

SUPREME COURT OF QUEENSLAND

CITATION: *Brian Geaney Pty Ltd & Anor v Close Constructions Pty Ltd & Ors* [2003] QSC 393

PARTIES: **BRIAN GEANEY PTY LTD ACN 010 651 546**
(First Plaintiff)
and
**THE PROPRIETORS 102 DENHAM STREET,
BUILDING UNITS PLAN NUMBER 100002**
(Second Plaintiff)
v
**CLOSE CONSTRUCTIONS PTY LTD
ACN 010 963 407**
(First Defendant)
and
**PAUL CRUCE ARCHITECT PTY LTD
ACN 018 188 100**
(Second Defendant)
and
CYRIL CASWELL
(Third Defendant)

FILE NO: S478 of 2002

DIVISION: Trial Division

DELIVERED ON: 21 September 2003

DELIVERED AT: Rockhampton

HEARING DATES: 28-29 November 2002, 24-28 March 2003, 16 June 2003, 23 June 2003 and 13-15 August 2003

JUDGE: Dutney J

ORDERS:

- 1. Judgement for the plaintiffs against the first, second and third defendants in the sum of \$18,000.00;**
- 2. Judgement for the first plaintiff against the first defendant in the further sum of \$51,529.00;**
- 3. The first defendant to indemnify the second defendant in respect of the judgement against the second defendant in the sum of \$3,600.00;**

4. **The third defendant to indemnify the second defendant in respect of the judgement against the second defendant in the sum of \$7,200.00.**

CATCHWORDS:

BUILDING AND ENGINEERING CONTRACTS - BREACH – COST OF RECTIFICATION WORKS – where First Plaintiff entered into a design and construct contract with First Defendant – whether breach of implied conditions that the building would be constructed with the skill, care and competence of an ordinary builder and in accordance with good building practice

NEGLIGENCE – STANDARD OF CARE – REASONABLE FORESEEABILITY OF DAMAGE – APPORTIONMENT OF RESPONSIBILITY – where stud frame construction of building converted into a masonry construction – where First, Second and Third Defendants aware of this fact – whether First Defendant’s failure to advise First Plaintiff of consequences of not installing control joints negligent

ARCHITECTS, ENGINEERS AND SURVEYORS – ARCHITECTS – where architect designed a building to suit First Plaintiff’s business – where design was for a stud frame form of construction – where architect became aware a different building material was being used – where architect’s retainer was to achieve council building approval - where First Defendant anticipated drawings with sufficient detail to build from – whether lack of detail on drawings had a causal connection with loss suffered by plaintiff – whether Second Defendant negligent in not seeking modification of engineer’s footing and slab plan to suit new building material

ARCHITECTS, ENGINEERS AND SURVEYORS – ENGINEERS – where engineer produced inter alia a footings and slab design - where engineer became aware a new building material was being used – whether failure to alter design to suit new building material negligent – where engineer certified various parts of the works on the building

Haines v Bendall (1991) 172 CLR 60, followed
Voli v Inglewood Shire Council (1963) 110 CLR 74, followed

COUNSEL: PO Land for the Plaintiff (28-29 November 2002, 24-28 March 2003, 16 June 2003, 23 June 2003)
 IR Perkins for the Plaintiff (13-15 August 2003)
 MB Smith for the First Defendant (28-29 November 2002)
 First Defendant self represented (24-28 March 2003, 16 June 2003, 23 June 2003 and 13-15 August 2003)
 RA Perry for the Second Defendant
 Third Defendant self represented

SOLICITORS: SR Wallace & Wallace for the Plaintiff
 Colin Fleming & Co for the First Defendant (28-29 November 2002) thereafter self represented
 Thynne & Macartney for the Second Defendant
 Third Defendant self represented

- [1] Through the first plaintiff, Brian Geaney holds the LJ Hooker Real Estate franchise in Rockhampton. In 1991 he decided to construct a purpose built office with highway access on the corner of Denham St and George Streets.
- [2] For that purpose Geaney Constructions Pty Ltd acquired the land to which I have referred. At that time it comprised four separate small parcels. A building on one of the parcels in Denham Street (not the corner) was occupied by a fish shop. Apart from that, the land was vacant.
- [3] Shortly after signing a contract to purchase the land Mr Geaney approached Mr Paul Cruice, the proprietor of the second defendant, Paul Cruice Architect Pty Ltd, with a view to having a building designed to suit his business and to fit on the block.
- [4] The contract to purchase the land settled in July 1992.
- [5] By the end of 1992 a proposed building had been drawn up by the second defendant. This proposal comprised three plans numbered WD-01, WD-02 and WD-03. The design was for a stud frame form of construction.
- [6] In March 1993, Mr Geaney again went to see Mr Cruice. Mr Cruice recommended that Mr Geaney obtain a soil test and advised that Mr Geaney would need to engage a structural engineer. The engineer selected was Mr

Caswell, the third defendant. The soil test revealed that the sight was class H. Mr Caswell ultimately produced three sheets labelled 93-012. Sheet 1 was a footings and slab design, sheet 2 dealt with the design and detailing of structural steel to support the roof and awnings, and sheet 3 dealt with the design and detailing of horizontal steel trusses to provide lateral support to the walls at roof level.

