IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. B 275 OF 1983

BETWEEN	BLOOMING THINGS LIMITED	PLAINTIFF
A N D	CARIBBEAN BORING AND DIAMOND DRILLING LIMITED	DEFENDANT

Dr. Lloyd Barnett and with him A. Morgan for the Plaintiff.

D. Scharschmidt and with him D. Batts for the Defendant.

HEARD: November 16, 17, 18, 1987; May 17, 18, 1988; December 4, 5, 8, 1988 and July 26, 1989.

SMITH, J:

By Writ of Summons dated 11th July 1983, the plaintiff claims damages for breach of contract, mis-representation and negligent mis-statement.

OUTLINE OF PLAINTIFF'S CASE:

The plaintiff company owned and operated a farm at Knollis in St. Catherine, there the production of anthurium blooms was started on a small scale. It was really a test of the capacity of the location to produce the quality required by the export market. The result was positive and so the decision was taken to have feasibility studies done and finances were sought for large scale production of anthurium blooms. According to Mrs. Beverley Morgan, a Director of the plaintiff's company and the wife of Dr. Brian Morgan another Director, "the major criterion for going forward with the project was the availability of a large volume of water which was consistent and of good quality." The Jamaica National Investment Corporation (J.N.I.C.) was involved. The defendant company was approached after Mrs. Morgan had had discussion with one Mr. Hardware of the Under Water Authority (U.W.A.) and subsequently a licence was obtained from the U.W.A. to drill a well.

On the 23rd September, 1982, the defendant company submitted a quotation, this was addressed to J.N.I.C. and attentioned Mr. Thorant Hardware. On the request of the defendant company, through Mr. Orlando C. Strudwick, $7000 was paid by Dr. Brian Morgan to the defendant "to supply and deliver 120 ft. of 10" diameter well casing ....." see letter dated 29th October, 1982, and copy cheque. A further sum of $900 was paid to the defendant by Dr. Morgan as an advance "to set up, prepare drilling area, watchman services, stand by time and drill well" - see letter dated 9th November, 1982, and copy cheque. On the 3rd December, 1982, the plaintiff company received a completion report from the defendant company. This report is of great importance to this case and is reproduced below.

" Caribbean Boring and Diamond Drilling Limited,
Hillview Avenue,
Kingston 10, Jamaica.

December 3, 1982.

Well Report - Knollis -
Blooming Things Limited

Introduction:

Blooming Things Limited was granted a licence to drill a well at Knollis, St. Catherine.

Permission was also granted for the abstraction of 120,000 gallons per day.

Caribbean Boring and Diamond Drilling Limited of 1 Hillview Avenue, Kingston 10 was contracted to carry out construction and testing of the well.

Construction Details

Details of construction are set out below.

Depth of Well	-	160 feet
Hole Size	-	17 inches to 120 feet
		8 " " 160 "

Casing

Diameter	Type	From	To	Total
11"	Plain	+1.5 feet	20 feet	21.5 feet
11"	Perforated	20 feet	110 feet	90 feet
11"	Plain	110 feet	120 feet	10 feet
Open Hole	-	120 feet	160 feet	40 feet

Slot Size in casing - 1/8"
Aquifer Tapped - Limestone
Static water level - 38.25 B.G.L.

The well was gravel packed between 120 and 10 feet below ground level with 3/4" washed river gravel to act as formation stablizer.

Top 10 feet of well was cement grouted to prevent contamination.

Development

The well was developed by air using a compressor with blowing capacity of 150-160 p.s.i. with a setting at 110 feet below ground level. The well was surged and then pumped. Prior to this bailing was carried out to remove cuttings from the well.

Testing

The well was tested twice. The first test was carried out with well depth of 120 feet. The test results are summarized below.

Discharge U.S. g.p.m.	Water Level ft.	Drawdown ft	Spec. Capacity US. g.p.m./ft.
0	38.25	Nil	Nil
246	78.25	40	6.15

The improvement in the specific capacity over the test was threefold.

The present well completed to a depth of 160 feet is capable of supplying the Clients' requirements.

Recovery to static level took seven (7) minutes.

Summary

If the Client desires to pump at 250 g.p.m. the drawdown will be approximately 41 feet and the pumping level close to 80 feet below ground level.

CARIBBEAN BORING & DIAMOND DRILLING LTD.,

.....
Orlando C. Strudwick, Director.

OCS/meh"

Based on the reported results of the well yields, the plaintiff claims that they purchased a deep well pump and "undertook a series of actions and commitments."

