79/2.

ROYAL COURT (INFERIOR NUMBER)

Before: Mr. P.L. Crill, Deputy Bailiff
Jurat L.V. Bailhache
Jurat L A. Picot

Between: Raymond Ernest Turner Plaintiff

And

Between: Seahorse Pools Limited Defendant

Advocate P. Mourant for the Plaintiff
Advocate F.J. Benest for the Defendant

The Plaintiff is the owner of "Le Clos du Parcq", St. Brelade. In 1975 he was carrying out alterations to the property and decided to refurbish the existing indoor swimming pool. He had had an indoor pool at his former house in England which he had had constructed under his supervision. He consulted his Architects and they recommended the Defendant Company of which Mr. M. Lee is the beneficial owner and the Managing Director. Among the works carried out by the Defendant Company was the taking up of the existing floor around the pool, which consisted of concrete or composite slabs, and the laying in their place of Italian ceramic tiles. The floor was completed in February, 1976, although the pool had been in use for some time before then. We were shown a photograph of the pool before it was refurbished and when we refer to left or right of the pool, we do so as if we were looking at the pool from where the photograph was taken. On the 30th April, 1977, the Plaintiff, who had changed into swimming trunks in the changing room to the right of the pool, came down some steps

onto / ...

onto the tiled floor. Upon stepping onto the tiles he slipped and, according to the Order of Justice, sustained a cracked fracture of the cronoid process of the right ulna. He now sues the Defendant Company in contract and in tort. By agreement of the parties we were asked to decide the question of liability only.

The claim is founded on an express warranty said to have been given by Mr. Lee to the Plaintiff at the time the contract for the laying of the tiles was made. Alternatively, it is pleaded that it was a condition of the contract that the tiles would be suitable for the purpose for which they were to be used. It is claimed also that the Plaintiff relied on Mr. Lee's advice in choosing the tiles. The Defendant Company's breach of its contract is described in the Order of Justice as follows:-

"(a) Supplying tiles for the pool room which were highly slippery when wet.

(b) Failing to ascertain that the said tiles would not cease to have the characteristics of reduced slip-tiles when wet.

(c) Supplying tiles of a quality or character other than as specified and advised by the Defendants or requested by the Plaintiff.

(d) Failing to exercise due care, skill and diligence in the submitting of sample tiles to the Plaintiff in the knowledge that such tiles were submitted for approval for laying in the pool room.

(e) Laying tiles in such a manner that ponding of water occurred on the pool surround thereby rendering the tiles highly slippery.

(f) / ...

(f) Failing to provide any or any adequate draining for the disposal of water on the pool surround to minimise the danger of slipping of which the Defendants would be aware".

It is quite true, of course, that although the relationship between the parties was founded on contract, that would not prevent a claim being brought in tort. However, in the course of the hearing Mr. Mourant for the Plaintiff said that he no longer relied on the claim in tort. The Defendant Company admits not building a drainage system but said it received no instructions to do so.

The action first came before the Court on the 22nd July, 1977. We were told that owing to a dispute over the Defendant Company's bill it was submitted to arbitration. We were not shown a copy of the agreement but we understand that it comprised all the items in the bill including the cost of installing the new tiles. The agreement was settled between the parties' lawyers in September or October, 1976. The hearing was in November, 1977, and an award was made in February, 1978. We were told, also, that the question of the suitability of the tiles for a swimming pool surround was not argued before the arbitrator.

In its amended answer, the Defendant Company denies that it held itself out as a specialist in tiling or that it was employed as a swimming pool consultant. We note, however, that it had not previously laid Italian Ceramic tiles around an indoor pool. There is some conflict of evidence whether the Defendant Company first went to the Plaintiff's property to submit tiles for some bathrooms and then was given the contract to tile the swimming pool surround or whether the tiling of the bathroom was

incidental / ...

incidental to the work on the pool surround. In this respect we think it is immaterial which contract came first. Mr. Lee told us that his Company, originally under another name, had been concerned with swimming pools for 17 years. It was his Company that Mr. Gordon Young a Surveyor employed by Messrs. Queree, Swain and Edwards, Architects and Surveyors, recommended to the Plaintiff. In our opinion, the Defendant Company is an expert in constructing swimming pools and Mr. Turner was entitled to consider it as such, whether the Company held itself out to be one or not, unless it expressly disclaimed being so, and we heard no evidence to suggest that it did this.