- [7] Some changes were made to Mr Cruice's design at the request of Mr Geaney.
- [8] The construction was then put out to tender. Three builders were asked to quote. The cheapest quote came from Close Constructions Pty Ltd, the first defendant. The proprietor of that company was Don Close. Mr Close' quote was for \$243,000. Mr Close was then selected as the preferred builder.
- [9] After selecting Mr Close as the preferred builder, Mr Geaney and Mr Close entered into discussions with a view to obtaining a lower price. Mr Close suggested that the use of Hebel block as a building material would reduce the cost. Mr Close was at that time the Hebel products representative in Rockhampton. The result of using Hebel block would be to convert a stud frame construction into a masonry construction. Mr Geaney went back to Mr Cruice and asked him about the change to Hebel block. In particular, Mr Geaney asked Mr Cruice whether Hebel was an acceptable product. Having received an affirmative answer, Mr Geaney went back to Mr Close. Mr Close said he would get construction plans drawn up. Mr Close did not say he would go back to Mr Cruice but Mr Geaney assumed he would.
- [10] What appears to have happened is that Mr Close prepared his own sketches of the redesign to convert the stud frame building to a Hebel block building. When these changes were settled, Mr Close took his sketches to Mr Cruice and asked Mr Cruice to produce plans sufficient to obtain council approval. Apart from the change from stud frame to masonry walls, Mr Close's design also altered and simplified the roof shape and changed the design of the awning to replicate the awnings over the Cambridge Hotel. Mr Close said in evidence:

“I asked Mr Cruice to provide plans that would be sufficient to enable us to get building approval and – and that was basically all that I required of him.”

I accept this evidence. This is not identical with what Mr Cruice said were the terms of his retainer but it is exactly what Mr Cruice purported to do in fact. I will look at the significance of this finding when I consider the liability of the second defendant later.

- [11] Mr Close was disappointed with the plans provided because he had expected, in particular, more engineering detail on them. Mr Cruice assured him they would be sufficient. Mr Close had hoped the plans drawn by Mr Cruice would be sufficient to build from. The plans were submitted and approved. The plans that Mr Close picked up from Mr Cruice comprised a site plan numbered PCA730, six copies of WD05 and four copies of the footing and slab plan numbered 93-012 sheet 1, which had been prepared by Mr Caswell in March 1993 for the original design. Mr Caswell’s only involvement with the redesign was that he was approached by Mr Close in about July 1993 with a view to Mr Caswell designing three roof beams and the purlins to support the roof sheeting. These drawings were faxed to Mr Cruice and incorporated in his plan WD05.
- [12] Mr Caswell was not asked to redesign his original foundation plan to incorporate Hebel block walls rather than the stud frame construction for which Mr Caswell had designed 93-012. Mr Caswell was aware that the plan had been changed to a Hebel block construction at the time he designed his roof beams and purlins. He knew that Mr Close was the Rockhampton agent for Hebel products and that Hebel provided a technical advisory service. He assumed Mr Close was making use of this service.
- [13] A building contract was entered into between the first plaintiff and the first defendant and dated 16th August 1993. Construction started.

- [14] Mr Cruice had no further involvement with the construction after Mr Close collected the plans for council approval.
- [15] Mr Caswell first became aware that his original footing design was being used when he carried out a footing inspection at the request of Mr Close in September 1993. Mr Caswell was not concerned at the use of his footings plan in this different context because he was satisfied that his design was sufficiently conservative to safely support the Hebel wall. Mr Caswell also did a slab inspection a week or so later.
- [16] Mr Caswell carried out the frame inspection in October 1993. At that stage the walls were up and the steel roof members and purlins were in place. At the time of this inspection Mr Caswell would have noticed that fly bracing was not provided to the primary roof support beams. It would also have been apparent that lateral bracing at the roof or ceiling level was not in place. Mr Caswell explained his failure to comment on this by saying that in his opinion fly bracing was not necessary in order to make the structure adequate. Mr Caswell also said that it was too early in the construction to determine whether or not lateral bracing was going to be provided. It could have been provided by means of a rigid ceiling. Mr Caswell's certificate stated that he had carried out a frame inspection and the works complied with the requirements of the relevant Australian standard and good building practice. Because the structure was masonry rather than framing, Mr Caswell said that he was not required to and did not in fact inspect the walls, but only the steel roof members.
- [17] The roof purlins on the side abutting the existing building were supported by the existing brick wall. Although he was not asked to design the support for the purlins Mr Caswell spoke to either Mr Close or an employee on site and told them there may not be sufficient anchorage to one of the steel members that was holding up the purlins. He says that he was told the matter would be attended to. He later received a phone call from Mr Close saying Mr Close would provide straps down the side of the wall and bolt them to the wall. Mr Caswell was never asked to go back and inspect this work.