After the installation of the pump, the designer - a foreigner - attempted to test the system and the well was found to have a yield far below that reported by the defendant. According to Mrs. Morgan "no water was delivered at the exit point of the irrigation system." The depth of the well in fact, was measured at 122 ft. with a yield of less than 1 US. g.p.m./ft.

The defendant company was informed of the problem. On the 12th March, 1983, a meeting was convened at defendant company's office. Among those at the meeting were Mr. Lechler, Mr. Strudwick, Mrs. Morgan, Dr. N. Brown and Mr. Hardware. It was agreed that the defendant company would do what was necessary to ensure that the well would consistently supply the volume of water specified in its report and that the irrigation system be reinstalled and properly functioning by the 29th March, 1983.

The plaintiff and the defendant company entered an agreement dated 7th April, 1983, by which the defendant undertook to core through the bottom of the existing well to a depth of 160 ft. in order to establish whether or not the well had been drilled to the depth of 160 ft. The plaintiff retained Mr. Michael White of Hydrology consultants Limited to act on their behalf and in particular to establish the status of the well.

After the coring exercise Mr. White was of the opinion that the cores obtained 130 to 150 ft. by drilling through the bottom of the Knollis well were of undisturbed limestone formation. He therefore concluded that the maximum drilled depth of the said well was 130 ft. below ground level.

On the 5th May, 1983, the plaintiff's attorney wrote their counter-part demanding that the defendant complete the "drilling, bailing, development and testing of the well" commencing on or before the 10th May, 1983.

This was not done and the plaintiff on the advice of their technical consultant, Mr. White, engaged the services of Hood Daniel to deepen and test the well. The latter deepened the well from 130 ft. to 250 ft., carried out certain procedure and handed over the well in July. A pump was installed and the irrigation system became functional. It is important to note that a detailed litho-logic log of the formation penetrated 130 to 250 ft. indicates that alternate hard and soft bands of white limestone formation were encountered in the deepened section of the well.

OUTLINE OF THE DEFENCE

The defendant company is engaged in the business of constructing wells inter alia. In or about October, 1982, Mr. Hardware, an engineer at the National Water Commission, a Consultant to and at the material time a servant or agent of the plaintiff approached Mr. Orlando Strudwick a director of the defendant company. Mr. Strudwick was requested to accompany him (Mr. Hardware) to a site where Dr. Morgan wanted a well drilled.

The defendant contends that Mr. Hardware, Dr. Brian and Mr. Strudwick went to the site at Shelton in St. Catherine - this site was pointed out by Mr. Hardware. Subsequently the site was changed. Mr. Strudwick acting on behalf of the defendant company prepared and forwarded an estimate to Mr. Hardware. The defendant claims that Mr. Hardware was the consultant on the job - he gave oral instructions as to the depth that should be drilled, as to the depth that should be cased, as to what test should be done and when to be done. On the oral instructions of Mr. Hardware they drilled the hole to a depth of 167 ft. According to the defendant, having carried out Mr. Hardware's instructions faithfully, they reported the results to Mr. Hardware. They claimed that the well might have collapsed as it was only cased to a depth of 120 ft.

Mr. Strudwick testified that he understood the plaintiff's requirement to be 250 gallons per minute. When he conducted test at 160 ft. the result was 246 gallons per minute. He claims that at the outset he did not appreciate what the nature of Dr. Morgan's business was. Only on completion of the well did Mr. Hardware tell him that Dr. Morgan was going to plant flowers. He did not know that there would be horticultural development on the property and that the well was drilled for that purpose. I will return to this later.

As regards the licence Mr. Strudwich said that a licence from the U.W.A. is required to drill a well. He said he never saw any licence in respect of the well drilled. Presumably this is to support his claim that he was acting under the instructions of Mr. Hardware who was at the time secretary to the Underground Water Authority. It should be noted here that in his report of December 3, mention is made of the licence.

He agreed that there were attempts to resolve the difficulties and that these ended in the agreement already referred to. However he contends that the result of the coring exercise was inconclusive.

THE ISSUES

There is no dispute that the defendant in his report of the 3rd December, 1982, (supra) stated that "the present well when completed to a depth of 160 feet is capable of supplying the client's requirement." The plaintiff company's claim that they acted on the statement and suffered damages as a consequence was not seriously challenged. Indeed Mrs. Beverley Morgan's evidence, that "as a result of receiving this report which indicated that the requirement had been met we undertook a series of actions and commitments" went virtually untraversed, evidentially, inspite of paragraph 19 of the Defence.

