as retention money until 5th June 1931". Now the amount of the retention money fixed by the award is 1% of the price ~~paid b~~ named in the contract. The date, 5th June 1931, is exactly six months from the date of the award, although it appears to be also 54 weeks approximately - six days more - from the date when the building

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was handed over, which, according to the architects, was 16th May 1930. The award seems to mean that the building owner must pay the full sum determined, unless under the maintenance clause in the specifications or possibly the clause in the contract, the retention money may be applied for the owner's benefit, and to treat the award for that as equivalent to the final certificate.

In these circumstances, the respondent could not retain the £40 out of the retention money if he were sued by the contractor upon the award unless he could establish fraud in the contractor or that the deficiency in the gauge of the lead was a defect that before 5th June 1931 revealed itself due to defective materials or that the deduction is authorised by the clause in the general conditions. We cannot assume that the respondent can establish fraud against the contractor. The provision in the general conditions looks rather to the remedy of defects and faults than to ~~the~~ compensation, and it needs some direction in writing from the architect and none has been given. The maintenance clause in the specifications is expressed in language not appropriate to the case of a discovery that the contractor has used materials inferior to those specified, although no defect in the building has resulted or is likely to occur. The respondent, therefore, appears to have no direct answer to an action by the contractor upon the award. Possibly he might succeed in a cross action against the contractor for unliquidated damages for breach of contract. But, as it appears that as a result of the architects' default, he has incurred a direct liability to the contractor of an amount greater by £40 than was proper, the burden is upon the architects of displacing their prima facie liability to recoup him this amount by way of damages, and this burden is not discharged by suggesting the existence of a collateral remedy against the contractor of a controversial nature. It follows that the Full Court were right in reversing the judgment of the learned primary Judge upon this item.

2. The Full Court awarded £600 damages against the appellants for failure in due care to see that the concrete floor was provided with a bed of rubble filling laid upon the excavated surface of the ground. The site of the building had been excavated before it was put into the control of the contractor. The building went much below the ground level and included a basement. The floor of the basement was specified as 3 inches

of concrete with a layer of bitumen or Seysul asphalte 3/4ths of an inch thick and a layer of 2 inches of metal topping finished with red oxide. Under this floor a number of weeping drains of porpus pipe were provided to carry away soakage. The specifications clearly required that where these drains were laid beneath the floor they should be filled over with rubble. But it appears that the member of the appellant firm who was responsible for the specifications intended to specify and considered that he had specified a rubble filling as the bed of the whole floor of the basement. Expressions occur in the specifications which suggest that the draftsman probably intended to specify a rubble bed, but they contain nothing definitely requiring it, and the plans do not indicate it, although according to some oral testimony, the bill of quantities includes the necessary rubble. The Full Court were of opinion that the specifications did not call for a rubble bed. Halse Rogers J. was of opinion that they failed to do so, and in the arbitration between the respondent and the contractor the arbitrators held that they did not require the contractor to lay a bed of rubble for the floor.

Upon this question of construction we find ourselves in agreement with Halse Rogers J. and the Arbitrators. The truth appears to be that the draftsman of the specifications omitted to include in them, as he intended to do, an express provision requiring such a bed, but in one or two other parts of the specifications employed language upon the assumption that such a provision had in fact been made. Although a critical reader of the specifications might suspect or believe that some error had been made and might reasonably conjecture that the error consisted of the omission of a clause specifying rubble, the references to be found in the specifications are in our opinion insufficient to supply the omission. An intention to require rubble cannot be spelt out of the documents themselves with enough clearness to call upon a contractor to provide it. Evidence was directed to the question whether a rubble bed was in fact a necessary or desirable part of the design of the basement floor. From this evidence we gather that it is a proper practice to specify such a bed for a concrete floor in such circumstances unless the architect is assured of the suitability and sufficiency of the surface upon which the floor would otherwise be laid. It further appears that if rubble is so specified, a damp proof course in the floor is often omitted. In the

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present case the excavated surface consisted of clay and sandstone and there was much conflicting evidence upon the question of its wetness and as to the manner in which water would percolate into the porous pipes and as to other matters affecting its suitability. It is not easy to say what part of this evidence the learned primary Judge thought reliable , and some of it amounted only to speculative arguments from probabilities. But probably all that can be said is that a wise precaution usually taken to guard against dangers which cannot be estimated satisfactorily in advance has been omitted, and that an accurate estimate of these dangers is no easier when the surface is concealed ~~from~~ by the floor itself. It was not until after the concrete had been put down that the architect discovered that his intention of having a rubble bed had not been carried out. The Seysul asphalte had not been laid and the expense of rectifying the error was not then so great as it is now. But it was greater than the cost would originally have been of including rubble. Indeed, the additional cost of the rubble if put down first would have been only £53. The architect discovered also that a proper rubble filling had not been laid over the porous drains. He at once called upon the contractor to lay rubble under the floor everywhere, but the contractor disputed that the specifications called for rubble. He required an arbitration, and proposed that one or other of the following courses should be adopted:

(i) that he would proceed to complete the floor, giving a guarantee to pay assessed damages if in the arbitration the contract should be interpreted as calling for a rubble bed;

(ii) that he should, under the architects' direction, cut up the concrete slab then laid, put in the rubble, and lay the floor complete, the respondent agreeing, if the contract should be interpreted against the respondent, to pay the cost of doing so as an extra.

