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Transcript of Proceedings

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Date: 24 June, 2003

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

DUTNEY J

No S478 of 2002

BRIAN GEANEY PTY LTD	Plaintiff
and	
CLOSE CONSTRUCTIONS PTY LTD (ACN 010 963 407)	First Defendant
and	
PAUL CRUICE ARCHITECT PTY LTD (ACN 018 188 100)	Second Defendant
and	
CYRIL CASWELL	Third Defendant

ROCKHAMPTON

..DATE 23/06/2003

JUDGMENT

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HIS HONOUR: There is before the Court an application which is framed in the nature of an application for summary judgment, but which seems to me, coming as it does, seven days after the commencement of hearing, to be an application that there is no case to answer on the part of the second defendant. There is a minor difficulty with the application in the sense that the plaintiff has not closed its case but neither side takes any real point in relation to that on the basis that the evidence which remains to be called is engineering evidence which goes primarily to the question of whether the foundations are such that the building ought to be demolished as opposed to repaired, and otherwise as to quantum.

One matter which has concerned me about the application is whether, in view of the fact that the second defendant prepared the original plans which were subsequently altered to the extent that they ceased to have any real relevance to the construction, but that the footings were not materially altered, a case might be made out on that basis. But I propose to deal with the application one way or the other notwithstanding that.

This has been a very expensive case involving, as I have indicated, seven days of oral hearings to date. It has been listed to resume on the 13th of August, which is in about seven weeks time. It is to be hoped that the hearing will conclude at that time.

The quantum involved as pleaded is of the order of $400,000. The evidence so far does not include any assertion by any engineer that the building ought to be demolished and hence the quantum involved subject to the evidence still to be called is presently only a fraction of that $400,000.

The issue between the plaintiff and the second defendant is whether the evidence is capable of sustaining a claim for negligence. It is not asserted that there was any direct contract between the plaintiff and the second defendant, rather the contract was between the first defendant and the second defendant. It is said that that contract was performed negligently in that the drawings prepared, pursuant to a retainer to produce drawings for council approval, did not contain sufficient detail to construct the building with the result that the present alleged defects exist in it.

The principles, to my mind, are not in serious dispute. Both sides have referred me to Voli v. Inglewood Shire Council, 110 CLR 74. That authority seems to me to be support for the proposition that where a professional, in that case, as in this, an architect, is engaged to perform a particular task, he has to perform that task with a reasonable degree of professional skill and competence. The question that arises however is a factual one which is what precisely was the scope and extent of the task that the professional in fact undertook.

The authorities support the proposition that where a submission of no case to answer is made, the party making it as a general rule of practice is required to elect whether to pursue the submission or to go into evidence.

Recent authority for that is derived from Australian Competition and Consumer Commission v. Pauls Limited 2002 FCA 1586, and Prentice v. Cummins (No 4) 2002 FCA 1215. That is not a rigid rule and there are some well-recognised exceptions, in particular where fraud is alleged. This is not a case of fraud. This seems to me to be a case really which will ultimately turn on its facts because, as I say, there does not seem to me to be any serious dispute as to what the propositions of law are, but rather how they are to be applied to the particular fact situation with which I have to deal.

In order to resolve the application of no case it will be necessary for me to consider in some detail the evidence which has been led. It is obvious from the lengthy submissions in writing by both sides that each seeks to give a construction to the evidence contrary to the interests of the other.

Were I to undertake the task of analysing the evidence at this stage, and to resolve the matter against the second defendant, that would not be an end of the matter. Of course the second defendant would have two options. One would be to make the submissions, again, at the conclusion of the trial, and the other would be to go into evidence so that the factual basis is more complete than it is at present.

It seems to me that the purpose for requiring an election in a case such as this is to avoid the prospect of, in effect, giving an advisory opinion to the party making the submission in a case which really turns on its facts so that the party gets two bites at the cherry, that is, to seek to submit that the plaintiff has failed to make out a case, and if it fails in that after examining all of the evidence, to then lead further evidence to support that same submission.

In those circumstances, it does not seem to me to be a case where I should depart from the usual practice of requiring the second defendant to elect. If I am to examine all of the material in this case in detail, it seems to me that I should do so only if I am satisfied that I have all the evidence which the parties want to put before me before doing so, and accordingly, if I am to proceed with the application on its merits I require the second defendant to make its election.

MR PERRY: Your Honour, in the light of that the second defendant would not pursue the application.

HIS HONOUR: All right. Well in those circumstances, the application will be dismissed with costs to be assessed on the standard basis.