In my view the resolution of this matter necessitates the consideration of the following questions:

1. Does the statement, the report, constitute a misrepresentation or a negligent misstatement? If the answer is in the affirmative then we should proceed to ask:
2. As between the plaintiff company and the defendant company was there a sufficient relationship of proximity, such that, in the reasonable contemplation of the defendant negligence on their part was likely to cause damage to the plaintiff? Cynat Products Limited v. Landbuild (Inv. & Property) Limited and others (1984) 3 All E.R. 513. If yes, then:
3. Are there any considerations which ought to negative or reduce or limit the scope of the duty or the damages to which a breach of it may give rise? See speech of Lord Wilberforce in Anns v. Merton London Borough (1977) 2 All E.R. 492 at 498.

I say this because the misrepresentation and negligent misstatement are alleged to have been made after the contract was entered into. It is not a contractual representation that is averred. It seems to me that the conduct of the plaintiff's case would indicate that the contract was used as the framework or the background to the action in tort.

The plaintiff contends that the misrepresentation by the defendant that they had achieved the required volume of water etc. would not only give rise to an action for a breach of the defendant's contractual obligation but also to an action in tort (see paragraphs 9 - 11 of statement of claim). If the defendant entered into such a contract they would in my view, be under a duty to take reasonable steps to ensure the accuracy of the report.

It is therefore against this contractual background that we must consider the defendant's tortious liability.

I will now attempt to consider the matters referred to above.

1. Does the report constitute a misrepresentation or negligent misstatement?

The plaintiff in its Statement of Claim paragraph 7 averred that the defendant represented in the report of the 3rd December, 1982:-

(a) That the well was completed to a depth of 160 feet below the original ground level;

(b) That the well as completed was capable of supplying the plaintiff's requirements;

(c) That test results of the well were a discharge of 246 US g.p.m., water level 78.25 ft, drawdown 40 feet. Specific capacity 6.15 US g.p.m/feet;

(d) That if the plaintiff desired to pump at 250 g.p.m. the drawdown would be approximately 41 feet and the pumping level close to 80 feet below sea level.

The defendant in paragraph 15 of its defence admits paragraph 7 of the Statement of Claim.

In paragraph 12 of the Statement of Claim the plaintiff contends that the "representations were and each of them was false, untrue or inaccurate and misleading."

The defendant in paragraph 16 claims that paragraph 7 of the Statement of Claim "was merely indicating to the plaintiff that the well as completed conformed with instructions given to it and was capable of supplying the plaintiff's requirements."

It is important to note that the said report has no such qualification. But let us look at the evidence in this regard.

DEPTH OF WELL

The defendant company accepted that in March 1983, the well was not open to 160 feet (150 below ground level). However they contend that the bottom 40 feet of the well had been filled in by drill cuttings and noncalcareous river gravel. When the problem arose concerning the depth of the well, the parties entered an agreement to resolve this dispute. The gist of the agreement which was signed on the 7th April, 1983, was that the defendant company would run a core through the bottom of the existing well to a depth of 160 feet in order to establish whether or not the well had been drilled to a depth of 160 feet. If this well had not been drilled to that depth then the defendant would deepen the well to that depth at its own expense and would also bear the expense of running the core. If the test was positive then the plaintiff would meet the claim of the defendant and the expenses of the coring exercise.

The plaintiff company employed Mr. White, the hydrogeologist to provide technical and professional advice. He was acceptable to both parties. At the end of the coring exercise the defendant claimed that the result was inconclusive. The plaintiff rejected this. On the one hand Mr. Lechler, Managing Director of the defendant company and a Civil Engineer, said he was not satisfied with the exercise. He testified that he saw the cores for a few minutes only and that later when he requested them Mr. White could not produce them. Mr. John Williams, a geologist, gave evidence for the defendant. He did not analyse the limestone cores and in this regard I find his evidence unhelpful.

On the other hand Mr. White was clearly of the view that the well was not drilled to 160 feet. He was present during most of the coring exercise and he analysed the limestone cores which were obtained at 130 - 150 feet. There is no reason to doubt Mr. White's integrity and reliability.

He took the cores to Mr. Lechler, he invited the U.W.A. to inspect them, before taking them to his home where in his absence they were disposed of without his knowledge.

I accept Mr. White's interpretation of the core results as set out below:

"3.3. Interpretation of Core Results

3.3.1 Depth 110 to 130 feet.

(a) The unconsolidated nature of the material encountered in the well - 110 to 130 feet indicates a drilled depth of 130 feet (formerly 140 feet).

