IN THE FIJI COURT OF APPEAL

Civil Jurisdiction

Civil Appeal No. 30 of 1983

Between:

SURUJ LAL s/o Rameshwar Maharaj	Appellant
and	
JOSEPH MICHAEL CHAND SUVA CITY COUNCIL & ATTORNEY-GENERAL	Respondents

Civil Appeal No. 33 of 1983

Between:

SUVA CITY COUNCIL	Appellant
and	
JOSEPH MICHAEL CHAND	Respondent

Mr. S.M. Koya for the 1st Appellant
Mr. V. Parmanandam for the 2nd Appellant
Mr. S. Shankar for the Respondent

Date of Hearing: 22nd March, 1983

Delivery of Judgment:

JUDGMENT OF THE COURT

Mishra, J.A.

The first appellant is in construction business and has built several houses in Suva area for sale or letting. The second appellant is the local authority controlling construction in this area under an Act of Parliament. They appeal from a decision of the Supreme Court, Suva holding them liable for damage suffered by

the respondent when his house, purchased from the first appellant, partially collapsed after a period of heavy rain. The two appeals were heard together.

The first appellant acquired a block of land in a large new sub-division at Tamavua from Hookers Ltd. It was situated on a slope, part of it being natural ground, and part fill from earth deposited by road-builders. Plans for the house submitted by him and approved by the City Council specified that all columns supporting the house be embedded 12" into solid soapstone. Part of the house was to be single-storeyed and the rest would have two storeys. The land on which the single-storeyed part was to stand presented no problem but on the other portion the first appellant (hereinafter called "the builder") dug several feet without striking soap-stone. Columns were then allowed to rest on natural ground above pads with the approval of a building inspector employed by the Council.

The house was completed in 1978 and a completion certificate was granted by the Council. A prospective buyer came to live in it as a tenant. Early in 1979 cracks appeared in the walls and he left without going through with the deal. The builder consulted an engineer but did not tell him about the piles not being on solid soapstone. The engineer advised him that the cracks were the result of normal settling down of the structure and the cracks, on his advice, were patched up and painted over. The builder then placed the house on the market.

He learnt from an advertisement in the local paper that the respondent (hereinafter called the "buyer") was looking for a house and contacted him. The latter inspected the house and, at the builder's suggestion, also saw the engineer who had reported on it. After negotiations (about which later) he purchased it in September 1979 for $45,000 and moved in.

On 3rd April, 1980 after a period of heavy rain the two-storeyed portion of the house sank down and away from the rest of the structure leaving a large gap in the wall. That part of the house was found to be beyond repair.

The buyer sued the builder and the Council for the damage caused to him. At the trial the only issue before the judge was that of liability, the quantum of damage being, by agreement, left for later consideration.

BUILDER'S LIABILITY

There was direct privity between the builder and the purchaser and no authority need be recited as to the clear duty owed both in contract and in tort.

Builder's Counsel argued the appeal under four distinct heads. He submitted that the learned Judge erred in -

(i) finding the allegation of fraud proved against his client;

(ii) holding that the cause of the damage was failure to base the columns on solid soapstone;

(iii) not holding that the clause in the sale agreement concerning builder's responsibility for defects occurring within 90 days excluded his liability for damage and

(iv) not holding that liability, if any was that of the Council alone whose inspector had approved the placing of columns in natural ground.

(i) We see nothing in the first allegation. The respondent had no doubt stated in his pleadings, as well as in evidence, that the builder's son had assured him that the foundations were solid but he had also alleged that the builder himself, before the sale agreement was signed, told him that the house was of sound construction. The son was found by the judge not to have been acting as the builder's agent; but that, by itself, could not prevent the Judges from properly drawing the inference that the builder himself was also guilty of deliberate misrepresentation. He, in our view, was quite justified in rejecting the builder's denials, particularly in view of certain vital parts of his evidence which were found to be demonstrably false.

