

**IN THE HIGH COURT**  
**OF SOLOMON ISLANDS**

Civil Case no. 467 of 1998

*Civil Jurisdiction*

**BETWEEN:**     **JAMES DELAY & MARY DELAY**  
                          **MANEFORU**

Plaintiff

**AND:**             **SOLOMON ISLANDS NATIONAL**  
                          **PROVIDENT FUND BOARD**

Defendant

Honiara: Brown J

Date of Hearing: 9 February 2004

Date of Judgment: 22 April 2004

*Contract- building contract facilitated by the SI National Provident Fund- loan moneys provided by the NPF-duty of care in NPF-whether liable when borrowers described in contract as "employer" of the builders in default*

The Solomon Islands National Provident Fund agreed to advance \$120,000 to the plaintiffs on the security of their registered land at Na'aha, Honiara late in 1998 for the erection of a house. Two builders were contracted over time but the house was not finished despite the total loan funds having been expended. The contract price for the building work to completion was \$120,000. The plaintiffs argued that the Funds building inspector had negligently approved progress payments so that they were left with a shortfall necessary to complete the work. In 1999 that had amounted to \$35,903.63 but had blown out by the year 2003 to \$80,088. The plaintiffs looked to the Fund to cover the shortfall.

*Held;*               (1) The actions of the building inspector (and vicariously, the defendant), inculpated in the fact of early progress payments to the contractors which exhausted funds before the practical completion of works, was evidence of negligence in breach of its duty of care.

(2) A duty of care by the NPF towards the borrowers arose in the circumstances of these building contracts in terms of the decision of the Court of Appeal in *J F Construction*.

(3) As the "employer" of the "contractor" (builder) the plaintiff was the principal in terms of the agreement and contributed to the loss occasioned by the failure to adequately manage the contract, and such negligence should be apportioned equally between the plaintiff and the defendant.

Cases cited. *J F Construction & SNPF Board -v- Anthony Wale & Rose Wale* (unreported civil appeal 13 of 1999)  
*M. Moeone & T. Meone -v- SINPF Board anor* (unreported HC. cc 195/1992)  
*Dunlop Pneumatic Tyre Co. -v- Selfridge & Co. Ltd* (1915) A.C 847

### Statement of Claim

This was an action for damages for breach of a duty of care under contract.

*A. Radcliffe for the plaintiffs*  
*J. Apaniai for the defendant.*

22 April 2004

The plaintiffs are the owner of land in Honiara on which they wished to build a residence.

James Maniforu approached the defendant (N.P.F.) in March 1998, for loan moneys to assist them with the building and was granted a loan in the sum of \$120,000.00 late in 1998 for this purpose, such loan to be secured by a registered charge over the property. By contract dated 6 November 1998 the plaintiff and his wife, Mary Delay Maniforu as "employers" engaged a "contractor", Arugafutu & Sons Construction to build their home in accordance with the plans, specifications and materials set out in the contract document, for the sum of \$120,000.00.

This contract was one provided by the defendants building inspector. It included, in clause (2) a particular provision about the "agent" of the "employer" (the house owner or plaintiff in this case) to this effect-

*"(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."*

In Clause 2-Interpretation, the NPF building inspector was deemed to be the "agent" of the "employers".

Further the contract provided, in an appendix, stages of completion and provision for retention fund.

**APPENDIX**

**"A. STAGES OF COMPLETION (CLAUSE 23)**

- STAGE 1 Clear Site. Site Shed, profiles, excavate foundation Columns  
8%
- STAGE 2 Steel works to Foundation Columns concrete to Foundation  
and Columns  
20%
- STAGE 3 Floor frame Slub. Wall frame Construction and roof  
framing and roof covering  
20%
- STAGE 4 External wall cladding flooring. Door & Window  
Framing fixed. Electrical & Plumbing  
15%
- STAGE 5 Internal wall cladding ceiling claddings Internal &  
External finishing  
15%
- STAGE 6 Door hanging, louver blades & frames fixed painting etc.  
12%
- STAGE 7 Staircase construction complete all works as per drawing  
Cart away all rubbish  
10%

The clause about progress payments stated.