(b) Given a maximum flow of 242 US g.p.m. into the well during construction and maximum well discharge during development and testing, velocities of the order of 0.05 ft/sec. can be expected within the 17" ID drill hole. A minimum velocity of 1.6 ft/sec. would be required to move 3/4" gravel grains into the well and well in excess of 2.6 ft/sec. to lift these grains off the bottom of the well.

The flow velocities required to pull the gravel into the well are therefore much higher than that which could have been achieved during development and testing. Neither were the velocities produced in the well sufficient to pile the gravel some 20 feet in the bottom of the well, assuming the existence of the cavity reported by the driller at 125 feet (formerly 135).

It is much more likely that the unconsolidated material encountered 110 to 130 feet was not removed from the well during construction i.e. the well was not bailed clean subsequent to the completion of drilling.

3.3.2 Depth 130 to 150 feet.

(a) The absence of drill cutting and/or non-calcareous gravel in the corehole below a depth of 130 feet confirmed that CBDD's suggestion of back-filling of the hole was not valid for depths below 130 feet.

(b) CBDD also raised the possibility that the core-barrel may not have been centered in the hole and as a result could have deviated away from the lower part of the well, such that the limestone cores obtained below 130 feet represented an area outside the well.

This is hardly likely to have been the case. The 3" ID steel well casing in which the core column was lowered was centered in the top of the well within the 10" ID casing, and care was taken to centre the 3" casing in the bottom well at 110 feet. This was done by simply hanging the 3" ID casing until plump.

The unconsolidated material encountered between 110 and 130 feet was not rigid enough to have caused any significant deviation in the alignment of the 3" ID casing down to the bottom of the well as 130 feet. That the casing was within the lower 8" ID section of the well at depth of 130 feet confirmed that it had been reasonably well centered at 110 feet depth - in bottom of the open hole.

The deviation below 130 feet suggested by CBDD could not therefore have occurred.

(c) Neither was the suggestion that the well had collapsed between 130 and 150 feet supported by an examination of the cores recovered nor by experience reported for other coreholes drilled in the limestone aquifer.

The hard and compact nature of the limestone cores did not suggest the likelihood of collapse. The collapse of limestone formation at such a shallow depth, particularly in a drill hole of as small a diameter as 8" ID, is very unusual. No such situation is known to the author.

If the drill hole had collapsed angular, freshly broken or drilled surfaces, unoxidised and without chemically redeposited calcium carbonate, should have been evident within the cores recovered. This was not the case. The extent of the oxidation and redeposition observed could not have developed below the water table in less than 5 months.

Finally, the relatively low core recovery of 25% obtained in the Knollis Well is typical of the limestone and when examined together with the discussion in the two preceding paragraphs, cannot indicate formation collapse. The recovery of 25% is higher than that reported for all of the eleven (11) exploratory wells and within the range obtained in the four (4) exploratory coreholes drilled by the Water Resources Division within the same limestone aquifer.

The above considerations leave no doubt that the cores obtained 130 to 150 feet by drilling through the bottom of the Knollis Well were of undisturbed limestone formation."

Mr. White's conclusion is in some respects supported by the evidence of Clarence Morgan a well drilling supervisor. It should also be noted that the defendant driller's log indicated a depth of 135 feet and did not specifically identify the bottom of the well.

I therefore find that the defendant's representation that the well was drilled to a depth of 160 feet was false and misleading. The defendant failed to make a proper assessment of the depth of the well.

YIELD TESTING:

The defendant's contention is that the reduction in yield resulted from drill cuttings and gravel being pulled into the well during development. The defendant company's report of the 3rd December, 1982 stated that the well was bailed and then surged using the air pumping method. Mr. Strudwick testified that the well was tested over a period of time to see how much water it was yielding. He said it was Mr. Hardware who determined the time over which the well was tested. What he did not say and could not reasonably say was that Mr. Hardware told him what to say in his report. He said he was not satisfied with what Mr. Hardware told him that should be done in carrying out the tests. He testified that it was critical that the amount of hours that he ran the tests should be correct. It is a continuous test, he said, and is normally run for 48 hours. He had earlier stated that the tests lasted for 24 hours and that he was there for 8 hours of the testing. He admitted that as a technical person he should have given some warning. However he maintained that the yield at the time of testing was 246 g.p.m.