- [18] Mr Close recollects some detail work being done by Mr Caswell in relation to the footings. I don't think anything turns on whether this is correct or not although there was some minor change to strengthen the footings by Mr Caswell. Mr Close also recalls Mr Caswell having some input into the roof frame structure. This input was reflected in the work inspected by Mr Caswell when he carried out the frame inspection.
- [19] As constructed, the walls lack control joints. Control joints are necessary in masonry walls to prevent or reduce cracking caused by normal movement in the masonry and foundations or slab. Mr Close said that he specifically raised with Mr Geaney the issue of control joints. Mr Close said that initially he questioned Mr Caswell as to whether control joints needed to be considered and was told they would have to be considered. Mr Close says he then spoke to Mr Caswell and Mr Geaney on site. While Mr Close could not detail the conversation, his recollection of its effect was that it was most likely that cracking would occur through the parapet and around the corners of the windows. Even with control joints on a class H site some fine cracking was likely. Mr Geaney is then said to have told Mr Close he did not want control joints in the building.
- [20] Mr Geaney initially had no recollection of discussing control joints with Mr Close but said in evidence that if he had he would have been guided by Mr Close. Later, after Mr Close had given his evidence, Mr Geaney was recalled to respond to Mr Close's evidence which had not been put to him in quite the terms Mr Close, who was then representing himself, had given it. On that occasion Mr Geaney said he did have some recollection of a conversation about control joints, but it was at a time prior to construction and the production of the plans for council approval. The discussion did not involve Mr Caswell. Mr Close brought plans for him to look at. Mr Geaney said he wanted the finish to look like sandstone. He said the discussion centred on the fact that control joints would detract from the look he wanted and he recalled that they agreed not to have them. Mr Geaney said, however, that if Mr Close had recommended them he would have had them put in.

- [21] Mr Caswell gave no evidence about his involvement in the conversation referred to by Mr Close but it would be inconsistent with his more general evidence as to the level of his involvement. Mr Geaney said he did not meet Mr Caswell personally until after the building was complete.
- [22] I find that Mr Close did discuss the issue of control joints with Mr Geaney. I am satisfied that Mr Geaney did instruct Mr Close not to install them but I am not satisfied that Mr Geaney properly understood or was told of the purpose of or need for these joints. I am not satisfied that Mr Caswell was involved in the discussion at the time Mr Geaney gave his instructions.
- [23] The building was completed and Mr Geaney moved in in early 1994. A building units plan was registered creating two separate lots. One lot comprised the existing building and the other lot comprised the new building built by the first defendant. The older building has since been sold. In 1995, Mr Geaney observed cracks beginning to appear in the rear wall of the building. At a later point, a crack appeared in the front door area. Mr Geaney was not concerned initially as he thought the cracks were as a result of the settling of the building but they continued to increase in size and number. Eventually, Mr Geaney became concerned and approached Mr Stanaway, an engineer, and this action was commenced. The cracking is best identified in the report of Mr Perkins, an engineer. The report is document 5 in exhibit 1. Mr Perkins identified eleven category 1 cracks, nine category 2 cracks and one category 3 crack. Category 1 cracks are fine cracks which do not need repair. Category 2 cracks are noticeable but easily filled. Category 3 cracks can be repaired but repair might need to be done to small parts of the surrounding wall and weatherproofing may be affected.
- [24] There is no dispute that the building is defective and needs to be rectified. There is no uniformity, however, as to what is wrong and how it is to be rectified.
- [25] Six engineers, including the third defendant, gave evidence. Mr Stanaway and Mr Perkins were called by the plaintiff. Mr Madders was called by the second

defendant. Mr Lait was called by the first defendant and Mr Ainsworth was called by the third defendant. Messrs Stanaway, Perkins, Lait and Madders addressed rectification in a comprehensive way.

[26] Of the four, only Mr Stanaway considered that the foundations were defective to such an extent that it was necessary to demolish and reconstruct the building. While it was recognised that the foundations did not comply with the Australian Standard in relation to a residential building, each of the other engineers considered that they were performing reasonably and no rectification was required. I accept the opinion of Messrs Perkins, Lait and Madders in this respect. Notwithstanding this, the footings and foundations appear to be under-engineered for a masonry building, with the result that there is likely to be more flexibility and thus more cracking than would be the case if it was designed to AS2870 – 1988. While that standard is particularly referable to residential construction it provides:

“The standard may also apply to other forms of construction including some light commercial and institutional buildings if they are similar to houses in size, loading and superstructure flexibility.”

This description fits the plaintiff’s building. I find that the standard represents a guide to the proper design characteristics of the slab for the plaintiff’s building. Mr Lait in his report expresses the opinion that the foundation system lacks the “stiffness” that would have been present had the footings and foundations been designed in accordance with the standard. Mr Madders in his report says that the footing and slab system is performing adequately but attributes the category 3 crack to foundation movement. Mr Perkins has a similar view. He said in his first report that the structural adequacy of the building was not seriously compromised by the deficiency in the slab but it was to be expected that cracks would continue to open. It seems that while the foundations of the building are adequate from a structural point of view, their deficiencies have and will result in excessive cracking of the masonry.

[27] Four other general areas of defect were identified namely, the:

- lack of control joints;

- insufficient lateral bracing of the walls to resist raking forces from strong wind loads;
- lack of fly bracing of the rafters to resist torsional buckling of the rafters; and
- inadequate support of the awning and sign over the front entrance.

Each of the engineers agreed generally as to the nature of the defects and the need for rectification. Both Mr Close and Mr Caswell also agreed that the building was defective in the ways I have identified in this paragraph although they disagreed that the slab was deficient. They agreed that it was necessary to affect some repair.

