



LEGAL BRIEFING

Baylis Farms Ltd v R B Dymott Builders Ltd [2010] EWHC 3886 (QB)

The Facts

Dymott undertook improvement works on premises owned by Baylis on the basis of verbal instructions without a written building agreement. The works included the creation of an office, lavatory and kitchen in an old dairy building with associated drainage works.

Following completion of the works, and faced with a refusal by Baylis to pay certain outstanding invoices, Dymott sued Baylis for the unpaid sum of £4,933.83. Baylis counterclaimed for defective works, namely defective construction of a drain from the new lavatory (£2,500); a leaking cistern system in the lavatory (£500) and defective doors (£80).

At Baylis' request, Dymott had laid the drain to an existing manhole outside another building on site and from there through an existing drain to an existing septic tank. Part of the drain did not produce the fall that would be required by good building practice and/or by building regulations and this eventually caused the drain to block. Baylis alleged that the drain was "not fit for purpose".

There was a dispute of fact as to what had been said in an important conversation between Mr Dymott and Mr Baylis about the adequacy of the fall in that part of the drain. Dymott alleged that Baylis was warned that the fall was inadequate but Baylis instructed Dymott to install the drain anyway. Baylis contended that Dymott had confirmed that notwithstanding the non-compliant fall, the drain would probably work and it was in reliance on that reassurance that the instruction to proceed was given.

The Judge at first instance was not satisfied that the inadequate fall was the cause of the drainage problem, given the period of time that had passed without complaint and the fact that the septic tank was problematic and had not been serviced regularly. In dismissing the counterclaim in relation to the drain, the Judge held that Dymott was not warranting that the new drain would work. Although Dymott had pointed out that the fall was inadequate, Dymott received instructions to carry on nonetheless.

Dymott obtained judgment for the amount claimed plus interest, less £80 awarded to Baylis on its counterclaim for the doors. Baylis was ordered to pay Dymott's costs of £14,500. Baylis appealed the decision.

The Issues

The main issues on appeal in relation to the drain were:

- (i) did the inadequate fall mean the drain was not fit for purpose?; and
- (ii) was the content and effect of the important conversation between Mr Baylis and Mr Dymott sufficient to exclude the implied warranty of fitness for purpose that would otherwise apply?

The Decision

Mr Justice McCombe decided that the new drain was not fit for purpose. The Judge accepted the following as being correct propositions of the law in this situation:

- (i) In a contract such as the present, there would ordinarily be an implied warranty as regards standards of workmanship. The contractor would be obliged to exercise all proper skill and care. It fell to the contractor to inform the employer of any defects in design of which he is aware or ought to have been aware.

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- (ii) There is an implied warranty that work carried out by the contractor will on completion be reasonably fit for the purpose for which it is required where the contractor holds himself out as capable of performing such works and where the employer is relying upon his skill and judgment - see per Lord Scarman in *Independent Broadcasting Authority v. EMI Electronics Limited and Anr* [1980] 14 Building Reports page 1 at pages 47 to 48.
 - (iii) There would be no such implied term as in (ii), if the client is warned in suitably clear terms of the risk of failure of the works and despite that clear warning the client instructs the contractor to proceed. In such circumstances there would be a consensual shifting of the risk of failure of the works from contractor to employer.

Applying those principles to the facts and in allowing Baylis' appeal, the Judge held that Dymott had not given a sufficient warning about the adequacy of the proposed drainage works and the risk of the drain's failure so as shift to the risk of failure of the works from Dymott to Baylis. The warranty of fitness for purpose could not be shifted by wrong advice.

Comment

The implied warranty of fitness for purpose is an important consumer protection mechanism. There is a significant burden placed on a contractor to show that a client has accepted the risk of substandard work so as to effectively oust the implied warranty. The warning about the risk of failure of the works must be suitably clear.

Mr Justice McCombe held that Mr Baylis should have been told that the drain probably would not work, rather than it probably would. Dymott's warning that the drain had inadequate fall but "from my experience it should still work", was not clear enough.

It would be prudent in similar situations to clearly record in writing the contractor's warning and the client's acceptance of the risk and instruction to proceed.

Andrew Hales
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