M. MEONE & T. MEONE -v- SOLOMON ISLANDS NATIONAL PROVIDENT FUND (First Defendant) ELISON TEALOA (Second Defendant)

High Court of Solomon Islands
(Palmer J.)
Civil Case No. **195 of 1992**
Hearing: **8th November 1993**
Judgment: **18th February 1994**

P. Lavery for Plaintiffs
A. Rose for the First Defendant
M. Samuels for the Second Defendant

PALMER J: The Plaintiffs claim against the First Defendant damages for breach of contract and or in the alternative, for negligence. The claim against the Second Defendant is also for breach of contract and or negligence.

On the question of a breach of contract, the Plaintiffs rely on a written contract of agency made with the First Defendant in early 1990.

Mr Lavery submits that that contract is contained in an agreement between Michael Meone (Employer) and ITLE CONSTRUCTION (Contractor) dated the 19th of July 1990, and identified as contract No. C10/89. In the interpretation section of that agreement there is the word 'agent' defined, and I quote: *"in relation to the Employer, means the person holding or acting in the post of building inspector with the Solomon Islands National Provident Fund."*

In section 1 (2) and (3) of the agreement, it reads:

> *(2) All rights and powers conferred upon the Employer by or under this contract may be enforced or exercised by his agent and for that purpose any reference to "Employer" in this contract shall include the agent, and anything done by the said agent in the purported enforcement or purported exercise of those rights or powers shall be deemed to have been done by and on behalf of the Employer.*

(3) *Any information, notice or document required under this contract to be served upon the Employer may be served on the Employer's agent or architect and such service shall be deemed to be service on the Employer.*

The above clauses are very clear in my view. Enshrined within the agreement is an agency relationship between the Employer, Mr Meone, and the First Defendant, through its officer, the Building Inspector.

The next question therefore, is whether there has been a breach of that agency agreement?

The breach alleged by the Plaintiffs is in the supervising and co-ordinating of the contract, or the policing and monitoring of the agreement.

The relevant clause, is section 13 of the Agreement. It reads:

> *"When in the opinion of the Employer's agent or architect the works are completed, the Employer's agent or architect shall forthwith issue a certificate to that effect and practical completion of the works shall be deemed for all purposes of this contract to have taken place on the day named in the certificate."*

The fault from which the breach was alleged to have originated from was the failure in ensuring that the foundations of the house had reached solid ground, or, was built on solid ground. Mr Lavery submits that by signing the completion certificate inrespect of the construction and completion of the foundations, the NPF Building Inspector was certifying that it had been properly constructed and completed, and accordingly, he had not done his job properly as required under the agreement.

The Building Inspector was not called to give evidence, although an application was made by counsel for the First Defendant to have the case adjourned so that he could make arrangements to have Mr Leve called. Mr Leve, had already left the employ of the First Defendant when this case came for hearing. The adjournment had been vehemently objected to by the Plaintiffs. In lieu therefore, Mr Haqa, the Controller of the Housing Loan Scheme for the First Defendant, was called to give evidence and inter alia, to explain what the functions and work of the Building Inspector was.

The crucial question is how the opinion of the Building Inspector from NPF that the works have been completed was formed. Must the NPF Building Inspector necessarily carry out tests and physically examine the ground content, to ensure that the foundation had gone right down to solid ground? Did the agency agreement require that this must be done? With respect, there is no evidence to show that this was

included as part of his duty under the Agr ;' Agreement. Even the Appendix to the Agreement, under the heading, 'Stage mentions only, the foundations, steps, floors, underground plumbing and wall f ..ing.

There is nothing in the agreement which spells out exactly what the duties of the NPF Building Inspector should be. There is no evidence from the Plaintiffs to specify what the duties of that Building Inspector were inrespect of the works needed to be done for the stage 1 completion certificate to be endorsed and payment released. All that has been described in evidence, is a very general duty of supervision, monitoring and policing of the contract. Apart from that there is nothing specific about what that Building Inspector is required to do; for instance, about the construction of the foundations. Is the Building Inspector required to be on the work site every day, once a week, once a month or how often? All that the contract says in clause 13 is, if in the opinion of the Building Inspector the works are completed, then he shall issue a certificate of completion.

The clear evidence before me is that the NPF Building Inspector was satisfied in his opinion that the works listed under the stage 1 completion certificate had been satisfactorily completed. There is no evidence to show that he should not have formed that opinion, that the works had not been completed! There is no evidence to show that he was aware of the defect picked up by the Honiara Town Council Building Inspector and the subsequent instructions given. There is no evidence to show that he was physically required to carry out the same examination of the foundation works as done by the Honiara Town Council Building Inspector.

