Monfort Bros v Jaimi

Supreme Court, Nuku'alofa
C 134/95
Hampton CJ

February & August 1997

Architect - negligence - standards applicable
Tort - negligence - architect - standard

Plaintiff sued for damages against architect for alleged negligence in design and supervision of building of a technical institute.

Held (dismissing all claims and allowing counter claim for outstanding fees):

1. An architect's liability is not, in the ordinary case, absolute in the sense that he is liable whenever loss result from his acts.
2. An error of judgment may or may not amount to negligence.
3. If the majority of architects would, under the circumstances, have done the same thing this would normally provide a good defence for a defendant charged with negligence, to clear himself if he shows that he acted in accord with general and approved practice.
4. In most cases expert evidence from a suitably qualified architect would be necessary to prove negligence.

(A subsequent appeal was not argued, and was dismissed by consent).

Case considered : Eckersly v Binney [1988] 18 Com LR1

Counsel for plaintiff : Mr Edward
Counsel for defendant : Mr Appleby

Judgment

The plaintiff, a religious order, sues the defendant, an Architect, for damages following it is said from alleged negligence with regards the construction of a Technical Institute in Popua on Tongatapu in 1994/1995.

There seems to be no dispute between counsel as to the legal principles in relation to the claim of negligence against an Architect. And I adopt what has been put in front of me from Keating on Building Contracts, the 6th edition 1995, where amongst other things the following principles are set out, and these are the ones that I see as being the main ones applicable to the case before me.

First, an Architect's liability is not, in the ordinary case, absolute in the sense that he is liable whenever loss results from his acts. Secondly, an error of judgment may or may not amount to negligence. I add to that this, it comes from the case of Eckersly v Binney [1988] 18, Com LR 1 p 80 by the now Chief Justice of England: "The law does not require of a professional man that he be a paragon combining the qualities of polymath and prophet". That may be pertinent given some comment which I will come to in due course made by Mr Julian, called as an expert on behalf of the plaintiff, in the course of this action.

Third, that if the majority of Architects would under the circumstances have done the same thing, this normally provides a good defence for a defendant charged with negligence to clear himself if he shows that he acted in accord with general and approved practice. Then in most cases expert evidence from a suitably qualified architect is necessary to prove negligence.

Here as I see the matter and as I have reviewed it over the last week, these matters have become really entirely factual issues. I have had the opportunity in the first week of this trial, back in February this year, of observing over a considerable period the plaintiff's principal witness, Brother Joseph Kottoor. The case was set down initially for 5 days, that was to encompass the plaintiff and defence case both on claim and counter-claim. At the end of 5 days Brother Joseph was still in the witness box and he continued on to the 6th day when the trial resumed in August.

Since then, really in the space of 3 days, I have heard 8 other witnesses to complete the case of plaintiff and defendant. I say this, that seldom have I had such a strong view about a witness as I have about Brother Joseph Kottoor. And I go on to express the view, that really encapsulates this judgment, that he was the author of the misfortunes that may be said to have befallen Montfort Brothers. If there are misfortunes, he has been the cause of the difficulties.

I have had to through the course of this trial and through the period from February to now, keep on reminding myself to keep this matter in proper context. There are some matters that I think do put it in proper context and should be stated at the start.

1. It seems extraordinary to me that the claim, as it has come down during the course of this trial, in fiscal terms, monetary terms (as it has on the plaintiff's own evidence or Brother Joseph's own evidence) to a comparatively small sum, should occupy such a length of time in Court. And one cannot help but reflect on that when it is put beside what obviously will have been considerably amounts of costs spent on litigating such a matter. It says something I believe as to the intransigence of this man, Brother Joseph, which I will come to shortly.

2. This matter is in relation to a building contract where the buildings are valued at something over $1.1 million. Over buildings completed within time for less than the contract price despite all the extras and changes, almost entirely at the instance of Brother Joseph. Buildings completed as I say, within price, within time, and to what I am told (and I was given a view as well by the request of both parties) was an appropriate and suitable standard.

Those matters commented on in detail, work commented in detail, by a very experienced Architect called on behalf of the defendant (and I apologise if I get the pronunciation wrong, hereafter I'll call him Mr Star) Michael Staruszkiewics.