Mr. White whose evidence I accept told the Court that after the coring exercise already referred to, the cores were examined and taken to the Kingston Offices of the defendant company. He discussed with Mr. Lechler of the defendant company whether or not the cores represented undrilled rock. Mr. Lechler suggested that the hole be pump-tested with a view to getting some idea as to what the yield would be from the drilled well and the 20 feet cored hole. This suggestion was carried out.

There was a maximum drawdown of 8.5 feet indicating a discharge of 36 US. g.p.m. giving a well yield of 3.5 US g.p.m. per foot of draw-down.

This yield was not sufficient to meet the requirement of the plaintiff company. Mr. White said he had further discussion with the defendant company following on the conduct of the test. At a meeting on April 16, at which Lechler, Strudwick and himself were present it was again agreed, he asserted, that the tests indicated that there was a significant doubt as to the defendant company's performance to the extent that the defendant company intimated a preparedness to fully absorb the rest of the coring themselves together with the additional expenses that would be involved in completing the well to 160 feet. A letter to Mr. White dated 27th April, 1983, from the defendant company's attorney tends to support him in this regard.

It reads in part:

> "Your letter of 20th April, 1983, to Caribbean Boring and Diamond Drilling Limited has been handed to us for reply.
>
> In paragraph 1 on the first page you said that it is your understanding that the results of the coring exercise have created significant doubts as to CBDD's performance. The only absolute information of which we can be reasonably sure is that the lower 20 feet was either partially blocked with fallen rocks, or was never drilled at all. No man can tell which. With regard to the second sentence of the first paragraph, CBDD is willing to absorb the cost of the coring, and to return to the well site to ensure that the 8" diameter hole is drilled to a depth of 150 feet. CBDD wants the core, and also wanted $11,495.50 when the drill bit hits - 150 feet. CBDD entirely rejects the idea that it contracted to drill a well that would produce anything specific ....."

I might pause here to emphasise Dr. Barnett's submission that the plaintiff's claim against the defendant is not for failing to produce the required volume of water but for reporting falsely that they had achieved the required volume.

I do not accept the defendant's claim that the well yield was as reported in letter of December 3. It is clear on the evidence that the yield test carried out by the defendant company was inadequate. I am inclined to accept the conclusions of Mr. White viz:

(a) The Knollis well was drilled to a depth of 140 feet (130 feet below ground level as the ground surface elevation at the well head was reduced by 10 feet) possibly in anticipation of taking advantage of high flows thought to be associated with a cavity reported by the driller at 135 feet (125 feet below ground level);

(b) The well was not properly cleaned down to bottom after completion, nor was it adequately developed prior to yield testing; and

(c) The reported well yield of 6.15 US g.p.m./ft. is not a reliable estimate of the realisable potential of the well.

I would therefore hold that the report constitutes a misrepresentation and a negligent misstatement.

2. I must therefore proceed to consider the second question posed viz:

> Was there sufficient relationship of proximity between the plaintiff company and the defendant company such that in the reasonable contemplation of the defendant negligence on his part was likely to cause damage to the plaintiff?

There can be no serious dispute that there was a contract between the plaintiff company and the defendant company. The drilling of the well commenced before the licence from the U.W.A. was obtained. The licence was granted on the 12th November, 1982, and signed by Mr. Hardware the Secretary of the U.W.A. who was known to both parties.

Before the licence was granted Mr. Strudwick sent to Mr. Hardware a quotation dated 29th September, 1982, in respect of the production of the well. The defendant relies on this to support their contention that Mr. Hardware was the technical adviser employed by the plaintiff and that the defendant got their instructions from him. But even if Mr. Hardware was so engaged this does not necessarily mean that there was no contract between the parties. The highest one can put it is to say that such employment of Mr. Hardware might well support the argument of counsel for the defendant that the defendant did not hold themselves out as experts. I will return to this argument of counsel.

Mrs. Beverley Morgan testified that her husband made initial arrangement with Mr. Strudwick. It is clear on the evidence that the 'quotation' was passed onto the plaintiff company because on the 29th October, 1982, and the 9th November, 1982, Mr. Strudwick (for defendant company) wrote to Dr. Morgan (of the plaintiff company) enclosing invoices for $7000 and $9000 respectively. These amounts were paid by Dr. Morgan. Thus although the initial communication was between the defendant company and Mr. Hardware, Dr. Morgan came into the picture before the licence was granted.

On 28th March, 1983, an attempt was made by the then attorney for the defendant company to deny a contract between the parties. In a letter of that date addressed to the attorneys fo plaintiff it was stated:

> " Your letter dated 14th March, 1983, written on behalf of Blooming Things Limited to CBDD has been passed to us for reply.
>
> We were under the impression that our client's contract was with Dr. Brian Morgan. Our clients have never heard of Blooming Things Limited nor have we, until we saw your letter."