[28] Before looking at the various opinions and proposed methods of rectification it is necessary to observe that the conversion of the original design from stud wall framing to Hebel block was cost driven. Mr Geaney was anxious that the building be erected as cheaply as possible and this was the reason he asked Mr Close to redesign the original proposal. Notwithstanding this the plaintiff is entitled to expect and to receive a building that will perform competently. Having said this, provided it meets acceptable performance standards, I do not consider that the plaintiff is entitled to expect a building that exceeds what it would have been prepared to pay for in the first instance. In other words, what the first plaintiff is entitled to is an adequate but not luxurious or extravagantly engineered building. This is relevant because the opinion I have formed is that the rectification work proposed by Mr Perkins involves the re-engineering of the building to a higher standard than the minimum required and higher than Mr Geaney would have been prepared to authorise if a lesser standard would have sufficed. Mr Perkins calculations of design wind strength were also out of step with all the other engineers who gave evidence and for that reason, should not be accepted. It was partly this calculation of wind strength which dictated Mr Perkins' preference for vertical spanning by posts to provide the lateral support presently lacking. This in turn required additional work and loss of useable floor space to which I will refer later and was significantly more expensive than the proposals of either Mr Lait or Mr Madders. Of the

two other engineers, Mr Lait and Mr Madders, the proposed methods of rectification are not greatly different. Mr Madders approach is slightly more conservative than that of Mr Lait. This is a case where a number of competent engineers have expressed opinions and where each recognises that there is scope for a range of possible approaches to rectification

- [29] Mr Madders' recommendations for rectification of the cracking and lack of control joints are to cut such joints in the walls and cosmetically rectify the existing cracks. The insufficiency of the wall strength and the inadequacy of wind resistance can be rectified by installing a double wind head plus some posts where localised pressures require the same. The wind heads are to be connected into the roof bracing system by a system of framing. Plywood walls for bracing in the interior would not need to be anchored into the slab because functionally they provide only stiffness and not strength. Framing is required inside the rear wall of the garage. With double wind heads no further support is required for the awning or sign.
- [30] This proposal differs from that of Mr Lait in a number of respects. Mr Lait would only install a single wind head spanning horizontally between the existing rafters and bracing panels and wall returns. This might require some additional strengthening of existing internal bracing walls. Some additional roof bracing would be required. Ply sheeted bracing walls would be required with full length anchor rods at the end of the bracing panels cut into the concrete slab. Some cosmetic treatment would be required where the rectification was below the ceiling level. With this method of rectification some localised strengthening may be required to support the awning.
- [31] Mr Madders' proposal is based upon the wind load rating of the Hebel walls at present and not upon the rating applicable at the time the building was built. If, as is the proper approach, the plaintiff's damages are assessed by reference to the sum necessary to put it in the position it would have been in had the negligence or breach of contract not occurred,¹ the rectification must be in

¹ See *Haines v Bendall* (1991) 172 CLR 60 at 63.

terms of what would have been the applicable standard in 1993. There is no suggestion any changes to the building standards since then prevent rectification to 1993 specifications. I therefore accept that Mr Lait's proposal of a single wind header best reflects the proper approach in this case, subject to adding to it the additional corner posts recommended by Mr Madders which Mr Lait conceded may have been necessary, subject to some calculations he had not done.

[32] Two quotes were produced for Mr Lait's proposal. Mr Close estimated the rectification costs at \$32,881.20 and TNA Builders prepared a preliminary costing in the sum of \$38,547.00. In addition, TNA Builders estimated the cost of repairing existing cracks at \$10,000. TNA Builders' quotation was prepared on the basis of working after hours to avoid the need to vacate the building. It included a sum which appears from the handwritten portion of the quote to be about \$300 for the installation of tie down rods. By trial it was accepted that tie down rods had been installed when the building was constructed. Neither quote includes the steel corner posts Mr Madders recommended. Mr Close also gave evidence that the work could be performed while the building continued to be occupied. This assessment was accepted by Mr Foster, who was a quantity surveyor who provided a costing for Mr Perkins' solution, Mr Lait and Mr Madders. The plaintiff could continue to occupy the building during rectification because the work was largely in the ceiling and with co-operation from the builder could be mainly done out of office hours.

[33] Mr Lait carried out calculations which satisfied him that on the basis that the wall of the adjoining shop was double brick the connection of the roof to it just satisfied the engineering requirements to resist uplift forces. Mr Lait was satisfied that Mr Close's costing of his proposal was adequate, save that he believed a further \$3000 should have been allowed for contingencies. He said that had the building been properly designed initially the construction costs would have been higher because of the additional lateral restraint and bracing in the roof.

[34] I accept Mr Lait's evidence that if his single wind header had been originally designed, as it should have been, the contract price would have been increased by the cost of its inclusion. In calculating what damage the plaintiff has suffered by reason of the failure to properly design and construct the building, an amount should be deducted from the cost of rectification to allow for the saving on the cost of the original construction of not installing the additional restraint. Despite the contract being for a fixed price of \$230,000 the problem with the lateral bracing occurred in the design stage which, if done properly, would have resulted in some increase in price, even if only for the extra materials.

