IN THE COURT OF APPEAL
OF SOLOMON ISLANDS

Civil Appeal No. 13 of 1999

BETWEEN: **J F CONSTRUCTION & SINPF BOARD** **Appellants**

AND: **ANTHONY WALE & ROSE WALE** **Respondents**

CORAM: Lord Slynn P., Ward JA., Los JA

HEARING: Thursday 8th February 2001
JUDGMENT: Thursday 25th October 2001 Reginla

JUDGMENT OF THE COURT

By a contract dated 30th January 1997, Jackson Fiulaua trading as J F Construction ("JF") agreed to build for Mrs and Mrs Wale ("the plaintiffs") a house for $175,000. To pay for this the plaintiffs borrowed money from Solomon Islands National Provident Fund Board ("the Board") who had recommended JF as builders. The contract between JF and the plaintiffs were subject to the General Conditions of Contract set out in the Schedule to the Contract. By clause 2 of the Conditions the contractor undertook *"upon and subject to these conditions [to] carry out and complete the works shown upon or described in the Contract documents and in these Conditions in every respect to the reasonable satisfaction of the Employer".*

By clause 1 of the Conditions it was provided that *"unless the context otherwise requires the expression "agent" in relation to the Employer, means the person holding or acting in the position of building inspector with the Solomon Islands National Provident Fund."* By clause 13 of the Conditions it was provided under the heading:

"PRACTICAL COMPLETION:

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

During the construction progress claims were made and progress certificates issued. On the 20th June 1997 the Honiara Town Council issued a Certificate that the building was fit for occupation and on 22nd June 1997 the plaintiffs were given the key to their home. They found, however, that there were many defects in the building which they set out in their letter dated 8th July 1997. Some of them were substantial. JF indicated in its letter of 10th September 1997 what it estimated was the cost of remedying the defects namely $4,567.60. The plaintiffs were not going to accept that JF carry out these works when they proposed to do so, in September, partly because of delay but also because the plaintiffs were not satisfied that the work could be done satisfactorily for the sort of cost JF had it in mind. They obtained a further estimate of the cost of putting right the defects which amounted in total to $47,385.45. They have not had the work done in this second estimate because it seems that they did not have the money to do so. The retention money was released to JF on 20th February 1998 and on 23rd March 1998 the plaintiffs issued a writ claiming damages against JF for failing to

construct the building in accordance with the contract and to the reasonable satisfaction of the plaintiffs. They pleaded that they had given notice to the defendants under clause 14 of the Contract requiring the defects to be remedied within a reasonable time but that they were not satisfied that JF would or could carry out work to the plaintiffs' satisfaction.

The plaintiffs also claimed damages from the Board on the basis that the Board's building inspector had failed in his duty carefully to inspect the building and to see that the building had been constructed in accordance with the contract before authorising the release of progress payments. The Board by its agent thus failed in its duty to inspect the building before releasing progress payments.

Clause 14 of the Conditions to which we have referred and which has been at the centre of much of the argument, provides as follows:

"14. <u>MAINTENACE PERIOD AND DEFECT LIABILITY</u>

(1) Any defect, shrinkage or other faults which appears within the maintenance period and which is due to materials or workmanship not in accordance with this contract shall be specified by or behalf of the employer in a schedule of defects and the Employer shall deliver or caused to be delivered the said schedule to the contractor not later than fourteen days after the expiration of the said maintenance period.

(2) The Contractor shall within a reasonable time after receipt of the schedule of defects make good at his own expense the defects, shrinkages and other faults specified in the said schedule.

(3) Where the Contractor fails to make good the defects, shrinkages and other faults as required under sub-clause (2) the employer may employ and pay other persons to make good the defects, shrinkages and other faults and all costs incurred in connection with such Employment shall be recoverable from the

> contractor by the Employer as a debt and may deducted by or on behalf of the employer from any monies due to the Contractor under this Contract."

The learned Chief Justice, held that JF was in breach of contract and further held that the Board had failed its duty of care to the plaintiffs. He gave judgment against the defendants for $37,385.45 with interest. That sum is taken from the estimate of $47,385.00, which has been mentioned, less $10,000 included in the estimate as *"compensation"* but he ordered that the total damages be apportioned - 60% to be paid by JF 40% by the Board.

Both defendants have appealed. On the appeal JF contended that the Chief Justice had misconstrued clause 14 of the Condition when he said:

> "Having said that, it is important to note what the provisions of clause 14 requires. In sub-clause (1) it is the first requirement for rectification of defects that the defects be specified in a schedule of defects by the employer or someone on his behalf. The employer must deliver that schedule to the contractor not less than 14 days after the expiration of the maintenance period. In other words, the Schedule of defects to be delivered to the contractor under clause 14 (1) must also be delivered at the end of the liability period and it must be so delivered within 14 days after the liability period ends. After receiving the schedule of defects under sub-clause (1), the contractor is required under sub-clause (2) to rectify the defects at his own expenses within a reasonable time. Sub-clause (3) then provides that if the contractor fails to rectify the defects, shrinkages and other faults as required by sub-clause (2) then the employer can employ some other persons to make good the defects, shrinkages and faults and the costs occasioned in doing so, shall be recoverable from the Contractor as a debt.
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> Thus upon reading the whole of clause 14, the obligation to rectify defects, shrinkages or other faults appearing in a schedule only arises at the end of the "maintenance period" or "defects liability period". In other words, the power to require the contractor to make good any defect, shrinkage or other faults due to materials or workmanship which is not in accordance with the contract can only be exercised at the end of the defects liability period and only in respect of scheduled defects.
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> As I have already pointed out earlier in this judgment, the obligation to rectify defects under clause 14 of the contract only arises following the schedule of the defects being delivered to the contractor not later than 14 days after the expiration of the said maintenance period. It is after the receipt of that schedule of defects that the

contractor shall within reasonable time make good the defects specified in the schedule. Thus clause 14 provides obligation to make good defects which are contained in a defects which are contained in a schedule of the defects at the end of the maintenance period which period was said to have ended on 20 December 1997. That is not the position here. The plaintiffs here did not wait for the maintenance period to lapse before complaining about the defects. Strictly Clause 14 would not assist the defendants here."