("23. (1) At the completion of each of the stages of completion specified in the Appendix to these conditions and upon receipt of a certificate from the Employer to the effect, the Employer may, if requested to do so by the contractor, make a progress payment to the contractor.

(2) The Employer may deduct or cause to be deducted the following amounts from the sum to be made as progress payment under sub-clause (1).

(a) retentions at the percentage specified in Part B 1 the Appendix;

- (b) *any other deductions authorized by law or under this contract.*
- (3) *No progress payment shall be made to the contractor unless the employer is satisfied that all insurances required to be made by the contractor under this contract have been made and are in full force and effect.*
- (4) *Any amount retained under sub-clause (2)(a) shall be deposited by or on behalf of the Employer with a bank nominated by the Contractor.*
- (5) *The Contractor is not entitled to any interest paid or payable on any investment of the retention money pursuant to sub-clause (4).*

### **The Claim**

By his statement of claim the plaintiff pleaded the contract terms, recited the fact that two contracts were entered into with separate builders, that the builders were recommended by the building inspector and that the respective builders failed to complete the work as shown by a report carried out on the 27 November 1999.

By paragraph 13 the plaintiffs pleaded;

*"The defendant had a duty of care to the plaintiff to ensure that the agent inspect the building at all relevant times and that the building had been constructed(sic) in accordance with the contracts before authorizing the release of progress payments to the first and second builders. The defendant, its servant or agent, authorized the release of progress payments."*

### **The Defence**

The Provident Fund admits the fact of the contracts, but says that the builders were chosen by the plaintiff. Further, the defendant admits the "agency" in terms of the interpretation clause, (above) but denies that such "agent" would be the defendants agent for any purposes implied by the plaintiff.

The defendant admits that progress payments were released, pursuant to the terms of the contract, upon receipt of a certificate of the plaintiff but says that the plaintiff agreed to the release of progress payments to the 1<sup>st</sup> builder at the commencement of the stages to which payments related, rather than at the end of such stages. The defendant denied the claim of the plaintiff that the 1<sup>st</sup> builder completed only 40% of

the construction work and received 48% of the contract price. Further, the notice of termination was given the 1<sup>st</sup> builder by the NPF building inspector.

The defendant again denied that the 2<sup>nd</sup> builder was the recommended builder of the NPF, rather the builder was chosen by the plaintiff. It was admitted that the 2<sup>nd</sup> building contract was in standard form to that of the 1<sup>st</sup> contract, and contained the same provisions.

The defendant denied the plaintiffs assertions that the 2<sup>nd</sup> builder completed 30% of the construction work or was paid 52% of the contract sum.

The defendant says that it does not know and cannot plead to para.11 of the claim, wherein the plaintiff alleged that the building had not been completed or that the plaintiffs report of the inspection of the 27 November 1999 revealed that the 1<sup>st</sup> and 2<sup>nd</sup> builders had failed to carry out their contractual work, or that the value of uncompleted work and materials required amounted to \$35,903.63. Rather, the defendant's assessment of uncompleted work at that time amounted to \$34,355.00.

The defendant denied a duty of care in the NPF, by its building inspector, to the plaintiff to ensure that the building was constructed in accordance with the terms of the contract, before authorizing release of the progress payments, and if found by the Court, breach of such duty, or any negligence in authorizing release of the progress payments in the manner carried out, pleaded that the plaintiff was guilty of contributory negligence.

### **Contribution negligence**

The defendant says that the plaintiff was guilty of contributory negligence in that he

- insisted on or agreed to the release of progress payments early to both the 1<sup>st</sup> and 2<sup>nd</sup> builders, with the knowledge that the particular stage work had not been completed or commenced.
- failed to ascertain completion of each stage.
- failed to supervise the builders.
- chose the 1<sup>st</sup> and 2<sup>nd</sup> builders without proper investigation into their qualifications or capabilities to complete the work.
- failed to ensure the building was properly constructed.
- failed to secure the site to prevent theft of materials.

In the alternative, the defendant says that the reason why construction of the dwelling was not completed was that ethnic tension supervened and the builders departed to their home provinces.