[35] Mr Madders said in evidence that his solution was not, in engineering terms, greatly different from that of Mr Perkins other than in spanning horizontally by wind heads in the ceiling rather than vertically by means of internal posts as Mr Perkins proposed. Mr Madders also agreed in cross examination that while he had not done any costing of Mr Perkins' proposal he would not be surprised if the cost was similar to his. In giving this evidence I understood Mr Madders to be referring to the engineering aspects of the rectification. It seems to me that the substantial extra cost in Mr Perkins' proposal is in the need to construct an internal stud frame wall inside the building. This wall is to overcome the problem created by the presence of vertical steel posts around the inside of the exterior walls. Unless boxed these posts would present an unsightly appearance. Even when boxed they would result in the loss of usable wall space around the perimeter of the interior. The internal stud frame wall is to provide a flat interior surface as was originally intended. Even had I accepted Mr Perkins' proposal rather than Mr Lait's proposal I would not have been satisfied as to the cost of carrying out the rectification works. I do not accept Mr Foster's estimate for a number of reasons. Firstly, the estimate includes work on the footings which Mr Perkins had deleted from his proposal and which was not included in the work to which Mr Madders was referring. The quantity of steel is greatly overstated. The work is to a standard better than the minimum to bring the building up to acceptable performance standards. Provision is made to replace carpets and floor coverings, to remove both the external roof cladding and the ceiling rather than one or the other to

provide access to the roof cavity. These and other matters are dealt with in the cross examination of Mr Foster by Mr Perry of counsel. As a result of this cross examination I am persuaded that Mr Foster's estimate is unreliable as a guide to the cost of rectification.

[36] Adopting the approach to rectification I indicated above, I accept the estimate of TNA Builders rather than that of Mr Close. TNA Builders do not have any interest in the proceedings. If Mr Close's figure is increased by the additional \$3000 for contingencies suggested by Mr Lait and \$300 for GST and the cost of installing control joints and repairing cracks excluded, Mr Close's quote comes to \$32,584.87. If the TNA Builders figure is reduced by \$300 for the tie down rods and the cost of repairing cracks is deleted, the figure for TNA Builders comes down to \$38,247. The difference is not materially more than might be explicable by TNA Builders including the higher cost of out of hours work.

[37] I propose to average the quotes for installation of control joints and crack repair from TNA Builders, Mr Close and Mr Foster who priced it at \$11,250. This results in a sum of \$8,282. While the TNA Builders figure is a guess with no real basis except a general "feeling", it is not much different to Mr Foster's figure. Mr Foster's quote includes repainting the entire exterior of the building.

[38] Because I am unable to isolate the cost of the three steel reinforcing posts Mr Madders recommended, and Mr Lait accepted might be required in addition to the wind header, I propose to deal with it this way. In calculating damages a sum should be deducted from the cost of rectification to represent the saving made by Mr Geaney in not including the extra structural features in the original building. It is ten years since the building was constructed. Costs would have increased significantly in that time. It would not be proper simply to deduct the present cost of including those features from the cost of construction ten years ago when they would have been a fraction of the present cost and GST free. Instead, I propose to equate the benefit obtained by the plaintiff with the present cost of the three additional posts and make no

addition to the damages for those posts or deductions for the lower original cost.

[39] TNA builders has prepared its estimate on the basis that the plaintiff will continue to occupy the premises during rectification. They have included the additional cost of performing the work outside normal hours. Since I accept that this is the proper approach there are no additional relocation costs which the plaintiff will incur. Nonetheless, there is likely to be some disruption to the plaintiff's business during the work. Some allowance should be made for this. Since the figure chosen must necessarily be arbitrary I would include in the damages a sum of \$5,000 under this head.

[40] Mr Litherland, a valuer, was called by the plaintiff. Part of his evidence was directed towards identifying the diminution in value of the plaintiff's building by reason of the lack of rigidity in the slab. Mr Foster had estimated the ongoing cost of rectification of the cracking at \$2,000 per year. Since no party cross examined Mr Foster in relation to this figure I am prepared to accept it. As a capitalised expense Mr Litherland considered the value of the building would be reduced as a result by \$18,000. There was debate as to whether this diminution was a loss suffered by the plaintiff or the body corporate. If the latter was the case the damage suffered by the first plaintiff was submitted by counsel for the second defendant to be only \$9,000. This is half the overall diminution because the other unit holder in the Building Units Plan would have to pay for the other half of the ongoing repairs. Since the issue is the value of the building rather than the direct cost of repair I doubt that that is the case. The two units in the Building Units Plan are separate and unrelated buildings, representing different periods of time. I consider it unlikely that a potential purchaser of the older building would give any consideration to the condition of the newer building with which we are concerned. Likewise I do not consider that in determining the value of the newer building a potential purchaser would rely on a contribution from the owner of the older building. I consider the loss in value, as opposed to the cost of repair, would be wholly borne by the first plaintiff. In any event, the issue is academic. On 24th March, 2003 leave was given to join as a second plaintiff The Proprietors 102

Denham Street, Building Units Plan Number 100002. This was by consent. It was done to avoid argument as to whether losses were suffered by the first plaintiff or the body corporate.

