

JERSEY / JUDGMENT

Colback -v- Deerglen (Jersey) Limited

[2013] JRC 049 (04 March 2013)

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judgment

the commissioner: 1. The plaintiff ("Pro-Fit") claims £20,093 from the defendant ("Deerglen") in respect of work it carried out in 2009 to the building known as The Kiosk, Liberty Wharf ("the Kiosk"). Deerglen counter-claims for damages in respect of the same work. 2. Attempts to settle the case failed and costs on both sides substantially exceeded the sums in contention before the three day hearing on 20 th November, 2012, began, let alone after it. 3. The Court heard evidence from five witnesses and two experts and reserved its decision. Subsequently, Deerglen has become insolvent and is subject to a creditors' winding up. 4. Mr Martyn Boyce, project manager of Pro-Fit, told us that he had been in the glazing business for some 25 years and had run Pro-Fit's business for some ten years. Their work was in the residential sector and this was the first commercial contract that the business had quoted for. The opportunity for that arose out of his meeting with Mr Louis Parr, a director and beneficial owner of Deerglen, in the pub. 5. Deerglen was the main contractor engaged in phases 2, 3 and 4 of Liberty Wharf by a subsidiary of Harcourt Developments Limited ("Harcourt"); the contract value was some £20M. The architects for the project were Axis Mason, but quite separately, Deerglen used the services of another architect, Mr Jorg-Gustov Haertwig, on a freelance basis to act as a design manager and assist Deerglen to value engineer designs which had been provided to it from Harcourt. 6. Mr Haertwig explained to us that the building of the Kiosk was an obligation imposed upon Harcourt by the Planning Department and his understanding was that there was a conflict between Harcourt and the Planning Department as to how much should be spent on it. Axis Mason had apparently provided Harcourt with detailed plans for the Kiosk which had a cost estimate of £400,000 when Harcourt had budgeted some £200,000. Deerglen gave him the task of reviewing Axis Mason's plans to value engineer the same down to a budgeted price of £200,000. Those revised plans were accepted and Deerglen commenced construction of the main structure of the Kiosk. Sub-contractors were required to build the glass façade and the glazed canopy. During the hearing we were provided by Mr Haertwig with a full set of the very detailed and precise drawings he had produced which do not appear to have been available to the parties or the experts during the process of this litigation. 7. Pro-Fit's revised quotation of 16 th October, 2008, which had been based on the drawings produced by Mr Haertwig, was accepted by Deerglen on 17 th October, 2008. Pro-Fit had quoted £35,000 for the façade and £11,700 for the glazed canopy. The purchase

order submitted by Deerglen stipulated that " all measurements on the drawings are to be checked on site" . 8. We are only concerned in this case with the glazed canopy. This extends over the outside of three sides of the Kiosk and appears to be designed for two purposes