The Chief Justice thus transposed *"not later than 14 days after the expiration of the said maintenance period"* into *"not less than 14 days after the expiration of the said maintenance period."* It is, however, to be noticed in the same paragraph and in other places he uses the word *"later"* rather than *"less"*. It was obviously a slip of the pen but Mr Nori says that it has affected the result since the Chief Justice took the view that no claim could be made under clause 14 and there was no power to require the defects to be remedied until after the maintenance period was at an end and maintenance period is defined in the Contract as *"the period of 26 weeks commencing on the date of practical completion."*

The result says Mr Nori is that the plaintiffs have to wait until the end of that time before they can prepare the schedule of defects.

It is quite plain that the schedule of defects must be produced *"not later than 14 days after the expiration of the maintenance period"* and accordingly it seems to the Court that Mr Nori is right in his contention that clause 14 was available to the plaintiffs in respect of any defect *"which appears within the maintenance period"* so long as the schedule of defects was delivered to the contractor within 14 days of the end of that period.

But Mr Nori goes on to say that the plaintiffs did not comply with the clause since they refused to allow JF to make good at his own expense the defects specified under clause 14 (2). Nor did the plaintiffs employ another person to do the works and then sue for the costs of doing so as a debt under clause 14 (3) of the Conditions. It seems to the Court the plaintiffs cannot be said to have behaved unreasonably in not accepting JF's description of the work to be done and the cost of doing it even allowing for the fact that JF's assessment of value took account of certain materials already available to him.

But whether they did or not does not conclude the issue. 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. The question was therefore whether

there was a breach of obligation by JF and what is the appropriate quantum of damages. There is no appeal against the findings that JF was in breach of contract or against the actual quantum of damages assessed by the Chief Justice. Although the difference between the two estimates are striking the Court accepts the Chief Justice's findings both as to JF's breach of contract and as to the quantum of damages.

The Chief Justice found that Board has failed in its duty of care. He said:

> **"In my judgment the building inspector had failed in his duty as agent of the plaintiffs to ensure proper inspection and monitoring of the first defendant's work on the plaintiffs' house. He had failed in a number of respects namely, to issue a Certificate of practical completion under clause 13. The Certificate of Occupation issued by Honiara Town Council was not what clause 13 stipulates the Employer's agent should so. It may well be that the Honiara Town Council should issue a Certificate of Occupation to occupy the house but the Certificate to show that the work had practically been completed must be issued by the Employer's agent or architect. That had not been done here.**
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> **Further, the Employer's agent knew of the existence of the defects. Before a retention money could be released there must be a certification to show that those defects had been remedied. Without such a certification, no retention money should be released to the contractor because the defects were still existing and while those defects remained not rectified the contractor is not entitled to the retention money. Even if there were no defects at the end of the maintenance period, the building inspector or the architect must be issued a Certificate to that effect. It is upon receipt of such certificate that the contractor is entitled to claim the retention money. These had not been done in this case."**

Mr Rose on behalf of the Board supported Mr Nori's submissions as to the proper interpretation and application of clause 14 of the Conditions. He challenges the findings of negligence on the part of the inspector and says that the inspector was not obliged to give detailed attention to the construction works. For the purposes of clause 13 of the Conditions, it was sufficient that the Town Council issued a certificate of fitness for occupation and that justified the release of the retention monies without a

certificate of practical completion from the building inspector. In any event the real cause of the plaintiffs' loss was the breach of contract by JF and the Board should be held liable.

On this aspect of the case despite Mr Rose's firm submissions the Court accepts both the findings of fact and the conclusion of the Chief Justice. The building inspector did owe a duty of care; in this case he broke it and the damage flowed from that breach.

The final issue on the appeal relates to the Chief Justice's decision to apportion damages between the two parties. The Chief Justice's primary finding was that both defendants were liable for the damage suffered by the plaintiffs but he went on to say a fairness required and apportionment between the defendants.

The appellants have both argued that the Chief Justice was not entitled to apportion since no submissions were made about apportionment and he did not invite submissions about it.

It was, however, obviously possible that if the Chief Justice found both defendants liable he might consider that the apportionment was appropriate and the defendants could have made submissions about it. The Court does not accept that the Chief Justice's decision to apportion is vitiated because he did not invite submissions even if it could be said to be better if Judges are minded to apportion to invite submissions as to the appropriate percentages to be adopted.

The Court therefore accepts the apportionment made by the Chief Justice. If the apportionment were set aside one possible solution would be to allow the primary finding of liability on the part of both defendants to stand in respect of the full amount. The plaintiffs do not ask for that by cross-appeal so it is hardly in the interest of the defendants for the Court to substitute that order on the basis that each was in breach of duty and that damages flowed from that breach. The apportionment therefore stands and the argument on the part of both defendants is rejected.

The appeal must accordingly be dismissed. The respondents are entitled to their costs against both appellants though obviously they can only be enforced once.

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President, Court of Appeal

Registrar
for

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Judge of Appeal

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Judge of Appeal