In his report, adopted as part of his evidence, he commented on the fact that the project came in finally with a saving of some $31,000, referring to that as being outstanding, and referring to the fact that the completion and the way it was completed was a credit to those concerned and to the construction administration abilities of the defendant.

It went on to observe that so far as he was concerned "the final architectural product is a project that all the participants can be proud of and will serve theTechnical Institute well in the future". One of the witnesses for the defendant who impressed me was the local Architect employed by the defendant. The defendant is based in Fiji. He has a Tongan Office and the local Architect here, Mr Solomone Tuita was in effect the person for the defendant administering this particular project. Mr Tuita in the course of his evidence said that in his experience, in most jobs, the contractor often fell behind the schedule; there would be problems with poor workmanship; there would be technical problems but in his view none of those occurred here. That the contractor was ahead. This was the first time in his experience that such had occurred and the quality of workmanship conformed with expectation and contract documents.

As I said in opening, my view is that the difficulties said to be faced by the plaintiff are in effect as a result of or in effect may have been made by , the actions of Brother Joseph Kottoor on behalf of the plaintiff. I make it clear now and I will come to this specifically later that I do not find negligence proved against the defendant measuring that against the authorities or principles I have already referred to, and measuring those principles against the evidence that has been put before me. Very strongly one is left with the view that in Brother Joseph's world, at least in so far as this particular matter was concerned, every one else was out of step but him. Anything and everything, it would seem, became in his eyes, a matter of contention and dispute. And Mr Star in the course of cross-examination, made these observations which I have seen to be pertinent, that never in his career had he seen a client dispute amounts certified in payment certificates as happened here and as I will come to.

As to that (and I add this now while I think of it) I add to that aspect about certificates that Mr Star went on to express the opinion that from all he observed, the Architect had tried to be impartial, and the correspondence both ways, that is, to the contractor and to the plaintiff showed that. The Architect frequently went back to the contractor. Amounts were reduced. The Architect was not rubber stamping what the contractor produced to him to be certified as the next progress claim but the Architect acted in accordance with the duties imposed on an Architect in that situation.

I do conclude that Brother Joseph was, and is, an intransigent man in all respects as he was, in all respects, and in relation to this building project whether in relation to

contractors or sub-contractors or materials or Architects, or when I come to it in terms of attitudes, to such as the Arbitrator. And those matters are clearly revealed in the evidence that he gave before me and under cross-examination. It can be seen, the attitude, in looking at the statement of claim of December 1995 and the further particulars of April 1996 that are in the file. An attitude that can be seen in relation to what occurred over payment of Architects fees, on the counter claim, and that was settled in relation to that aspect only on the 9th day of this trial. Fees that were outstanding since 1995. The attitude can be shown as well, or can be seen as well, in relation to the last of the progress claims, (it was not a final claim as submitted, it was the last of the progress claims, certificate 7) and the refusal by Brother Joseph to accept even on the amended certificate 7, despite Arbitration, any aspect of that certificate in effect. And it was that attitude, and that conduct in relation to that certificate, that brought the determination of the building contract by the contractor, and the subsequent difficulties.

Mr Star made the points, and it was made by others in evidence, (and this was important) that the plaintiff, had to pay the contractor under that amended certificate 7. It is the plaintiff who, as the client has the contract with the builder or contractor. The contract is clear, that payment should be made on the certificate. This was not even in its amended form, a final certificate. It was still a progress certificate, until the final wash up and the final certificate which would have only come at the end of the 6 months defects period.

The contract, if payment had been made, would have covered defects and I include in that term "defects" not only work done allegedly improperly but work not done at all. During that period those defects would have been remedied, all necessary adjustments and re-calculations would have been carried out. And much if not all, (and I turn to the list of the matters that are now complained of, as founding negligence against the Architect) would have been resolved.

The onus was on the client, as Mr Star said, to fulfil and pay on the certificate. He did not do so, chose not to do so. The result was a termination, the loss of that defects period where the matters now complained of could have been resolved. And as Mr Star says within the approved tender contract sum.

The defendant and others of his employees as I have indicated say similar things. Indeed they, the defendant and the employees, tried to dissuade Brother Joseph on behalf of the plaintiff from the course that led to termination. They had told me so, and I accepted as so, in their oral evidence. It is clear from the documentary evidence before me as well.