### **The evidence of the plaintiff**

The plaintiff James Delay Maniforu gave evidence in court. He called a building project works manager, one Derek Koli'na'higa who had a diploma in construction and civil engineering as well as equipment procurement and technology, the last from an institution in Turin, Italy. He gave evidence of the value of work needed to complete the building.

### **The sworn evidence of James Delay Maniforu.**

He stated that he met the Board's building inspector Mr. Elwin Mai'tea in about July 1998 when he took steps to obtain a housing loan from the Fund. In November 1998, the Fund approved a loan for \$120,000.00 to fund the building on the block of land at Na'aha, land acquired in 1996.

In the course of discussions with Mr. Mai'tea, a firm of builders, "Anigafutu and Sons, Construction" was suggested and the plaintiffs agreed to its engagement. A contract C467/98 dated 6 November 1998 was entered into with that firm; that form contract having been furnished by the Fund's building inspector. The plaintiff said that he relied upon the inspectors recommendation of the firm for that the firm had some jobs already with NPF. As a consequence the plaintiff wrote a letter to NPF at the inspectors' suggestion and the contract was prepared and signed. The plaintiff had not previously built a home; he had no experience in that field.

At the commencement of the project, he said the building inspector suggested that progress moneys be released early to the builder so that materials could be purchased and work commence. He agreed to the suggestion and the first progress payment was released so that the job could get underway.

Nothing happened, so that the builder was warned by letter of the 3 December 1998, of the plaintiffs intention to terminate the contract. This letter was exhibited.

Again, on the 8<sup>th</sup> January 1999 he wrote seeking reassurance that corrugated roofing irons on site were 24 GC grade as stipulated in the contract.

Later, he was called to Mr. Mai'tea's office to sign the 2<sup>nd</sup> stage payment released when he was told he would need to sign the release to ensure work progressed. In fact on the 8 January 1999, James Maneforu said he wrote a second letter to the builder complaining about the progress on the job. That letter, exhibited, pointed to 3

aspects for the builder to address. He said he had released the 3<sup>rd</sup> stage payment by then, although he knew the work was not up to date. Mr. Mai'tea said he should release the payment to ensure continuation of work. As a result of complaints to the building inspector, the 1<sup>st</sup> contract was terminated for breach by the builder by letter dated 1<sup>st</sup> February. That letter exhibited was under hand of the building inspector, E. Maetia for the General Manager, NPF.

A 2<sup>nd</sup> contract was entered into with Pa'ac Construction on 1<sup>st</sup> February 1999, builders who were erecting a home near the plaintiff's and which suited James Maniforu. Again, the 4<sup>th</sup> progress payment was released, early, to enable the builder to start work. James Maniforu said that he had agreed to that course of action to have the work progress.

Then in March 1999, he went to Melbourne, Australia, returning in July and in the interim, he wrote to NPF informing them that his wife, Mary Maneforu would act in his stead.

Before he left, he wrote to Mr. Joe Haga, Housing Controller, NPF complaining about the actions of the building inspector, Mr. Elwin Maetia and seeking redress.

A diary note on the letter, (exhibit "1") dated 25 March 1999 stated that following discussions it was decided to (i) penalize the builder Anigorfutu by transferring \$2,800 of his retention money and (ii) monitor progress and if necessary, seek a further \$5,000 loan.

In his absence overseas, his wife executed progress payment release forms when called for by the building inspector.

On his return, he saw the building inspector for the work provided for by stages 6 and 7 had not been completed yet payment had been made. The home remained uncompleted until now.

In November 1999 he had Mr. Koli, an engineer employed by the Ministry of Health prepare a report of work that needed to be done. Later, last year Mr. Koli reassessed the cost of rectification upwards to \$80,088.62.

In cross examination, Mr. Maniforu agreed that he was the "employer" so named in the building contract form. He denied that he had chosen the 1<sup>st</sup> builder, rather said the builder had been recommended by Elwin Maetia the inspector.

He agreed that he had arranged timber from Isabel to be cut for the house and that part of a progress payment was made available to pay for that timber, that a charter fee of \$6,000 had been advanced for the purpose. In fact actual money paid was \$15,000.00. The charter fee was \$6,000.00 and \$3,000.00 was paid for labor (to recover timber) where the balance of \$3,000.00 went was not made clear.