I am strengthened in my view that it was not part of his duty under the Agency Agreement to carry out the same examination and inspection as done by the Honiara Town Council Building Inspector because if that was so, it would be duplicating work, and a waste of time and money, and not necessary.

I am satisfied that the NPF Building Inspector was entitled to rely on the skill, experience and expertise of the second Defendant, as a competent builder, but also on that of the Honiara Town Council Building Inspector. The inspection done by the Honiara Town Council Building Inspector was a statutory duty imposed under the By-laws of the Honiara Town Council. Therefore, whether the NPF Building Inspector carried out any inspection of the foundation works or not, and irrespective of what his opinion may have been, the inspection of the works would still have to be done by the Honiara Town Council Building Inspector and his word final.

I am not satisfied therefore on the balance of probabilities that the NPF Building Inspector's duty under the Agreement included a physical examination and inspection of the foundation works to the same standard as imposed on the Honiara Town Council Building Inspector.

When can that duty imposed under the Agreement be discharged, and when can that opinion be formed that the works have been satisfactorily completed? It is my opinion that the duty can equally be discharged when the Builder advises him that Stage 1 of the building or construction phase had been completed, and requests that the NPF Building Inspector have it certified accordingly and to release the monies. The NPF Building Inspector can then go to the site personally, and carry out a general inspection inrespect of the foundations, steps, floors, under ground plumbing and wall framing, and thereby form his opinion as to whether or not stage 1 of the works had been completed. No where does it say that he must inspect the foundations before the cement is poured or that he must ensure that the foundations reach solid ground.

It may be argued that under clause 2(1) of the Agreement which reads:

> *"The Contractor shall upon and subject to these conditions carry out and complete the works shown upon or described in the contract documents and in these conditions in every respect to the reasonable satisfaction of the Employer?",*

the NPF Building Inspector must necessarily be reasonably satisfied that the foundation works had been carried out and completed in accordance with the specifications in the drawings. That the NPF Building Inspector could not have been reasonably satisfied that the foundation works had been completed when he endorsed the Stage 1 Completion Certificate.

The problem with this arguement is that it is not clear whether inspecting the foundation works is to be reasonably expected from the NPF Building Inspector as well, when it is common knowledge that that specific part of the works is to be done by the Honiara Town Council Building Inspector. How far does his duty extend? Does it extend to ensuring that the works is inspected? And does it also include ensuring that the instructions given by the Honiara Town Council Building Inspector are actually carried out.

Mr Lavery submits that the First Defendant had held itself out as being responsible for policing and monitoring the contract and accordingly, the plaintiffs were entitled to rely on that to some extent.

I am satisfied that the NPF Building Inspector was a person qualified in either the building trade or architecture. He would be expected therefore to some extent to have some knowledge about what to look for when inspecting foundational works.

The crucial question is, was it part of his duty under the agency agreement to inspect the foundations before the cement was poured. The problem with the plaintiffs submissions here is that there is no express provision in the Agreement which provides for that. Under clause 2(1), there is a requirement to be reasonably satisfied. In Mr Boyle's evidence he pointed out that the two footings he inspected conformed to the specifications in the drawings. There is evidence to show that the foundation works had been constructed in accordance to the specifications. Was the NPF Building Inspector therefore entitled to be satisfied about the construction of the foundation? There is no evidence to show that the NPF Building Inspector was informed by the Second Defendant as to the composition of the ground on which the foundation was constructed. I also pointed out that there is no evidence to suggest that the NPF Building Inspector was also required under the Agreement to carry out the same inspection as required by the Honiara Town Council Building Inspector. I am satisfied that had such an inspection been done by the NPF Building Inspector that he would have become aware of the problem of the soft ground. However, there is no evidence to say that that was part of his duty under the Agency Agreement. Accordingly, I am not satisfied that there has been a breach of the Agency Agreement by the NPF Building Inspector. It would not be proper to imply a term in the agreement when there is evidence to show that there are other persons who are specifically responsible for ensuring that the foundation works comply with the specifications in the drawings and with the statutory requirements under the Honiara Town Council By-laws. Also the fact that the NPF Building Inspector may have held himself out as being responsible for policing and monitoring the contract does not cover the more detailed and specific duties spelled out in the contract whose duties and responsibilities specifically belong to the Builder and the Honiara Town Council Building Inspector.

The Construction of the foundations and its inspection and approval was a matter specifically within the responsibilities of the Second Defendant as the builder, and the Honiara Town Council Building Inspector.