[41] Mr Litherland gave evidence of a stigma effect. In other words the building might be worth less because of the stigma of this litigation and the defects in construction. The building is now 10 years old. It is superior in appearance and more modern than most of the buildings in its locality. An allowance has been made to effect regular repair of any abnormal cracking. I am not persuaded that there is any additional “stigma” effect that should be taken into account.

[42] It remains to be considered which, if any, of the defendants is liable for what part of the plaintiff’s loss. I shall deal with the defendants in turn.

Close Constructions Pty Ltd

[43] The first defendant was the builder. The case against the first defendant was that the contract it entered into with the first plaintiff was to design and construct the building. The defects I have found to exist in the building are design defects. Additionally, in the case of the failure to install control joints this was on instructions from Mr Geaney. Mr Close submitted that the evidence did not establish that it was a design and construct contract. He referred to the plans which identified the work as being done for the first plaintiff. The first page of the written contract identifies the first plaintiff as the party responsible for the design of the footings and slab. Despite this I am satisfied on the evidence that Mr Close did in fact design the building. He obtained from Mr Cruice plans for the purpose of council approval only. He was aware that the plans he obtained were not in the detail that would be necessary for the purpose of construction. The additional detail necessary to construct the building was drawn by Mr Close himself. Mr Close had modified the overall design when Mr Cruice’s original plan had proved more expensive to build than Mr Geaney wanted to pay. Having undertaken the actual design of the detail I am satisfied that the contract was in fact a design

and construct contract, notwithstanding the form of contract signed. In relation to the extent of Mr Caswell's involvement in the construction or design, I generally prefer Mr Caswell's evidence. Apart from my impression of the witnesses and the accuracy of their respective recollections after the lapse of a decade, Mr Caswell's evidence is consistent with the work for which he billed the first defendant and Mr Close's evidence is not.

[44] In relation to the control joints, even though Mr Geaney instructed the first defendant not to install them that instruction was based on advice from Mr Close on behalf of the first defendant. I am satisfied that that advice was negligent in that Mr Close did not explain sufficiently the purpose of the control joints or the consequences of not including them. Mr Geaney was not given enough information to make an informed decision. In essence, I find that Mr Geaney said he wanted a particular look for the building. He was told that control joints would adversely affect this look. Mr Close informed him that in those circumstances control joints were not necessary. Such advice in my view was not sufficient to discharge the duty of care where Mr Close was aware that the first plaintiff was relying on his particular expertise as a registered builder and local Hebel agent.

[45] I am satisfied on the basis of the findings above that the building was not constructed with the skill care and competence of an ordinary builder undertaking a design and construct contract or in accordance with good building practice. I find that the contract entered into between the first plaintiff and the first defendant was subject to the implied conditions that the building would be constructed with the skill, care and competence of an ordinary builder and in accordance with good building practice.

[46] On the basis of both negligence and breach of contract I find the first defendant liable to the first plaintiff for each of the heads of damage to which I have referred.

Paul Cruice Architect Pty Ltd

- [47] The case against the second defendant must be based upon negligence in drawing plans or in failing to advise in relation to the defects in the design features of the building. There was no contract between the first plaintiff and the second defendant after Mr Close became involved. Hence the pleaded contractual claim cannot succeed.
- [48] Whether the second defendant could be liable for failure to include certain features in the plans he drew or supplied to Mr Close or for failing to advise of design omissions in the plans depends on the actual terms of the retainer between Mr Close or the first defendant and the second defendant. I am satisfied that the only retainer between the first and second defendants was for the production of plans sufficient to obtain council approval. In his own evidence Mr Cruice limited his retainer even further to one for the drawing of a plan to lodge with others for approval. This plan was WD-05. This retainer was inconsistent with what Mr Cruice in fact did, which was to supply three plans all of which were required for approval. I thus prefer Mr Close's evidence on the retainer. Mr Cruice produced to Mr Close three plans in response to and in alleged performance of the retainer. Council approval was obtained in reliance on those plans.
- [49] The mere fact that council approval was obtained on the basis of the plans provided does not, in my opinion, discharge the second defendant from any further liability. There is the additional obligation that the retainer be carried out with the skill and care of an ordinary competent architect.² It is readily foreseeable that a person in the position of the first plaintiff might suffer damage if the plans are incompetent and would, if followed, result in a defective building even though they succeed in achieving the express, but limited, purpose for which they are produced.
- [50] The failure to provide adequate lateral support for the walls and the omission of control joints can be dealt with most readily. Despite the evidence of Mr Macks that a competent architect should produce plans from which a builder

² See *Voli v Inglewood Shire Council* (1963) 110 CLR 74 at 84.

could complete the building, even where the retainer was limited as this one was, I am not persuaded that the failure to show adequate lateral support or control joints here is either negligent or in breach of the retainer. Mr Cruice was not retained to provide plans from which the building could be built. Mr Close when he received the plans was aware that they lacked sufficient architectural and engineering detail to allow the building to be built and that he would have to provide that detail himself. He thus did not rely on the plans provided by Mr Cruice when determining the extent of lateral support required. Neither did he rely on the plans when omitting the control joints. He had already received instructions from Mr Geaney that the control joints were to be omitted. Even if Mr Cruice had shown such joints in plan WD-05 Mr Close would have deleted them in accordance with his instructions. Mr Close was aware of their purpose and the need to include them. I am not persuaded that it is necessary to show either the lateral support or the control joints on a plan such as WD-05 nor to include them in plans lodged for council approval. Thus these features were not required in order to satisfy the retainer. There is no causal link between their omission from the plans and any loss suffered by the plaintiff.