He agreed that he had approved early release of the progress payments but said he agreed for he trusted the building inspector for the work to progress.

In fact he had agreed with Joe Hara after discussion, the terms of the diary note.

Throughout the cross examination he agreed that payment was released early not on his recommendation but after discussion with the building inspector.

He agreed that the 2<sup>nd</sup> builder had vacated the site before July although he did not know the reason. He did not know what materials were left on site when the builder left, but saw the site in November when the report was prepared by Mr. Koli.

In re-examination, he was of the opinion that the timber and charter costs were less than the cost of timber, if bought in Honiara and he tried, but failed to find the 2<sup>nd</sup> builder in Honiara. (He appears to have left Honiara because of the risks to person and property about the time of the tension.)

### **The plaintiffs 2<sup>nd</sup> witness**

Derek Koli Na'ahiga gave evidence that he is the plaintiffs uncle and at his request inspected the site of the partly completed house in November 1999 and prepared a report costing the work and materials needed for completion.

(This report contract of some 85 pages appears professionally done and became exhibit "J").

On pages 2 and 3 the expert tabulated the work done and required to complete the job, as well, gave percentage estimates of the 2<sup>nd</sup> builders specified work completed and incomplete.

The total cost of rectification and materials, then, was \$35,903.63.

Later, in September 2003 for the purposes of this case, he updated his report by preparing a fresh costing based on contemporary labor charges and materials cost. That figure totaled \$80,088.62. His report and its basis were not seriously challenged (for later in the evidence, NPF's cost of completion earlier, approximated this experts cost).



**Court finding**

I should say I am satisfied that both the reports accurately and fairly set out the work needed to be done and the materials necessary to complete this project.

**The plaintiffs 3<sup>rd</sup> witness**

Mr. Livingston Saepio, the City Council Building Inspector gave evidence. No first stage footings inspection certificate had been issued nor inspection done. No certificate of completion has ever issued. Normally the NPF building inspector would contact the Council Inspector when certification in accordance with Councils requirements was necessary. It had not happened in this instance.

In cross examination, the fact of the By-laws throwing responsibility on the builder was raised.

**The Defense Case**

The defendant admitted for the purposes of this case that the building inspector was the agent of the owner or "employer" in terms of the interpretation clause.

It denied that it recommended the 1st or 2nd builder or that it was negligent in administering the contract.

\* Further, progress payment were released at the instigation of the plaintiff, the defendant only agreeing to his request.

The loss on the contract, then fell solely on the plaintiff, for he had authorized all progress payments, notwithstanding work was in arrears.

**The defendants witnesses**

Mr. Elwyn Maetia was the NPF building inspector. He said the NPF previously had made progress payments but the practice had changed so that the borrower had also to authorize payment. In this case the plaintiff had authorized all the payments. He said the client borrower and he discussed before the client signed, authorizing him to release progress payments various progress claims were shown him, he agreed the fact that work remained outstanding was known to the plaintiff when the plaintiff approved the advance.

He stated that a further \$5,000 loan was in fact made by the NPF to fund the completion of works together with some \$2,000 forfeited retention moneys. He prepared a building inspection report at the request of NPF on the 5 June 2001, when his material and labour costs totaled \$34,354.90.

### **Defendants submissions**

The defendant said;

- The plaintiff approved early release.
- The plaintiff has been shown to be knowledgeable in building work.
- The defendant is not the body obliged to certify completion of stages of building work for the "builder" is subject to the Honiara Town Council By-laws which place the responsibility to seek inspection and certification on him.
- The plaintiff chose to terminate the first builders contract when only a relatively small sum needed to be expended to bring the work to satisfactory completion and *ipso facto* the problems which followed flowed from the plaintiffs act of termination.