Before moving on to consider the alternative arguement of Mr Lavery on the ground of negligence, it needs to be pointed out that the cause of the structural failure of the building and subsequent damage to it is not in much dispute.

In the evidence of Mr Charles Boyle, a qualified architect of some 17 years experience, and manager of a local architectural firm, Pacific Architects, the cause of the structural failure was due to the foundations being constructed on uncompacted fill. Mr Boyle

had prepared a report on the house which has been submitted to court as an exhibit in support of the Plaintiff's case.

At page 3 of his report, he described the detailed examinations done on two footings which formed part of the foundations. His observations were that the footings (i.e. the size and depth) complied with the requirements on the plan. However, they were built on uncompacted earth/clay/small rock mix and were easily removed by hand.

In another report on the same house prepared by the Chief Building Inspector, from the Honiara Town Council, Mr Auna, (some of the instructions being given to him by the building Inspector who actually did the inspection on the foundation before the cement was poured) he stated at page 2 of his report:

> *"During the foundation inspection by the Honiara Municipal Authority Building Inspector, it was noticed that the column pads are undersize, and the holes should be dug down to solid ground and the contractor on site agreed that they will dig down to that depth, as our minimum required depth is 0.900mm above ground level and the size of the pads for 250 x 250sq concrete columns should be 690mm x 690mm x 250mm minimum standard. Yet these instructions has been neglected by the builder and this causes the defects."*

The Assistant Building Inspector, from the Honiara Town Council, who did the inspection, was not available to give evidence as he was on leave. It was however agreed by consent to have the report prepared by Mr Auna tendered in evidence.

The Second Defendant on the other hand denies that the instructions from the Honiara Town Council Building Inspector were ever communicated to him. He pointed out that the Honiara Town Council Building Inspector gave the go ahead and that was why the cement was poured. He acknowledges that the ground was soft, but that he relied on the view of the Honiara Town Council Building Inspector to go ahead and pour the cement. He however, has no valid explanation for the structural failure to the building.

Is the report provided by Mr Auna reliable? The point about the foundation not dug to solid ground has been confirmed by the evidence and report produced by Mr Boyle.

The observations of Mr Boyle about the two footings he checked was that they were in accordance with the specifications in the drawings. That does not necessarily mean however, that they conformed to the requirements as set by the By-laws of the Honiara Town Council. There is no reason for me not to accept the report prepared by Mr Auna as correct and truthful.

I have heard and seen the Second Defendant give evidence in court. I am not satisfied however with his explanations and denials as to how the foundation was constructed.

I am satisfied I can accept the evidence of Mr Anna and the report tendered by him as revealing the true state of affairs concerning the construction of the foundation.

The cause of the subsidence therefore is two-fold. First, constructing the foundations on uncompacted fill; and secondly, using column pads that were undersized.

This brings me to consider the question of negligence. The submission of Mr Lavery in support of this point is in essence similar to the submissions raised in support of a breach of the Agency agreement between the Plaintiff and the First Defendant. Mr Lavery submits that the First Defendant held themselves out as building supervisors and accordingly owed a duty of care, to ensure that the foundations reached solid ground and conformed to the requirements of the Honiara Town Council building By-laws. The standard of care and skill therefore he argues, to be imputed to the NPF Building Inspector, is that possessed by a person of ordinary competence in the same calling. He would therefore have the same knowledge of the Honiara Town Council By-laws and their requirements as to the construction of the foundations. A building inspector exercising reasonable care and skill in such circumstances would have ensured that the foundations reached solid ground and that the column pads were of the correct size as required by the Honiara Town Council By-laws. He submits that the NPF Building Inspector failed in that duty and accordingly was negligent.

It has not been disputed that the NPF Building Inspector is someone either qualified in the building trade or architecture. However, it has not been shown to my satisfaction that the duty of care of the NPF Building Inspector included a close and detailed supervision of the construction of the foundations. The detailed supervision of the construction of the foundation was the specific responsibility of the builder. The inspection and approval of the foundation works was the specific responsibility of the Honiara Town Council Building Inspector. Accordingly, there is little room left whereby it could be argued that a duty lies on the part of the NPF Building Inspector to closely monitor and supervise the construction of the foundation works and to inspect them before cement is actually poured. Those duties I am satisfied were discharged by the Builder and the Honiara Town Council Building Inspector.