- [51] I take a different view in relation to the footing and slab plan, sheet 1 of 93-012. This was a plan prepared by Mr Caswell rather than Mr Cruice. It was, however, provided to Mr Close in July 1993 with the other two plans in purported satisfaction of the limited retainer Mr Cruice had been given. It was a plan sufficiently detailed to enable the footings and slab to be constructed. It was not a plan which had been prepared for the building in relation to which the building approval was being sought. It had been prepared for the original proposal for a stud framed building. Mr Cruice knew that it had not been prepared for a masonry building. He did not revert to Mr Caswell as to its applicability to the new design. He merely produced it to Mr Close for the purpose of obtaining the approval. It seems to me to be obvious that the production of such a plan to Mr Close and the obtaining of building approval based on it would more than likely mean that the builder would in due course use it to construct the footings and slab. It is certainly foreseeable. The nature of the retainer limits the extent of the detail the architect is required to include

on the plans and the number of plans but it does not remove the requirement that plans and the detail included on them must reflect the ordinary level of skill and care expected of an architect. It was in my opinion negligent of Mr Cruice to include in the material given to Mr Close a plan which was not drawn for the particular project without satisfying himself that it was suitable for the purpose, or without warning Mr Close that he should not use it without first having it checked by an engineer to ascertain its suitability for the new design.

[52] It was, in my opinion foreseeable that Mr Close would construct the building using the footings and slab plan provided and that if it was unsuitable the plaintiff, as the party for whom the building was being constructed, could suffer damage. The fact that ultimately the footings would need to be inspected and approved is not in my opinion a matter which breaks the chain of causation. Having armed Mr Close with an inappropriate plan it is in my opinion not open to Mr Cruice to absolve himself by relying on the inappropriateness being detected at a later date by somebody else.

[53] Mr Perry for the second defendant submitted that there was no evidence which could support Mr Close's submission that he relied on having been given the plan by Mr Cruice as an indication that it was appropriate for the different type of building. While Mr Close did not say in direct terms that he relied on the fact of having been given the plan he did say that he built the slab in accordance with the "intent of what the plans indicated". Later Mr Close said:

"Because of the – the lack of – of detail and conflicting issues on the drawings, in particular the foundations and footings I elected to ensure that I had the engineer do the inspections because it was going to be a lot easier to have him understand what was being constructed than relying solely on council inspectors to do the inspections because they would then be questioning me why this is not exactly the same as what you're building and that was the layout of the engineering drawings in comparison to the architectural drawing."

What is clear from Mr Close's evidence is that he did not profess any engineering expertise. He recognised that the engineering plan he was given

by Mr Cruice was for the original design and did not correspond exactly with the new architectural design. He appears to have anticipated being questioned about the discrepancy if the footings were inspected by a council officer and thus chose to have the author of the plan, Mr Caswell, do the inspections. The clear inference is that Mr Close assumed the propriety of using the footing and slab plan numbered 93-012 because it was given to him for the purpose of getting building approval. I am thus satisfied that the evidence supports the conclusion that the use of the engineering plan by Mr Close was in reliance on its having been supplied to him by Mr Cruice. Although Mr Caswell did make some changes to the foundations and footings at the inspection stage, these were in the nature of extra stiffening to support some posts and strengthened rather than weakened the end product.

[54] While I am satisfied that the diminution in value of the finished building caused by the defect in the footings and foundations has been caused or contributed to by the negligence of the second defendant in the light of the submissions by Mr Perry it is necessary to consider whether the first plaintiff's pleadings are drawn sufficiently widely to cover negligence on the basis that I have found existed.

[55] The first plaintiff's second further amended Statement of Claim after pleading the design of the original proposal deals with the subsequent retainer of the second defendant in this way:

“15. The third defendant's design of the foundation slab for the building designed by the second defendant and which the second defendant incorporated into the [original] design did not comply with Australian Standard 2870.1 – 1988 and was deficient in that:-

15.1 the internal slab beams were 300 mm in depth instead of having a minimum depth of 400mm; and

15.2 the spacing of the internal slab beams are 6.8 m in the north-south direction ... and 8.8 m in the east-west direction ... instead of being 6 m centre to centre.

17. In or about June 1993 ... the plaintiff through its servant or agent the first defendant, orally retained the second defendant

for reward to redesign the building designed by the second defendant ...