First of all we have to decide what were the express terms of the contract. It is clear from the evidence that the tiles, which were supplied by the Defendant Company were in fact very slippery when wet. Did, however, Mr. Lee and thus the Defendant Company, undertake to supply what the Plaintiff said he did, namely, "reduced slip tiles", which, in the event, were defective in that they became excessively slippery when wet? On this point there is a direct conflict of evidence between Mr. & Mrs. Turner on the one hand, and Mr. Lee and his Manager, Mr. Ellis, on the other. The Plaintiff's case is that he relied on Mr. Lee's expertise in choosing a suitable tile for the pool surround, having previously told him that he wanted one that was non-slip such as he had had around his previous pool. According to Mr. Turner, Mr. Lee not only produced a tile, which he said was a reduced slip tile, but conducted an experiment by wetting it and rubbing his hand over it to show its reduced slipperiness. Mrs. Turner, however, said that that test had been carried out by Mr. Ellis

while / ...

while Mr. Lee and Mr. Ellis denied that any such test had been carried out at all. What is beyond doubt is that we are not dealing with a latent defect in a ceramic tile but, on the contrary, a patent or obvious one. Thus many of the cases cited to us by counsel cannot apply as they were concerned mainly with latent defects. To succeed in his allegation that Mr. Lee's company is liable due to an express term in the contract the Plaintiff must show that Mr. Lee made a negligent mis-statement which induced him to enter into a contract. If he is unsuccessful in this, then Mr. Mourant relies on the doctrine of an implied warranty, which although the present contract was for the supply of labour and materials, applies in the same manner as it does to one for the sale of goods. The defect in the tile, being as we have said previously, a patent one, the duty owed by the Defendant to the Plaintiff falls into two parts. As to the work itself, it must be done with all proper care and skill or as was put by the Royal Court in Dawson v Rothwell, reported in Jersey Judgments Volume 1 at page 1704 "We believe it to be the law that the public profession of an art or skilled employment is a representation and an undertaking to all the world that the professor or workman possess the requisite skill and ability to prosecute the employment which he has undertaken to a successful termination. Consequently in the case of any contract for work there is an implied engagement on the part of the person undertaking to do the work that it will be performed with due care, diligence and skill according to the orders given and assented to".

As regards a patent defect the contractor will be liable for loss caused by the use of material which reasonable inspection would have shown to be defective. Far from having

chosen / ...

chosen to assume such a duty, however, the Defendant Company in this action says that the Plaintiff, or his wife, chose the tiles and took upon themselves the risk that they might be defective for the purpose they required them. But not every choice by an employer will relieve the contractor. As Lord Pearce said in Young and Marten v McManus Childs reported in 2 All England Law Reports 1968 at pages 1174 and 1175 "It is frequent for builders to fit baths, sanitary equipment, central heating and the like, encouraging their clients to choose from the wholesalers' display room the bath or sanitary fitting which they prefer. It would, I think, surprise the average householder if it were suggested that simply by exercising a choice he had lost all right of recourse in respect of the quality of the fittings against the builder who normally has a better knowledge of these matters. Of course if a builder warned him against a particular fitting or manufacturer and he persisted in his choice, he would obviously be doing so at his own risk; and a builder can always make it clear that he is not prepared to take responsibility for a particular kind of fitting material".

Mr. Benest, for the Defendant Company, relies not only on the latter part of this passage but also the last part of a passage in Duncan v Blundell cited in the Judgment of Lord Upjohn in Young's case on page 1176: "Where a person is employed in a work of skill, the employer buys both his labour and his judgment; he ought not to undertake the work if it cannot succeed, and he should know whether it will or not; of course it is otherwise if the party employing him choose to supersede the workman's judgment by using his own".

It is to be noted that the contract was not merely one of

a / ...

a sale by description. Even if the defect in the tiles had been latent -the authorities indicate that before a Plaintiff can succeed in such a case he would have to show that he substantially relied on the Defendant's skill in the choice of the materials. Thus our findings of fact, as regards the nature of the contract between the Plaintiff and the Defendant Company will cover both the question of an express term of the contract and latent defect because the allegation in each case is the same namely, that the Plaintiff was relying wholly or substantially on the skill and judgment of the Defendant Company acting through Mr. Lee.