There is also no evidence to show that the NPF Building Inspector was informed about the fault in the foundations and the subsequent instructions given to the Builder by the Honiara Town Council Building Inspector. Had that fact been communicated, then the NPF Building Inspector would have been responsible to some extent. In the

circumstances described above, I am not satisfied that the NPF Building Inspector was negligent. He was entitled to rely on the skill and expertise of the builder and the inspection of the foundation works, by the Honiara Town Council Building Inspector, and consequently to express the opinion that the works had been completed, and to sign the stage 1 completion certificate. The negligence of the builder and the Honiara Town Council Building Inspector if any, cannot be imputed to the NPF Building Inspector.

With respect this part of the claim against the First Defendant must fail.

In paragraph 5 of the Statement of Claim it was also alleged that in breach of its contract of agency and/or negligently, the First Defendant permitted the costs of construction to overrun leading to a total construction cost of $84,132.84, which resulted in a direct loss to the Plaintiffs of $19,132.84.

It is not disputed that the contract price was for $65,000.00. There is evidence however that towards November of 1990, the Plaintiff, Michael Meone sought an increase of the loan of $65,000.00 by $15,000.00, to include additional items which were listed in a letter written to the First Defendant and dated 15 November 1990. That letter reads:

> *"As my house is towards completion, I am now kindly applying for the remaining money of $15,000 of the approved loan of $800,000 (sic) to provide the following basic items which I need in the house sir. It will be more difficult for finding another source of funds to provide the items to improve my standard of living and make life much more comfortable.*
>
> *The list of items are as follows;*
>
> *(a) Solar hot water*
> *(b) Speedie gas stove*
> *(c) Refridgerator or ice box*
> *(d) Basic furnitures i.e.*
> *1x dinning table*
> *4x dinning chairs*
> *3x beds*
> *1x setee*
> *2x arm chairs*
> *1x kitchen table*
> *1x foodsafe*
> *1x drawer for cups and plates*
>
> *I do understand the policy for the scheme but I also find difficult to have other source, therefor it will only proper if I suffer to repay only one loan rather than two."*

There is no evidence to show that a response was made to this letter by the First Defendant. However, it is clear from the evidence of Mr Haga, that the request was not only approved, but duly acted upon.

There is no evidence to say that the expenditure of the $15,000.00 on the various items listed, was not properly spent. Mr Meone acknowledged that the variations have been done, but that his dissatisfaction was in not being informed and kept up to date as to the variations. Further, it seems that he had requested details of the various purchases made, but that this had not been done. I am satisfied that the First Defendant had the necessary authority as the agent of the Employer to incur the necessary expenses for the variations requested, though I can accept that as a matter of courtesy he should have advised the Employer straightaway about his actions.

In a letter marked exhibit 6, and dated 18th February 1991, the details of the loan drawn are spelled out at paragraph 2. Little dispute has been raised inrespect of that breakdown apart from the unpaid land rent of $250.00. The explanation provided by Mr Haga inrespect of the payment of it is satisfactory. It seems that there has been some misunderstanding about that, as Mr Meone claims that the rent had been paid. This is however a non-issue as far as the claim of the Plaintiffs under paragraph (5) of the Statement of Claim is concerned.

I am not satisfied that a cause of action lies inrespect of the claim in paragraph (5) of the Statement of Claim and accordingly must be dismissed.

CLAIM AGAINST THE SECOND DEFENDANT

The claim against the Second Defendant is two pronged. First, it is alleged that there has been a breach of the terms of the argreement made between the Plaintiff, Michael Meone and the Second Defendant. And secondly, that the Second Defendant had acted negligently in the construction of the building, especially in the construction of the foundations.

Under the first head, Mr Lavery submits that there has been a fundamental breach to the agreement, in that the Second Defendant had failed to construct a dwelling house fit for habitation.

It has already been pointed out that the cause of the defect is the subsidence of the house as a result of it being built on uncompacted fill and with undersized column pads.

The second defendant gave evidence under oath. The first thing he pointed out was that the location of the house as marked on the drawing had been shifted by the

Plaintiff, Mrs Tasibete Meone, prior to actual construction work. This variation was unauthorised, and contributed to the fault in the foundations not being built on solid ground. As changed, the house was located on ground which had been filled up from a previous dozing and clearing by a bull-dozer. It is clear to me that had the building been constructed on its original site, the problem about the foundations would never have occurred. A question that can be asked then, is does this fact, absolve the Second Defendant from taking appropriate remedial action when faced with the problem of uncompacted fill or soft ground? In his evidence under oath, the Defendant stated that he was aware that the ground was soft. His response however, when asked about this was, to leave it for the Honiara Town Council Building Inspector to check it and if he advises otherwise, then remedial action can be taken.