(ii) As for the main cause of the structural failure there was a great deal of expert evidence from engineers and, as generally happens with such evidence, not altogether without conflict. Mr. Power who had seen the house before, and at the time of, the sale, had given the opinion that the earlier cracks were due to normal settlement of the structure and would probably cease. He was not in a position to examine the foundations or the nature of the ground around them.

Golder Associates, geotechnical and mining engineers, relied on probes and test pits dug around the foundations. In their opinion the footings were in "clayey silt/silty clay with soapstone fragments" and they could not say if this was fill or residual soil.

Another engineer Mr. Williams was of the opinion that it could not categorically be stated that failure of the structure was caused by a landslide.

Mr. Hill had actually dug up the foundations and inspected them closely. He is a civil engineer, with considerable experience of construction business in Fiji.

He expressed his opinion with considerable emphasis -

> "Cause of failure was obvious - foundations not in solid soapstone. Clay had become saturated and bearing capacity of clay was substantially reduced. Had columns been embedded in soapstone I would not have expected building to fall. "

As for the need for amendment to the plan in view of the discovered deficiency of the ground he said -

> "If first defendant had come to have plan amended because he could not find soapstone, it would have necessitated change of design. "

Mr. Parmar, a city council engineer, said all columns, in the absence of soil investigation, must be set 12" into solid soapstone, but added that permission might be given for columns to rest in "good natural soil" if soapstone could not be found at a reasonable depth. He denied that he had amended the plans to permit this as alleged by the builder. He was not even in Fiji during that period. He would however, have allowed the amendment sought by the builder if he had come to him. He admitted that he had not investigated the soil of that block at any time during construction and was, for his calculations, relying on the report by Golder Associates.

The learned Judge did not regard Mr. Parmar an entirely independent witness.

There was considerable expert evidence, not seriously challenged, that there had been some soil-movement due to heavy rain. The learned Judge, however, accepted Mr. Hill's evidence that the failure of the structure was due to the fact that the foundations had been allowed to rest in the soil that moved, instead of

in soapstone which would not have moved.

He said -

> " I accept the evidence of Messrs Hill and Williams that the basic cause of the damage to the building was the failure by the builder to found the foundations 12" into soapstone resulting in the columns having inadequate support when the ground under it moved slightly towards Salato Road causing at least two columns to drop and move laterally. "

We are satisfied that, on the evidence, this was a correct inference.

(iii) The clause referred to by the buyer's counsel read :

> "(a) The Vendor will forthwith at his own cost and expense make good any defects shrinkages or other faults which may within a period of ninety days from settlement date appear in the building erected on the said Lot 16.
>
> (b) In the event of any defects, shrinkages or other faults appearing in the said building within a period of ninety days from settlement date and such defects, shrinkages or other defects are in the opinion of Cedric Power of Suva Civil Engineer attributable to settlement the Vendor will forthwith after written notice from the said Cedric Power carry out, at the Vendor's cost and expense, all remedial work specified by the said Cedric Power under the direction and to the satisfaction of the said Cedric Power. Cedric Power's fees are to be paid by Purchaser. "

The clause was the result of Mr. Power's inspection and his opinion that the process of normal settlement would cease within 90 days.

"It would not extend in my views," said the judge "to cover damage caused by a deliberate failure by the builder to follow the plans which created a serious defect the existence of which might not be discovered for very many years after the sale. "

We agree with that view. The clause was inserted in favour of the purchaser and cannot operate as an exclusion clause for the protection of the builder in case of serious latent defects caused by his negligent acts.

(iv) The builder's last submission was that his action amounted to no more than mere compliance with the building inspector's instructions and the negligence, if any, was therefore, the Council's not his. That, however, is not what the evidence indicates nor is it a fact found by the learned Judge. The builder claimed that the plan had, on his application, been properly amended by Mr. Parmar, an assertion which the learned Judge held to be a deliberate lie. We agree with his general inference that the builder himself decided to ignore specifications as to foundations so as to minimise costs and found an ally in a building inspector not too scrupulous in the performance of his duty. In such circumstances the builder cannot avoid responsibility for damage caused to the buyer by failure of the structure.