### **The plaintiffs submissions**

The agents duty –

- To inspect the building work at relevant times and be satisfied that the house was constructed as contracted for, before progress payments were released.
- The independent right to sue the builder for breach does not exculpate the NPF.
- Release of progress payments before their due dates was negligent.
- The agent had a positive duty to ensure building work was "per contract".
- Abandonment of the site by the second builder cannot absolve the agent from responsibility earlier to have ensured that the first builder constructed a storage hut for materials on site.

### **Findings on the evidence**

The NPF building inspector failed to liaise with the council building inspector. He had not visited the site with the client borrower. While he seeks to rely upon the authorization of the progress payments by the client borrower, the fact remained that the building work continually fell behind and did not comply with the contractual terms and specification so clearly demonstrated by Mr. Koli's first report. This non compliance should have been apparent to the building inspector on inspection. These breaches and omissions were, to a large extent, apparent to the plaintiff who discussed them with the building inspector.

The NPF building inspector had negligently permitted the builders to proceed in contravention of By Laws requiring footings certification and, on the face of the contract, the absence of security on-site to maintain materials.

I am further satisfied that the plaintiff must bear some responsibility for the loss for he had been shown in evidence to have quite properly in the face of the 2 building contracts, taken an active part in supervising the management of those contracts. He arranged, for instance, the early release of funds to facilitate the timber from Isabel, he was instrumental in sacking the first builder, and he knew when authorizing early release of progress payments that work remained to be done.

If an apportionment was to be made so far as the negligence is concerned, a fair apportionment would be 50/50.

### The law applicable

Now in his argument Mr Radcliffe for the plaintiff relied on the judgment of the Court of Appeal in *J F Construction & SNPF Board -v- Anthony Wale & Rose Wale* (unreported civil appeal 13 of 1999) where the Court of Appeal said, at 6 (when dealing with the possibility of alternate remedies under General Conditions of Contract set out in a schedule to a building contract);

*"The real question at the end of the day is whether Mr Nori is right in saying that the remedy under clause 14 of the Conditions is the exclusive remedy available to the Plaintiffs and that they cannot sue in damages for breach of contract as they have sought to do but that they must comply strictly with the provisions of clause 14. It seems to the Court that clause 14 is not the exclusive remedy. Accepting that it would be possible by clear words to take away the right to damages because of the provision of an alternative remedy the Court does not accept that that has been done in this case. What is provided is an additional remedy (and no doubt for persons who had the ability to pay a new contractor and to sue for his costs as a debt a convenient remedy) but the clause does not expressly or by necessary implication take away a right to claim damages. See for example Hancock -v- P W Brazier (Enley Limited) [1966] 1 WLR 1317 per Diplock L, J at first instance and Lord Denning MR in the Court of Appeal. On this issue the Court agrees with Chief Justice that a remedy in damages is available."*

In the case before me the plaintiffs rely on these two building contracts with the builders, (as was the case in *J F Construction* above) and it would seem, a collateral contract to be implied between these plaintiffs and the NPF, an implied contract not pleaded.

By virtue of paragraph 13 of the statement of claim, the suggestion of an independent obligation in the building inspector (and his employer, NPF) towards the plaintiffs is clear from the use of the phrase, "the defendant had a duty of care to the plaintiff". One must presume such a duty by contract, for no argument has been advanced that there was a tortious or statutory obligation. But the only basis for the pleading, in terms of paragraph 13 (in the absence of any particulars relating to what I have called an implied collateral contract) must be the *ratio decidendi* of Muri CJ approved and applied in *J F Constructions* by the Court of Appeal. For no collateral contract had been pleaded in that case on appeal, rather the Court of Appeal said, at 8;

*"The building inspector did owe a duty of care; in this case he broke it and the damage flowed from that breach."*

This followed the Honourable Chief Justice' finding that;

*"In my judgment, the building inspector -v- (NPF) had failed in his duty as agent of the plaintiffs to ensure proper inspection and monitoring of the first defendant's (builders) work on the plaintiffs house."*

(It must also be remembered that the NPF is vicariously responsible for the negligent acts of its employees.)

Palmer J (as he then was) also had reason to consider the terms of this particular building contract of the NPF in *M. Moeone & T. Meone -v- SINPF Board anor* (unreported HC. cc 195/1992) where at 5 he said;

*"... the fact that the NPF 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"*.