- firstly, to provide shelter for people below and secondly, to direct rain on to the " green" roof of the Kiosk. The glazing was to be set above a number of steel beams, each of which was slightly angled upwards. The beams lengthened as the canopy extended round the Kiosk shortening again on the other side. As Mr Haertwig explained to us, it is a geometric fact that the longer the steel beam when placed at an angle, the higher it will be from the ground if measured from the tip of the steel beam to the ground and the natural result of the design was to create a curve or wave effect. 9. Mr Boyce commenced work creating the templates for the glazing in January 2009, when the main structure of the Kiosk was almost complete and the beams in place. He was assisted by his fellow employee Mr David Gallery who devised a wooden jig (held together by double bolts so once fixed it could not move) which was placed above the beams in order to measure the area of each piece of glazing. That jig was then taken down and the shape of the glazing drawn on to sheets of ply so that the template could be cut out. The resulting template was then taken back on to the roof, to make sure it fitted correctly. It was an old-fashioned, but in Mr Boyce's view, very accurate method and anyway he was not aware of any other way of doing it. The templates were then sent to the supplier in England for the glazing panels to be made. 10. Mr Boyce informed us that this process was observed by Mr Haertwig without adverse comment and on occasion, Mr Parr. It became apparent, he said, from the actual structure that the glazing on the canopy needed to extend over the roofline towards the garden by half a metre, which was not shown in the plans. Due to the increase in size of the glazing, his suppliers advised that the thickness of the glass should be increased from 8mm to 12mm. He informed Mr Haertwig of this, and that it would give rise to an increase in the quotation, but was advised to go ahead. 11. In the meantime, a dispute had arisen between Pro-Fit and Deerglen over the payment of Pro-Fit's interim account covering, in the main, the work on the façade which led to Pro-Fit instructing Collect Services Limited and its lawyers to enforce its claim. Those difficulties were resolved and Pro-Fit attended on site to install the glazing in August/ September 2009. 12. Mr Boyce gave evidence of discussions he had with Mr Haertwig over the "wave effect" of the canopy from which it is clear that he misunderstood the natural effect of the design, thinking instead that Mr Haertwig was seeking to change the design to allow for the outer edge of the glazing to " zig-zag " up and down, so to speak. The bolts for fixing the glazing had not been specified by Pro-Fit and were not included in the quotation. According to Mr Boyce, Deerglen specified the use of swivel bolts, which Mr Boyce assumed was to assist in creating this wave effect. 13. The Court made a site visit and from the layman's point of view, it is difficult to see what is wrong with the glazed canopy, although on close observation it is clear that the glazing panels are not straight - there is an irregular wave pattern. However, Harcourt have withheld payment under the main contract to Deerglen because according to its email of 25 th June, 2012, " the glazing is quite odiously poorly installed as the panel edges are not running in a smooth line as per the design

criteria". 14. In its counter-claim, Deerglen plead that the glazed canopy was not executed in accordance with Deerglen's details and drawings and the glazing had been incorrectly cut. In the premises, the glazed canopy was not fit for purpose and would have to be replaced by Deerglen at a cost of some £22,345. Deerglen's expert, Mr Paul Labesse, a building surveyor, expressed the view that the canopy had been incorrectly templated, causing the wave pattern referred to. In his view this could only have been caused by the glazing being too large, causing the glazing to "kick up" where it joined. 15. Without rehearsing all of the evidence, we find that there were three problems which were causative of the matters of which Deerglen now complain. The metal beams 16. Mr Haertwig designed the beams so that they would be in two parts - one part would be amalgamated into the concrete structure of the Kiosk itself and would be adjustable and the second part would attach to the first and form the main support for the glazing. Unfortunately, when Deerglen cast the first part of the steel beam into the Kiosk, they were all inserted upside down, therefore preventing the steel beams from having the manoeuvrability which he had designed. This meant that the steel beams could not now be adjusted. In order to salvage the situation, Deerglen cut off part of the first part of the steel beams and welded the second part of the steel beams to it. The steel beams provided adequate support for the glazed canopy, but they had lost their ability to be adjusted. Furthermore the height of each beam was irregular as confirmed by the measurements taken by Mr Labesse. 17. Although we could detect an element of scepticism on the part of Deerglen at the jig used by Pro-Fit to measure the panels, none of the experts, or indeed the witnesses, came up with a better system. Mr Haertwig did say that in his view as this was "computer aided design", the panels and beams should have been fabricated from the same data thus eliminating any possible error as between the two. The beams would then have been adjusted to fit the glazing, rather than the other way round. That was not possible in this case, because the beams had already been incorrectly fitted so that Pro-Fit were forced to fit the glazing to the existing incorrectly installed beams. 18. Pro-Fit's expert, Mr A P Booth, chartered surveyor, disagrees with Mr Labesse that the irregular wave pattern discernible in the canopy today was attributable to incorrect templating. No one had actually measured the glazing so as to opine definitively on the point, but in his view it was as close a fit as could be achieved and if the glazing did "kick up" it was as a consequence of it following the construction of the beams. We preferred the evidence of Mr Booth. The parapet height 19. When making the templates, the parapet to the Kiosk had not been completed. It is not in dispute that Mr Boyce was told there would be 50 ml clearance from the beam to the roofline when Pro-Fit came to install the canopy, but in fact the parapet had been raised 90 - 110 ml. Whilst the swivel bolts allowed for an element of adjustment, this placed them at the very outer range of their capability. Lack of supervision 20. This was a very small part of Deerglen's contract. It did not come under the auspices of the architects engaged on the project, namely Axis Mason. Mr Haertwig's role vis-à-vis Deerglen ended with the preparation of the drawings and he had no further contractual responsibility in the matter. 21. Mr Parr had told Mr Boyce that if he had any questions about the drawings he should ask Mr Haertwig, who was on site attending to other matters from time to time. Without knowledge of the internal arrangements between Mr Haertwig