However the report dated 3rd December already referred to is captioned 'Well Report - Knollis - Blooming Things Limited', and in its introduction states:

> "Blooming Things Limited was granted licence to drill a well at Knollis, St. Catherine ....
>
> Caribbean Boring and Diamond Limited of Hillview Avenue, Kingston 10, was contracted to carry out construction and testing of the well." Emphasis mine.

Mr. Strudwick in a letter, dated 16th March, 1983, addressed to the plaintiff attorneys captioned:

> " Subject: Blooming Things Limited - Well at Knollis, St. Catherine," stated:
>
> " We emphatically deny the statement in your second paragraph. We contracted to drill a hole in the ground, install casing in same, develop and test for water and report results in hope that it would be a producing well.
>
> Your clients did not consult with us after we submitted our report to them. They had their own Consultant who instructed us during the drilling, casing, development and testing of the well."

To my mind it is clear that there was a contractual relationship between plaintiff and the defendant. And, as said before, it seems that the plaintiff sets out to use this contractual relationship as the background to the action in tort.

It is on this relationship that the plaintiff relies to establish a duty of care. As regards this duty of care, Mr. Scharschmidt for the defendant company submitted that there is no allegation in the pleadings that the defendant held themselves out as experts and so they were under no duty of care. He argued that the defendant described themselves as well drillers and thus would only hold themselves out as possessing skill in drilling and therefore on the pleadings the defendant would owe the plaintiff no duty of care. He relied on Mutual Life and Citizens' Assurance Company Limited v. Evatt (1971) 1 All E.R. 150. In that case the Privy Council held that the plaintiff, a policy holder in the defendant insurance company, did not have a cause of action in negligence against the plaintiff for

financial loss he had suffered, after acting on the gratuitous and incorrect advice and information received from the defendnats. It was held that because the defendant's business did not include giving advice on investments and it did not claim to have that required skill and competence to give reliable advice, the only duty owed towards the plaintiff was to give an honest answer to his inquiries.

It seems to me that this case is not very helpful for whereas in the instant case there was a contractual relationship this was not so in the Mutual Life case. Furthermore it should be noted that the dissenting judgments of Lords Reid and Morris of Borth-y-Yest were preferred to those of the majority by the Court of Appeal in Esso Petroleum Company Limited v. Nordon (1976) Q.B. 801.

DUTY ARISING IN CONTRACT

A person practising a calling involving personal skill is under a duty to exercise reasonable care and skill where an agreement exists between the professional or skilled person and his client. Generally in the absence of any express term the Court will find that there is one implied that the professional or skilled person will exercise reasonable care and skill in rendering his services in respect of which his client has agreed to pay a fee. As was said by Oliver, J. in Midland Bank Trust Co. Ltd. v. Hett Stubbs and Kemp (1978) 3 WLR 167 "A contract gives rise to a complex of rights and duties of which the duty to exercise reasonable care and skill is but one." Thus in contract of this nature the services to be rendered and the relationship between the parties will be defined in terms whether expressed or implied.

DUTY ARISING IN TORT

In Hedley Byrne & C. Ltd v. Heller & Partners Ltd. (1964) A.C. 465 the House of Lords held, among other things, that a duty to take reasonable care in making statements existed wherever a special relationship has been created

and there had been no disclaimer of responsibility. Now it seems settled law that the professional or other skilled person owes a duty of care both in contract and in tort to his client to exercise reasonable care and skill.

In the case before me, the defendant contracted "to construct and test", this much is agreed both on the pleadings and the evidence. The defendant company contends that they constructed and tested the well by faithfully following the instructions of Mr. Hardware, and that they had expressed their reservations as to the adequacy of the test to Mr. Hardware. They did not so inform the plaintiff. The report does not contain any such warning.

Mr. Strudwick claims that Mr. Hardware was the Consultant employed by the plaintiff. Mrs. Beverley Morgan denies this. Mr. Hardware did not give evidence. So apart from Mr. Strudwick's evidence to this effect there is no other evidence in this regard. The Court is forced to ask how did the defendant know that Mr. Hardware was acting as the Consultant of the plaintiff? Was it he who told them so? Or was it an assumption on their part because of Mr. Hardware's involvement? I am not satisfied on the balance of probabilities that Mr. Hardware was in fact the Technical Consultant of the plaintiff. Furthermore there is no evidence as to the duty of Mr. Hardware as a Consultant.