- 18A Further, and by reason of the facts alleged in paragraphs 5 and 17 hereof, the second defendant owed to the plaintiff a duty to exercise the skill, care and competence of an ordinary architect engaged for the purpose for which it was engaged in paragraph 17 hereof.
21. In carrying out its retainer as alleged in paragraph 17 hereof and/or in breach of the duty of care alleged in paragraph 18A hereof, the second defendant did not re-design or cause to be re-designed the slab foundation on which the re-designed building was to be constructed.
25. The building as built by the first defendant to the second defendant's re-design as depicted in Working Drawing PCA-730 WD-05 July 1993, is defective in that:-
- ...
- 25.2 the foundation lacks rigidity to support the non-articulated external Hebel block walls
- 26 The defects alleged in paragraph 25 hereof were caused by the negligence of the second defendant in the following particulars:-
- 26.1 when it knew that the slab foundation would sit on Class H soil and when it knew or ought to have known that the third defendant's design of the slab foundation was deficient as alleged in paragraph 15 hereof, designed non-articulated external Hebel block walls to be supported by the slab foundation contrary to AS 2870.1 – 1988 and Section 5.14 of the Hebel Technical Handbook.
- 26.2 When it knew or ought to have known that the third defendant did or was likely to design the slab foundation so as to comply with AS2870.1 – 1988 or use that Australian Standard as a guide for its design of the slab foundation, failed to advise the plaintiff and/or the first defendant that AS2870.1 – 1988 had no prescribed footing system for non-articulated masonry constructions on a Class H building site.”

[56] Apart from taking issue with the use of the expression re-design used by the first plaintiff, the second defendant in its pleading dealt with the first plaintiff's case in this way. It pleaded in paragraph 18 the alternative retainer to produce limited architectural drawings and denied that it was part of that retainer to redesign or cause to be redesigned the slab foundation on which the building was to be constructed. In paragraph 23 the second defendant, in

response to paragraph 21 of the first plaintiff's pleading, went on to deny that redesign of the slab foundation was part of any duty of care, a plea repeated in paragraph 28 in response to paragraph 26 of the first plaintiff's pleading.

[57] In reply to the second defendant's paragraph 18 the first plaintiff said in paragraph 7(c):

“As to paragraph 18 of the amended defence the plaintiff says ... that regardless of the terms of the retainer between the first defendant and the second defendant (as to which the plaintiff does not know):-

(i) the second defendant owed to the plaintiff a duty to apply the skill, care and competence of an ordinary skilled architect carrying out a further design of a building previously designed by that architect but incorporating features not considered nor designed in the previous design;”

[58] In my opinion the pleadings are wide enough to encompass the negligence which I have found against the second defendant. Paragraph 15 of the second further amended statement of claim correctly identifies the defect I have found in the footings and slab plan 93-012 sheet 1 as applied to the building actually constructed. Although paragraph 17 of the second further amended statement of claim describes a retainer more extensive than that I found to exist paragraph 18 of the reply is broad enough to pick up a less extensive retainer. Paragraph 21 of the second further amended statement of claim covers the provision of the incorrect plan. While the retainer I have found may not have required the architect to redesign the foundations, the negligent act of providing a foundations plan in response to the retainer without either making any necessary adjustments to it or advising that it was drawn for another type of building and should not be used without reverting to an engineer is capable of falling within that which is pleaded.

[59] I therefore find the second defendant liable for the diminution in the value of the building occasioned by the lack of a suitably “stiff” slab.

Cyril Caswell

[60] In my opinion the liability of Mr Caswell depends on his certification of various parts of the works on the building. The footings and slab inspections are the easiest to deal with.

[61] Although Mr Caswell was not involved in the decision to use plans drawn by him for another type of building in the construction of the first plaintiff's building he became aware of this when he first inspected the footings. At that time he was asked to certify that the footings were in accordance with "the requirements of the relevant Australian Standards and good building practice." While there may be room for debate as to whether the pleaded Australian Standard is applicable, the footings and slab were on the evidence I have accepted not in accordance with good building practice. Mr Caswell by then knew it was his earlier design for a different style of building which had been built to and should have reconsidered the suitability of his design for the project he was certifying. His certification was thus, in my opinion, negligent. The result of this negligence is that the value of the building has been reduced in the way described by Mr Litherland.

[62] I accept Mr Caswell's evidence regarding what he observed on the frame inspection and the inability to then determine whether proper bracing would be provided to the finished building. I do not consider that a retainer to certify a particular stage of the construction carries with it any obligation to render gratuitous advice about later aspects of the construction. I am not persuaded on the evidence that Mr Caswell's frame certification was improper or negligent.

Notices of Indemnity

[63] The second defendant has claimed an indemnity from the first and third defendants against any liability it was found to have to the first plaintiff. The three defendants are each liable in negligence to the first plaintiff in relation to the damage suffered by reason of the inadequacies in the slab. As between the defendants I consider that the degree of liability of the second and third defendants exceeds that of the first defendant. This is on the basis that they

were experts on whose expertise the first defendant as a builder was entitled to rely. I consider that the first defendant should, however, accept some liability as between defendants. It knew that the plan had been prepared for an earlier design and should have been aware of relevant standards which differentiate between foundations for stud frame walled and masonry buildings. As between defendants I apportion liability as to 20% to the first defendant, 40% to the second defendant and 40% to the third defendant.

Orders

[64] In the result I make the following orders:

1. I give judgement for the first plaintiff against the first, second and third defendants in the sum of \$18,000.00.
2. I give judgement for the first plaintiff against the first defendant in the further sum of \$51,529.00.
3. I order the first defendant to indemnify the second defendant in respect of the judgement against the second defendant in the sum of \$3,600.00.
4. I order the third defendant to indemnify the second defendant in respect of the judgement against the second defendant in the sum of \$7,200.00.

[65] I will hear argument in relation to costs.