The architects on behalf of the respondent chose the first alternative and the floor was completed without rubble. The respondent submitted his claim against the contractor under this arrangement in the general arbitration upon the completion of the work, and, except for the rubble immediately over the drains, in respect of which £117 was awarded, the claim failed because of the interpretation of the specifications adopted by the arbitrators. In the present action against the architects, the appellants, the respondent presents his claim to damages upon an alternative. He says that

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if rubble was not called for by the specifications, the omission arose from want of due care in the preparation of the plans and specifications, and if it was called for by the specifications, the failure of the contractor to supply it occurred through a want of due care in supervision. Halse Rogers J. in some measure adopted the first alternative. He did not find that to design such a concrete floor without a rubble bed was to adopt a negligent form of construction, but he considered that when the architects had formed an intention of requiring a rubble bed, the failure so to draw the specifications as to call for it amounted to negligence. He found, however, that the respondent had suffered no damage, or no damage beyond that allowed for in the sum awarded against the contractor by the arbitrators. This finding was based upon the conclusion that in the result a good and sufficient floor had been provided and that it was neither necessary at present nor likely to become necessary to take up the floor and put down a rubble bed. The Full Court adopted the second alternative, and awarded £600 against the appellants as the estimated cost of rectifying the defect after deducting £53, the additional cost of putting in rubble in the first instance. Their Honours considered that, notwithstanding the finding of the learned primary Judge, the floor was unsatisfactory, because they were satisfied upon the evidence that it admitted damp from the subsoil. The evidence upon the question whether it did in fact admit damp was fully discussed before us, and we are of opinion that the finding that it did not do so, which the judgment of Halse Rogers J. clearly implies, ought not to have been disturbed. There is no reason to suppose that he did not take into account all the evidence relied upon by the Full Court, including an experiment to which their Honours attached much weight. We ourselves do not find that experiment so convincing, and we think that Halse Rogers J., who not only heard and saw the witnesses but viewed the premises, was in a better position than an appellate Court can be to form an opinion upon this question of fact. But we think that there was a failure of due care on the part of the appellants in preparing the plans and specifications in such a way that rubble was not called for, and in not discovering earlier by supervision that the contractor was not putting down a rubble bed. But we are of opinion that on the one hand the finding of the Full Court that the present condition of the floor

called for remedy should not be supported, and on the other hand the finding of Halse Rogers J. in favour of its complete sufficiency goes too far. We accept his finding to this extent namely that the floor is apparently good and sound and that there is no present reason for taking it up and no immediate likelihood of it becoming necessary or desirable to do so. But the very purpose of requiring rubble is to give a greater degree of security against the action of water and possible failures of the weeping drains adequately to perform their function. The evidence does not show that all reasonable apprehension upon these matters is excluded. The respondent's position is that he has less security than he ought against possible difficulties which may or may not have become actual. The security is not so diminished that a reasonable man would now set about obtaining it by a costly alteration of the floor. He would do nothing unless and until the floor actually fails in some way. But at the same time, can it be said that for this reason a building owner who was entitled to the exclusion or reduction of this risk is entitled only to nominal damages? The situation is, we think, one which calls for the assessment of damages for exposure to mischance. Such an assessment must necessarily be attended with difficulty and be not made as a matter of calculation but almost as an exercise of discretion. On the whole, we think that the respondent should receive £100 damages upon this item of negligence.