and Deerglen , it was reasonable, in our view, for Mr Boyce to regard Mr Haertwig as the architect for the project and as having " apparent authority" to act on behalf of Deerglen (see Bowstead and Reynolds on Agency 18 th Edition at 8-021). 22. In his statement, Mr Parr said that he was project managing the Kiosk. In evidence, he told us that he was not supervising the work of the Kiosk; that, he said, was the task of the site foreman, Mr Caspers . Mr Haertwig informed us, however, that Mr Caspers had left the site before this work was done. 23. Mr Parr was very critical of the methods used by Mr Boyce, which he said he observed daily from his window; he said he had advised Mr Boyce to put all of the templates up on the beams together and that if this had been done, and the templates measured more accurately, there would have been no problem. Mr Boyce, he said, refused to do so and he had no power to instruct him to do so. 24. Mr Haertwig had repeatedly warned Mr Parr about his concerns over the technical ability of Mr Boyce to carry out this work. Indeed, he told us that this whole sub contract was "an unhappy circumstance", with a design which was too complex for the amount of money that Harcourt wanted to spend. He said it was " an impossible exercise" because it had been designed in three dimensions by computer and the glazing and beams should have been fabricated using the same data. 25. Mr Boyce told us that he thought he had erected all of the templates in one piece, but he denied being advised by Mr Parr or by anyone else to do so or refusing to do so. We accept his evidence. Furthermore, we do not accept that Mr Parr had no authority to instruct Mr Boyce to do so. 26. This was therefore a very small but technically complex sub contract undertaken by a sub-contractor for whom Mr Parr was aware this was its first commercial contract and we find that no supervision was provided at all. Decision 27. We conclude that the defects of which Deerglen complains are attributable to these three factors. Fundamentally, it is unreasonable for Deerglen to ask a sub-contractor to carry out a very technical piece of work on the basis of drawings produced by it and then to fail to comply with those drawings itself by erecting unadjustable steel beams of irregular height, creating a defective base upon which the canopy was to rest. In our view, any architect supervising that work would have required the metal beams to be installed in the manner shown so that they were adjustable as originally designed by Mr Haertwig . Pro-Fit would not have been incorrectly informed as to the height of the parapet when making the templates and its work would have been properly supervised. The defects that now exist are attributable to these factors and not to any breach of contract or lack of skill on the part of Pro-Fit. 28. As to the canopy being fit for purpose, we were given no authority on the meaning of that phrase. This contract was entered into before the Supply of Goods and Services (Jersey)(Law) 2009 came into force and so the provisions of that Law have no application to it. In our view, the glazed canopy does carry out the purpose of sheltering people below from rain and directing that rain on to the "green" roof. To the extent that the natural wave designed by Mr Haertwig has not been achieved, that is through no fault on the part of Pro-fit; it is attributable to the factors we have set out above. 29. Finally, we accept Mr Boyce's evidence in relation to the need to order larger and therefore thicker glazing panels and we therefore grant Pro-fit judgment in the sum of £20,093 together with interest on that sum at the court rate and dismiss the counter-claim. We will need to hear from counsel as to the date from which interest should

begin to run and on the issue of costs. Authorities Bowstead and Reynolds on Agency 18th Edition. Supply of Goods and Services (Jersey)(Law) 2009. Page Last Updated: 14 Aug 2015
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Prepared on 24 October 2026 · Esheria