Apart, however, from the question of express terms we accept the statements about implied terms in a contract as set out on pages 274 and 275 of the 10th Edition of Hudson's Building and Engineering Contracts. There the learned author says:

"It is submitted that a contractor undertaking to do work and supply materials impliedly undertakes:

(a) to do the work undertaken with care and skill or, as sometimes expressed, in a workmanlike manner;

(b) to use materials of good quality. In the case of materials described expressly this will mean good of their expressed kind. (In the case of goods not described, or not described in sufficient detail, it is submitted that there will be reliance on the contractor to that extent, and the warranty in (c) below will apply);

(c) that both the work and materials will be reasonably fit for the purpose for which they are required, unless the circumstances of the contract are such as to exclude any such obligation (this obligation is

additional / ...

additional to that in (a) and (b)), and only becomes relevant, for practical purposes, if the contractor has fulfilled his obligations under (a) and (b)".

Under (a) the allegations are those contained in Paragraphs 11 (e) and 11 (f) of the Order of Justice as regards the method of laying the tiles and the failure to provide a drainage system. Under (b) since the question of the tiles not being of good quality has never arisen (b) cannot apply. It is quite true that the most recent authorities seem to show that as regards (c) the liability is absolute, but in our view that liability must depend on the circumstances of the contract, as Hudson says, and if the circumstances are such that there was not a substantial reliance on the skill and judgment of the contractor we are not prepared to hold that in such circumstances the obligation is absolute.

As regards the performance of the contract itself we believe that the Royal Court's judgment in the case of Dawson v Rothwell, which we have already mentioned predicates a test of reasonableness. Even if in that case Young and Marten v McManus Childs was not cited to the Court, and we don't know whether it was, we think it would be wrong, (if we were to find that the implied undertaking was absolute as regards the performance of the work and the supply of materials), that that implied undertaking could replace an express contract where the Plaintiff substitutes his own skill and judgment for that of the contractor.

If one examines the evidence the first thing to be noticed as regards the tiles is that while Mr. Lee had not used the tiles before in an interior pool he knew that they had been used on the Continent around other pools &it was reasonable for him to

suppose / ...

suppose that they were suitable for the purpose for which they were intended to be laid. We do not think that Mr. Lee however was justified in saying to the Court in effect that the tiles were only laid to withstand a certain amount of water and that the splashing of children using the pool to an excessive amount was not something which a contractor could reasonably be expected to anticipate. In determining the express terms of the contract the Court had to choose between the Plaintiff's evidence and his witnesses and that of the Defendant Company and its witnesses. In the Court's opinion, we prefer to accept the evidence given by the Defendant and his witnesses. We asked ourselves whether, if Mr. Turner had had no trouble with his pool in England as he told us, why was he so concerned as to the type of tiles to be laid here around the new pool?

In this regard the evidence of Mr. Davies an Architect on behalf of the Defendant is very material. He said upon being shown the tiles in a photograph, which depicted Mr. Turner's pool in England, that if it was claimed that they were not slippery then that was due to first, the materials which would have to be different from the tiles in dispute, secondly, the ventilation, and thirdly effective drainage. From the appearance of the tiles in the photograph they appeared to be slippery. One way to limit tiles' slipperiness would be to have raised ridges which would prevent the skidding effect. He had the impression from the photograph of Mr. Turner's previous pool that the tiles were flat ones. In spite of the evidence of the two employees of Mr. Turner we think that, since all ceramic tiles with a glossy finish are slippery when wet, which is the conclusion we drew having regard to the testimony of all the experts we heard, then it is more than likely that the tiles

of / ...

of Mr. Turner's pool in England were, in fact, slippery when wet. Mr. Turner said he did not know what the term "direct labour" meant. He is an experienced business man who employed workmen to build his previous pool; we think he erred in this assertion. Mr. Colin Smith who had been the arbitrator between the parties and who was called by the Plaintiff, said that the slipperiness of the tiles was evidenced by the gloss, and in referring to the tiles in dispute he said that would be obvious to anyone.

We accept the evidence of Mr. Ellis and Mr. Lee that the test described by Mr. Turner and Mrs. Turner did not take place. We are satisfied that the essence of the agreement was this; that Mr. and Mrs. Turner had had experience of pools in England; that they chose the tiles they wished and merely instructed the Defendant Company to instal them around the pool. According to Mr. Smith there is no such thing as a "non-slip glazed tile". The most that can be produced is a "reduced slip tile" but that is not a technical expression. Even so, a reduced slip tile would not be sold as such. Mrs. Turner in her examination in chief said that she had told Mr. Lee that she wanted some tiles like those she had had in England which had been pretty and non slippery. In cross examination, however, she said that she did not tell Mr. Lee that she and her husband had had similar tiles before around the pool in England. She admitted that she regarded Mr. Ellis as a straightforward person; we also formed that assessment of his evidence which we have set out in some detail. When he was speaking to Mrs. Turner about the tiles he said that she asked him about the colours and he told her that he was "no good" as regards that aspect but he thought the ones she had in mind would be slippery. He was quite clear that neither Mr. nor Mrs. Turner mentioned slipperiness