His decision turned on the liability of the builder under the contract to the "employer" and the statutory liability of the Honiara Town Council Building Inspector, for he chose, rightly in my view, to address the parties to the contract and their responsibilities under it.

In neither case quoted, is it clear how the building inspector owed any such duty "as agent of the plaintiff to ensure proper inspection etc" to the various plaintiffs, under the building contract for that contract was only between the "employer" and the "contractor" or builder. Yet in those cases, and here, the plaintiffs seek to rely on the building contract as affording them remedy against the NPF (through its building inspector) when on its face, the NPF is not a party and consequently on the basis of

the doctrine of *privity of contract* this defendant may not be held to a contract to which it is not a party.

*My Lords, in the law of England, certain principles are fundamental. One is that only a person who is a party to a contract can sue on it. Our law knows nothing of jus quaesitum tertio arising by way of contract. Such a right may be conferred by way of property, as, for example, under a trust, but it cannot be conferred on a stranger to a contract as a right to enforce the contract in personam.*

*(Dunlop Pneumatic Tyre Co. -v- Selfridge & Co. Ltd) (1915) A.C 847 at 853)*

The Statement of Claim pleads the building contract as affording these plaintiffs right to sue the building inspector, and vicariously, NPF. Yet the building inspector is not a party to the agreement. He is, in the interpretation clause, the "agent" of the "employer". On the face of it, the principals are "James Delay and Mary Delay" described as the "employers". Here the principals to the building contract seek to sue their agent, (the building inspector) on a contract to which he is not a party.

The "contractors" are the two builders. Nowhere is NPF or the building inspector of NPF named as a party to the agreement. The "employers" rights under the building contract are to be found in the terms of the document, and only affect its parties

There is no implied collateral contract pleaded, between the NPF and the plaintiffs, for instance to suppose that the NPF would indemnify the plaintiffs against losses suffered under the written building contract in consideration of the appointment of the NPF building inspector as the plaintiffs agent in that written contract. To look at it in another way, could the "contractor" named in the written Agreement sue NPF under the Agreement for a failure to pay progress payments at all? The "contractor" may sue the principal or "employer" but where is the **privity of contract** with NPF? In this case I would have thought any promise in NPF to these plaintiffs to effectively indemnify them against negligence of its building inspector in breaching an alleged duty of care would need to be found outside this building Agreement and the terms to be implied in any such duty of care, to be particularly pleaded.

Nevertheless, I am constrained by the Court of Appeal decision in *J F Construction* and must presume (since the facts in both cases are similar, involving as they do, the same lender and building contract) that the Court has treated the case as an "exception" perhaps, to the **privity** doctrine when accepting the trial judges finding on the "breach of a duty of care" and its corollary, the existence of such a duty under the contract. The decision rather changes the nature of the business of NPF, from that of a lender of funds, to something approaching an indemnifier against risk of the borrower.

Be that as it may, I propose to allow the claim on the basis of a duty of care as applied in *J F Construction*. The negligence giving rise to the breach of the duty is that of the building inspector having been shown to have been inculcated in the fact of the early progress payments to the contractors which obviously had the effect of exhausting funds before the practical completion of works.

### Quantum

It is accepted the house needs labor and materials to be completed.

In 1999 that work was costed at \$35,903.63. In the report of NPF the cost was \$34,354.90.

The plaintiffs cannot, in their circumstances, be expected to mitigate the loss by completing the work at their own expense, in 1999. I am satisfied the costings of the expert, (exhibit "K") carried out in 2003, are fair and reasonable as a basis for assessing damages in this case.

There shall be a verdict for the plaintiff on the claim and for the defendant in respect of its claim for contributory negligence. There shall be judgment for the plaintiff (the sum of \$80,088.62 less 50% for their contributory negligence) in the sum of \$40,044.32. The defendant has not satisfied me any deductions should be made to that total figure for presumed loss or damage to materials caused by the "tension".

### Order

Verdict and judgment for the plaintiff in the sum of \$40,044.32.

Verdict for the defendant on its claim for contributory negligence.

The defendant shall pay the plaintiffs costs.

Brown J  
Judge