I am of the view that the defendant cannot escape liability by saying that they were acting solely on the instructions of Mr. Hardware in constructing and testing the well and that they expressed their reservations to him. Even if they were acting on the instructions of Mr. Hardware in the manner they claim, the defendant would still, in my view, be under a duty of care in the making of the representations contained in the report. This is so because I find as a fact that in making the said representations the defendant well knew and in fact intended that the plaintiff would rely on such representations.

I conclude therefore that there was sufficient relationship of proximity between the parties and that the defendant ought reasonably to have known that negligence on his part in making the representations was likely to cause damage to the plaintiff. Accordingly the defendant was under a duty of care to exercise reasonable skill and competence in testing and reporting on the well, and I find that the defendant was in breach of this duty and also in breach of contract.

3. We must now move to the final question. Are there any considerations which ought to negative or reduce or limit the scope of the duty or the damages to which a breach of it may give rise?

Counsel for the defendant submitted that the plaintiff placed reliance on Mr. Hardware's instructions and not on the skill and competence of the defendnat. I find on the evidence that the defendant held themselves out as professional persons skilled in the drilling and testing of wells. As said before I accept Mrs. Beverley Morgan's evidence that she relied on the statements in the report and I also find that it was reasonable for her to so rely. Indeed there is no evidence of any instructions given to the plaintiff by Mr. Hardware as all the suggestions put to the plaintiff in this regard were denied.

It was further argued by counsel for the defendant that the report was written against the background of the defendant through Mr. Strudwick conveying certain reservations to Mr. Hardware on whose instructions he acted. In his evidence Mr. Strudwick stated that he was apprehensive about the instructions given by Mr. Hardware; these were:

(1) to leave the additional 40 feet uncased; and

(11) to test the well for 24 hours.

Mr. Scharschmidt submitted that the defendant having expressed these reservations to Mr. Hardware and having been told to go ahead by the latter would owe no duty to the plaintiff.

Dr. Barnett for the plaintiff contended that the defendant cannot prove Mr. Hardware's authority by Mr. Strudwick's assumption, it must be by some statement by the plaintiff or conduct on their part. I cannot disagree with this. But even if Mr. Hardware had some special relationship with the plaintiff it would nevertheless be negligent of the defendant not to express the reservations in the written report. It is whether the defendant had acted reasonably. The defendant cannot negate his duty to the plaintiff by orally expressing his reservations to Mr. Hardware. See Cynat Products Limited v. Landbuild (Investment and Property) Limited and others (supra).

It was submitted that where, as in this case, the plaintiff has to rely on a contract in order to establish a duty of care, in the event of a breach, the measure of damages will be assessed in contract as opposed to tort. Counsel relied on Halsbury's 4th Edition Volume 12 paragraph 1172 for support for this proposition.

In the foot note to this paragraph reference is made to Groom v. Crocker (1939) 1 K.B. 194 at 205 and Clark v. Kirty-Smith (1964) Ch. 506, (1964) 2 All E.R. 835 as the authorities for this proposition. This rule has its genesis in Groom v. Crocker. I must say with respect that in principle it seems that there can be no practical ground for placing such a limitation on the right of a plaintiff and in particular in the circumstances of this case. Indeed this proposition was rejected by the C.A. (U.K.) in Batty v. Metropolitan Property Realization Limited (1978) 2 All E.R. 445 at 453-4.

In disposing of this submission I will content myself by quoting from Charlesworth and Percy on Negligence 7th Edition pages 572-3 paragraphs 9-84.

> "For more than a century, prior to 1938, it had been commonly accepted by the English Courts that negligent solicitors would be held liable to their clients in tort, equally as in contract. Then, in that year, the Court of Appeal in Groom v. Croker held that not only was there no tortious liability but the mutual rights and duties of a solicitor and his client were regulated by the contract of engagement and the limits of its terms only. This decision undoubtedly set the scene for a number of years to come and the principle was followed slavishly, without any apparent demur. Indeed it was not until 1976 the reserved judgment of the Court of Appeal in Esso Petroleum Company Limited v. Marden that Lord Denning Mr.R. expressed the opinion that it was in conflict with other decisions of high authority. For certain it is in conflict with modern authority, following the far reaching effects of the momentous decision in Hedley Byrne and Company Limited v. Heller and Partners Limited. Thereafter, the restored legal principle that a solicitor was liable to his client concurrently in contract and tort has been applied and developed ...."