The appeal of the first appellant is dismissed with costs to the respondent.

COUNCIL'S LIABILITY

Learned Counsel for the appellant Council also grouped several of his 9 grounds together for submissions. Ground 9 which alleged that Malele, the building inspector, was acting outside the scope of his authority was withdrawn.

Under grounds 1 and 2 Counsel submits that the learned Judge erred in holding the building inspector negligent in failing to ensure that the foundations were in accordance with the specifications and also in failing to require the builder to break up the concrete covering to facilitate inspection of the foundations instead of accepting the builder's word. The learned Judge, says Counsel, ignored the discretion enjoyed by the Council in matters of inspection. He cites Anns v. Merton London Borough (1977 2 W.L.R. 1024) where at p.1035 Lord Wilberforce said :

> "The standard of care must be related to the duty to be performed - namely to ensure compliance with the byelaws. It must be related to the fact that the person responsible for construction in accordance with the byelaws is the builder, and that the inspector's function is supervisory. It must be related to the fact that once the inspector has passed the foundations they will be covered up, with no subsequent opportunity for inspection. But this duty, heavily operational though it may be, is still a duty arising under the statute. There may be a discretionary element in its exercise - discretionary as to the time and manner of inspection, and the techniques to be used. A plaintiff complaining of negligence must prove, the burden being on him, that action taken was not within the limits of a discretion bona fide exercised, before he can begin to rely upon a common law duty of care. But if he can do this, he should, in principle, be able to sue. "

The passage has little application to the circumstances of this case. The learned Judge here found Malele an untruthful witness whose evidence relating to the alleged alteration to the plan, be rejected entirely. It is difficult to see how any question on his part of any discretion being exercised in good faith could arise. There was no amendment to the plan in possession of the Council and the builder's assertion that Mr. Parmar had approved alterations to the plan was palpably false. The learned Judge, from this, inferred, as he was entitled to, that the inspector had deliberately closed his eyes to a serious default on the part of the builder.

The submission, therefore, fails.

The Council also complains of insufficient consideration given to the evidence of its engineer Mr. Kangatheran. We have already dealt with the learned Judge's treatment of expert evidence and can add little to what has already been said. Mr. Kangatheran had had little to do with the inspection of the site or supervision of the construction and the learned Judge found himself unable to derive much assistance from his evidence. We see no merit in the submission.

In grounds 4 and 5 the Council submits that the learned Judge, having held the builder to be in breach of regulation 16 of the Towns (Building) Regulations which forbids deviations from the approved specifications erred in finding that the Council also was liable for the damage. We find nothing in this submission. The Council's liability arises not so much from the action of the builder as from that of its own building inspector. No steps were taken by him to check if the plans had in fact been amended, nor did he insist on personal inspection of foundations before concrete was poured over them. He would appear to have assisted the builder in his default.

Grounds 6, 7 and 8 urge that the Council should not have been held liable where a builder suffers detriment as a result of his own unlawful facts - (Governors of Peabody Foundation v. Sir Lindsay Parkinson 1983 3 All E.R. 417). This, of course, might be true if the builder himself had suffered damage and was suing the Council. The damage here has been caused to a purchaser. It is now settled law that where a local authority is negligent in exercising control over construction which the law vests in it, it is liable to future owners if they suffer injury or damage as a result. (See Dutton v. Bognor Regis U.D.C. (1972) 1 Q.B. 373; Johnson v. Mount Albert Borough (1977) 2 N.Z.L.R. 530; Anns v. Merton London Borough Council (1978) A.C. 728.)

The appeal of the second appellant is also dismissed with costs to the respondent.

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Judge of Appeal

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