In the case of ***Batty -v- Metropolitan Property [1978] 2 All ER 445 at page 455; Megaw LJ*** stated:

> *"Of course, the question whether or not there has been a breach of the duty will depend on all relevant considerations going to the question: did the builder act as a competent and careful builder would have acted in what he did or did not do by way of examination and investigation?"*

The question to be asked inrespect of the Second Defendant is what would a competent and careful builder have done, or how would such a builder have acted when faced with the problem of uncompacted fill or soft ground? Would he have closed his eyes to it and leave it for the Honiara Town Council Building Inspector to decide for him.

With respect, such a builder in my view would either take appropriate varying measures to counter that problem, if not, discuss it with the NPF Building Inspector, if his concern was over the funds to cater for such a variation, and then also discuss it with the Honiara Town Council Building Inspector to find out what appropriate action would need to be taken.

There is evidence to say that the Second Defendant was informed about the defects and given specific instructions to comply with. The Second Defendant denies being informed. Instead he said in evidence, that the Honiara Town Council Building Inspector had told him to go ahead with the pouring of the cement. If what he says is true, then he should have sought to have the Honiara Town Council Building Inspector joined as a Third Party. It is too late to try and raise as a partial defence that the Honiara Town Council Building Inspector should also be liable for contributory negligence. It does not assist the Second defendant in terms of his credibility. I have observed this defendant giving evidence under oath and I am not all that impressed with him. His denials fall flat in the face of sharp cross-examination by Mr Lavery,

Even under examination-in Chief, his answers were evasive. For instance, when it was put to him by his counsel that Mr Boyle had stated in his evidence that a competent builder would know whether he had struck solid ground or not, his answer was: "*yes, but it was hard to move because the owner wanted it at that spot. If it was no good, then the Honiara Town Council Building Inspector would not have passed the foundation works.*"

I am satisfied that the Second Defendant knew that the ground was soft and that he should have taken appropriate remedial or varying measures to counter that problem as a competent builder. He failed to do that. I am satisfied also that certain instructions were given to the Second Defendant, but he failed to comply with them. That is negligence on his part.

I might add here that there was a certain amount of slackness or failure on the part of the Honiara Town Council Building Inspector, to follow up on his instructions, and to ensure, by way of a further inspection, that the works had indeed been corrected. The question as to whether there is liability on the part of the Honiara Town Council Building Inspector and should be sued is a matter for the Plaintiffs to make a decision on. I would suggest also that in such situations, where verbal instructions have been given at the site, that these should be put down later on the same day or the next, in writing, and copies dispatched to interested persons, such as, the NPF Building Inspector, the Employer and a copy to the Chief Building Inspector of Honiara Town Council. I would also suggest that the Honiara Town Council Building Inspector make it a condition that the works must be further inspected, after the remedial work had been done in accordance with his instructions.

Apart from this fundamental defect, I am not satisfied on the balance of probabilities that there was any other breaches of the contract agreement or associated negligence with those works. The building was constructed according to specifications on the drawings but failed due to the defect in the construction of the foundations. I am also not satisifed that the various defects raised by the Plaintiffs during the construction phase were not adequately remedied by the Second Defendant.

The claim against the Second Defendant for breach of contract fails but succeeds under negligence.

DAMAGES

It has not been disputed that the resultant loss and damage incurred by the Plaintiffs is as a direct result of the fault in the construction of the foundations. Three reports have been submitted to the court to assist in the assessment of damages.

Mr Boyle's report indicated (with the estimate done in June 1992) that remedial work would be in the vicinity of $48,700.00. As at the date of hearing (8/11/93) his estimate based on an 18% increase was about $57,000.00.

In a valuation report done by the Principal Valuer from the Ministry of Agriculture and Lands dated 4/5/92, he estimated the market price as at $50,000.00.

The report of Mr Auna also confirmed that major remedial work would have to be done.

I am satisfied that the figure quoted by Mr Boyle is reasonable, taking all their reports into account.

The final point to consider is whether the Plaintiffs should be held liable for contributory negligence inrespect of having the location of the house changed at their direction without getting the proper approvals for it from their architect, and from the Honiara Town Council. Taking this factor into account I am satisfied their liability should be limited to 5%.

Judgement is made for the Plaintiffs against the Second Defendant in the sum of $57,000.00 less $2,850.00 (being 5% of $57,000.00) which is $54,150.00, plus interest on the judgment sum at 5% and costs.

No order for costs is made inrespect of the First Defendant.

(A.R. Palmer)
JUDGE