CoUnsel for the defendant also urged that the agreement of the 7th April, 1984, entered into by the parties was intended to set up the framework for resolving the dispute and that the plaintiff was estopped from going outside the terms of this agreement. Dr. Barnett on the other hand argued that this agreement was to resolve the dispute as to whether the well had in fact been drilled to 160 feet.

It seems clear to me that at the time when this agreement was entered into the parties could not have been addressing the plaintiff's claim against the defendnat for reporting falsely that the required volume was achieved. Indeed at the time of agreement the consequences of the plaintiff's reliance on the report were not in their contemplation. I hold, therefore, that this agreement does not limit the damages to which the plaintiff is entitled.

Counsel for defendant further submitted that there is no evidence that at the time the report was made the defendant was told the purpose for which the water was needed. Mr. Strudwick gave evidence that he was not told anything

about anthuriums and that he did not know that there would be horticultural development on the property. However he said he assumed that there would be some development "involving the planting of things" and that the well was wanted for irrigation purposes. He said that it was only on completion of the well did Mr. Hardware tell him that they were going to plant flowers.

Mrs. Beverley Morgan said that the plaintiff company had in September, 1982, begun production of anthurium on a small scale at the site at Knollis. It is difficult to accept that Mr. Strudwick who admitted that he had visited the site on more than one occasion did not observe what was being done at the site.

DAMAGES

The test is that of reasonable foreseeability. In this regard it may be helpful to bear in mind the principle that once the type or kind of loss has been established as reasonably foreseeable then the consequences will be recoverable whether or not they were foreseeable - See Wagon Mound (No. 1) (1961) A.C. 388 and the recent case of Banque Keyser S.A. v. Skundia (U.K.) Insurance C.A. (1989) 3 W.L.R. 25 at pages 70 - 77.

I must now proceed to examine the particulars of special damages in the Statement of Claim and the evidence in relation thereto.

(a) Amount paid for completion of well. Mrs. Morgan testified that she paid $11,054.74. The amount claimed in Statement of Claim is $10,200. Amount to be awarded .....$10,200.00.

(b) Cost of removing, repairing and reinstalling pump. Amount paid was US$917.15 (J$3,118.31). Here I agree with Mr. Scharschmidt that Mrs. Morgan was not qualified to determine what caused the damage to the pump. Thus the plaintiff has not established to my satisfaction the causation and cannot be awarded anything under this head;

(c) Travel and accommodation expenses of foreign pump technician. Amount claimed $2,438.91.

For the reasons given at (b) above no amount is awarded under this heading;

(d) Fees for Hydrology Consultants Limited to advise on state of well and supervise core testing and its completion. Amount claimed and supported by evidence $6,993.00

(e) Trucking water 1,600.00

(f) Rental of front end loader to excavate river D'oro for water and construct mini dam. The evidence is that $6,000 was paid 6,000.00

(g) Cost of pumps to extract water from river. Amount claimed and supported by evidence $5,260 ..... 5,260.00

(h) Cost of irrigation piping to re-route to new water sources 2,000.00

(i) Cost of additional labour. The amount claimed is $14,000 from January to July. However, under cross-examination Mrs. Morgan's evidence is that it was between March and July that water problem existed. Amount awarded $7,000.00..... 7,000.00

(j) Cost of delays in shipment of plants:

(1) Additional shipments 35,000.00

(2) Increase in delivered cost of $1.62 per plant after placing of plantings on parallel rate. Mrs. Morgan's evidence is that 283,531 plants were involved. Thus the amount recoverable would be $283,531 X 1.62 ..... 459,320.00

(3) Interest charges on letter of credit. Amount claimed $36,761. The evidence is that $30,000 was paid $30,000.00

(k) Replacement of 10,000 plants lost for lack of water as per evidence ... 34,000.00

(l) Loss of income on 10,000 plants. There is insufficient evidence to support this claim, no award can therefore be made.

(m) Loss of income due to the plants being traumatised by lack of water and retardation by lack of their blooming cycle by 6 months. The Statement of Claim refers to 80,000 plants - 4 mini blooms per plant at export value of US$263,500 calculated as follows 80,000 X 2.95 parallel exchange rate. However the evidence is that 40,000 plants were affected. The amount awarded must therefore be half the amount claimed 118,250.00

Total $709,053.00

The total amount awarded to the plaintiff is therefore $709,053 with interest at 3% from the 15th July, 1983.

The defendant must pay the plaintiff's costs to be agreed or taxed.