The defendant himself said that it was important to try and prevent this confrontation and avoid the contractor walking off the job which would and could only result in costing the plaintiff more. The defendant, in accordance with his duty as an Architect, tried to prevent the plaintiff giving a ground to the contractor to allow him to terminate, to walk off the job.

In the end of the defendant trying to prevent this occurrence, caught really between a rock and a hard place, had no say in what occurred because Brother Joseph would not pay and the contractor simply determined the contract in accordance with notice that had been previously given, and had been given in relation to difficulties with payment, or over payment, of the earlier certificates.

At the time of that determination, practical completion had been reached in relation to the project. The buildings were in effect finished. There were only minor things left

and I stress minor things and that is the conclusion I have reached. All of which should have been picked up and could have been picked up , in the defects period.

The defendant, I conclude, did his best to prevent the termination. This was after the Arbitration and I will refer to the Arbitration in detail later. The defendant concluded, and I concur with him and this was expressed in the course of cross-examination, that the problem so far as he could see, lay with the personally of Brother Joseph who wanted, he said, it seemed to him vengeance from the contractor, the consultant, everyone. A one track mind; would not even listen to the Arbitrator and the result of the Arbitration.

Brother Joseph, I am sure was demanding, difficult and dogmatic. I note that one of the plaintiff's own experts, described him as a difficult client and surely he was, and that it seems to me is the root and cause of the difficulties here.

The position as to that aspect is in my view well summarised and set out in the report of Mr Star which he gave in his evidence in chief at pages 5 and 6, paragraph 4.6, and I do not intend to read that total aspect now but it should be read into this judgment in its entirety, all of paragraph 4.6 of that report.

As indeed, and I turn to a further extract from his evidence in chief, the report at paragraph 7, summary on pages 24 and 25, and that whole paragraph should be read into this judgment as well.

I accept from Mr Star's evidence that there is no basis for the allegation of negligence but I do not just accept what he says. I have formed that view and had formed that view quite independently long before he gave evidence, and in particular as I listened to the evidence of Brother Joseph. As Mr Appleby submits, in effect Mr Star gives me a yardstick, an objective standard, against which I could measure such things, and a standard that is established by his experience in Australia and in the Pacific and indeed in a number of other places through out the World. (The Judge then traversed numerous factual issues and claims).

It has been considerably reduced by now. It leads me then to the alternative or further or alternative cause of action which claims a fiduciary relationship between defendants and plaintiff, a reliance, said to be heavy, by the plaintiff on the defendants' skill and professional expertise, an allegation of gross negligence and a failure to carry out the obligations implict in the fiduciary relationship by doing or failing to do the matters already considered in paragraphs 8, 9 and 16 of the Statement of Claim. And as a result of that, seeking general and/or punitive damages in the sum of $17,000.

The claim must fail in any event because of the findings I have already made in relation to the claimed negligence that it hangs on, and that I have already dealt with in relation to, the alleged failure of the defendant. There is no need for me to comment further except to say that in rejecting this claim, I do so on the basis as I have already outlined, but also that it seems to me there is force in what was Mr Appleby has said in his submission, as to whether such a fiduciary relationship as alleged, existed here in any event, and quite what basis there can be for a claim of punitive damages in these sort of circumstances, I cannot follow. It seems to me, there can be no legal basis to claim punitive damages when the allegations were of negligence in a professional relationship; either damages flow from the alleged negligence or not.

I noted that Mr Edwards in making his final submissions did not refer in any way to this further or alternative claim. In the circumstances, I dismiss that aspect of the claim as well.

There will, on the claim, be judgment for the defendant against the plaintiff. On the counter-claim, there will be an Order made as I indicated earlier and as recorded in my Note Book by consent, to the effect that the plaintiff on the counter-claim is to pay to the defendant, to settle the professional fee aspects, the sum of $36,000 plus $1,000 costs.

Such payment to be made on this basis: ONE $20,000 forthwith, TWO balance within 2 months from 14th August 1997 with interest payable on such outstanding balance at the current Bank of Tonga Overdraft rate.

I go back then to the claim and the judgment in favour of the defendant on the claim. Insofar, as that is concerned costs will follow the event. There will be costs as agreed or as taxed, in favour of the defendant against the plaintiff on the claim.