3. The Full Court awarded to the respondent a further sum of £460 as damages for negligence on the part of the appellants in the supervision of the work of rendering the external face of the southern wall in cement. The damages were calculated as the estimated cost of painting the southern wall in order to give a protection against weather which the cement rendering had, in the opinion of the Court, failed to give completely. An expert witness of experience called by the respondent upon being asked: "What sort of a job is the external rendering in the building?" answered - "As far as thickness goes, it is slightly under usual, nothing very "serious; it appears to be a weak mixture roughly put on". The specifications required a mixture of five parts of sand to two of cement gauged with toxicement in the proportion of 3 lbs. to one bag of cement, and they called for a rendering full 5/8ths of an inch thick. The statement of

accounts and demands put before the arbitrators prepared by the architects contained a claim for damages for work not carried out to the specifications in respect of external rendering. In forwarding this document to the solicitors for the respondent, the appellants wrote:

"As regards the thickness of cement rendering, we have carefully measured same at twenty two (22) positions on the various walls, and find that the thickness varies from 7/16ths" in three (3) places to 3/4ths" in three (3) places, other measurements being averaged in between these two thicknesses. We must point out that from a practical point of view it is ~~x~~ impossible to obtain a uniform thickness throughout , as the bricks themselves vary in size. The sketch in the margin will indicate the thicknesses referred to herein. We are of opinion that as far as practicable the specified thickness has been provided, and accordingly we do not advise any action in this connection".

The arbitrators appear to have considered that the contractor had made some saving in cement, for upon the claim relating to the external rendering they allowed against him the sum of £14. The award was dated 5th November 1930. In the following March wet weather patches of damp appeared through the southern wall. In July much more water shewed. Possibly this might have been treated as a defect to be made good out of the retention moneys. But apparently this was not done and the architects have now been saddled with a liability for the cost of remedying it. Much evidence was given in relation to the thickness of the rendering upon the wall and as to the probable nature of the mixture. On the whole, the evidence tended to shew that owing to unevenness in the surface of the wall, the thickness of the rendering varied in different places and ~~x~~ upon the average was somewhat under the requirement of the specifications. Some seven samples were taken from the southern wall, and an analysis was made of them in the aggregate. The result was said to shew a weaker mixture than that specified. But evidence was given on the part of the appellants that a proper practice was pursued by the plasterer to obtain the due thickness, and that their clerk of works had insisted that some of the work should be done twice. Evidence was also given of some supervision and check of the mixing of the cement. Further, the inference to be otherwise/drawn from the analysed samples was weakened by an apparent incongruity between another analysis, that of the mortar, and the con-

dition and quality of the mortar revealed by inspection. Explanations were offered of the failure of the wall to exclude the water. Witnesses said that until a wall was painted it would not exclude water altogether in very heavy driving rain . The specifications had provided for a coating of lime and oil to make the wall quite water proof, at any rate until painted, but with the concurrence of the respondent this provision had been excised to reduce expense. Again, it was said that slight cracks in the wall of such a building inevitably occurred at the beams or girders and these were responsible . Upon the whole evidence, Halse Rogers J. was not satisfied that the architects had been guilty of any negligence resulting in the admission of water. He found definitely that there was no negligence in respect of the nature of the mixture. The latter finding the Full Court felt unable to interfere with, but their Honours considered that negligence in supervising the thickness of the rendering was made out. Although the simple fact that water did gain admission in substantial quantities through the wall built under the direction of the appellants cannot but impress us , on the whole of the evidence we think there is no sufficient ground for disturbing the finding of the primary Judge. The matter largely turned upon his opinion of the accuracy of the witnesses, and also upon the impression which an inspection of the premises produced. The degree to which the average thickness of the rendering fell below that specified was very difficult to estimate, and in any case the deficiency could not be a matter obvious to the most experienced eye. Some failure in the exercise of the care and skill reasonably required must positively appear, and we do not think that the refusal of Halse Rogers J. to infer it from the circumstances can be held erroneous. For these reasons we think the award of damages by the Full Court upon this item should be reversed.

4. By a cross appeal the respondent ~~claims~~ complains that the Full Court should have awarded him damages against the architects in respect of a deficiency of cement content in the cement mortar. This question depended in the main upon analyses of samples. The finding of the primary Judge was against the claim, and this was upheld by the Full Court. We think it depended altogether on inferences from evidence which he was in a much better position to deal with than an appellate Court, and we are of opinion that his finding should not be disturbed.

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5. Lastly, a similar question is raised by the cross appeal in respect of the cement content of the internal rendering and the concrete floors. We think the same reasons lead to the failure of this part of the cross appeal also.

The appeal is allowed.

The judgment of the Full Court is discharged. In lieu thereof it is ordered that the judgment of Halse Rogers J. on the cross action be set aside and that in its place judgment be entered for the defendant respondent for the sum of £140.

And it is ordered that the respondent, the defendant, pay the plaintiffs, the appellants, their costs of the action and cross action, except the costs of the findings raised by the cross action in respect of the basement floor and the deficiency of the gauge of lead in the damp course in the walls; and that the costs of these findings be paid by the plaintiffs appellants. And that the respondent pay the ~~cost~~ appellants their costs of the appeal to this Court.

No costs of the appeal to the Full Court from the judgment of Halse Rogers J.

Costs to be set off.

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