and /

to him at that time. While the choice of tile was being discussed with Mr. Ellis, Mr. Turner left Mrs. Turner alone with Mr. Ellis. She said that they had had similar tiles around their pool in England. When the tile was finally chosen by Mrs. Turner, she asked Mr. Ellis for some extra tiles for the patio outside and he warned her that those tiles could become greasy because of of algae. Mrs. Turner said that she would make sure that they were kept clean. Mr. Ellis was quite sure about his recollections as to what had been said. The sequel of choosing the tiles was that Mr. Lee sent up some tiles with Mr. Ellis to give to Mr. and Mrs. Turner. At one stage he also sent a book of patterns which was produced to us at the end of the trial. According to Mr. Ellis, Mrs. Turner chose a plain tile but he thought that one with a pattern with a starburst would break the monotony and he left the tiles with the Turners. The next time he was at the site he asked Mr. and Mrs. Turner if they had chosen a pattern and Mrs. Turner said that she had and he reported accordingly to Mr. Lee. At no time, he said, was Mr. Lee present when the tiles were chosen. Mr. Ellis is quite sure that he told Mrs. Turner that he thought that the tiles she had chosen would be slippery. We have already said that they certainly were when wet and all the evidence points to this. Indeed Mr. Davies the Defendant Company's own witness said that, if wet, the tiles would be like walking on ice.

Mr. Hotton, who was a swimming pool contractor of many years experience, told us that he found it hard to believe that Mr. and Mrs. Turner did not have trouble with the slipperiness of tiles in England. In his opinion there would be slipperiness with any kind of flat surface tile but he thought that York Stone was one of the best kinds of surround to prevent slipperiness. This was the opinion also of Mr. Lee but we here

In / ...

in mind also that the previous surround of the pool at the premises had in fact been some sort of concrete or composite material which, according to Mrs. Turner, would have caused the children to stubb their toes on it. In short, therefore, we are satisfied that Mr. and Mrs. Turner, knowing full well that the tiles they were choosing could be slippery when wet, nevertheless ordered those tiles from the Defendant Company. Under those circumstances we are not satisfied that there was an express contract in the sense that Mr. and Mrs. Turner were relying on the skill of the Defendant Company, through Mr. Lee, to chose proper tiles. Far from there being any substantial reliance on Mr. Lee's skill and judgment there was in fact, none at all.

When we come to the question of drainage, we are satisfied that there was some ponding. But we are also satisfied that the Defendant Company was given no instructions to construct a drainage system. In any case Mr. Lee told us that he was satisfied that the normal practice was for the excess water to go down the heating ducts. Mr. Avery, a witness for the Defendant Company, said that even if the water did go down the ducts it would do no damage because the evaporation rate in a heated indoor swimming pool was too rapid. But was the ponding more than one could reasonably expect under the circumstances? The slipperiness and ponding became apparant from the moment the pool was first taken into use in February, 1976, and yet Mr. and Mrs. Turner agreed to accept the position until Mr. Turner had his unfortunate accident in the following year. At that time his own party guest Mr. Peter Smyth was not warned by him before going onto the pool surround. There is a minute of a site visit of the 13th May, 1976, which was produced to us. Mr. Gordon Young, the Surveyor, visited the pool and in the presence of Mr. Turner was shown some grouting between the tiles; the colour was coming out from the material and

discolouring / ...

discolouring the water which was lying on the surface of the tiles. However, the reference to ponding was merely incidental to the effect that the escape of the coloured grouting was having. There was no complaint of ponding as such. Indeed Mr. and Mrs. Turner both told us that they agreed to accept the condition of the tiles and the slipperiness which they told us, and which we accept, had manifested itself immediately, rather than have the aggravation of putting them right. We may therefore infer that had there been no accident some fifteen months' later, Mr. Turner would not have brought this action. Applying the tests set out, to which we have referred on pages 274 and 275 of Hudson, we are unable to find that the Defendant Company was in breach of its obligations to the Plaintiff and, accordingly, the action fails and is dismissed with costs.