IN THE HIGH COURT OF NEW ZEALAND 4/6
NAPIER REGISTRY

CP114/91

BETWEEN COLERAINE HOLDINGS LIMITED (formerly known as NAPIER CITY GYM LIMITED

Plaintiff

A N D HARVEY FULTON & LONG

Defendant

Hearing: 19-21 May 1993

Counsel: M.A. Courtney with J.G. Krebs for Plaintiff
Mrs P.J. Andrews with A.M. Stevens for Defendant

Judgment: 31 May, 1993

JUDGMENT OF ELLIS J.

The plaintiff took out replacement insurance for its three storey building in Napier on 20 December 1989. Its broker obtained a valuation for this purpose from Mr O'Dwyer of the defendant firm. He was an experienced public valuer. The building burned down on 1 April 1990. The insurance monies were insufficient to reinstate the building. The plaintiff blames Mr O'Dwyer and alleges he negligently underestimated the reinstatement value. The plaintiff claims to recover its losses.

The Relevant History

Mr O'Dwyer's valuation certificate was sought with urgency. Mr O'Dwyer had already valued the property for other purposes. His certificate was provided to cover an insurance period of 17 months from 20 December 1989 to 31 May 1991 and stated:

> "B. REINSTATEMENT ESTIMATE
> The estimated cost of rebuilding the property at the level of costs applying at the inception of the current period of insurance ignoring the inflationary factors which may operate subsequent thereto including the use of currently equivalent building materials & techniques & such additional costs as necessary to comply with any Act of Parliament or any Regulation under or framed in pursuance of any such Act or with By-Laws of any Municipal or Local Authority (inclusive of all fees). $488,200
> Note (i) If the reinstatement estimate is based upon the use of different materials and/or additional services from those existing, briefly describe them.....
> Note (ii) By what amounts do the considerations referred to in Note (i) increase the Reinstatement Cost? $_____
> Note (iii) Are there any Regulations preventing reinstatement wholly or in part? If so give brief details .....
>
> C. DEMOLITION
> What is the estimated amount required to cover the cost of any Demolition Shoring up or Propping of the building damaged or destroyed and the Removal of Debris including Contents whether damaged or not. $ 29,100
>
> D. INFLATIONARY PROVISION
> (i) Indemnity (as defined in A above)
> The estimated amount of inflation in "Indemnity Value" anticipated during the period of insurance only is ..... $ 31,600
> (ii) Reinstatement (as defined in B above)
> The estimated amount of inflation in costs anticipated **during both the period of insurance and the estimated reinstatement period** taking into consideration time required for damage inspections, demolition, preparation of new

preliminary proposals and their approval, preparation of work drawings and specifications, schedule of quantities, obtaining City Council approval tenders etc.
is ..... $ 97,900

Estimates under B, C and D are given without prejudice and all items including A are on the basis that this is not a structural survey."

The critical figure is the reinstatement estimate of $488,200.

The building comprised two discreet and uninterconnected parts. The property had frontages to Tennyson and Carlyle Streets. Principal entry was from Carlyle Street and provided for eleven carparks with level or near level entry to the ground floor which was untenanted. The ground floor comprised 490m^2 and included a carpeted office and ablution facilities. This area had no internal connecting stairway with the upper floors. However it seems that some time before there had been internal stairs which had been removed and the gap in the dividing floor covered over but not in such a way as to create a separate fire compartment.

Access to the first and second floor was from the carpark by external staircase to the first floor, thence by internal staircase to the third or mezzanine floor. The two upper floors had secondary access from Tennyson Street with which the first floor was roughly level. The first floor was of 504m^2 and the mezzanine of 247m^2. These were occupied by the plaintiff and recently set up as a gymnasium at considerable expense and effort. Its improvements included saunas, mirrors, and glued carpet floor covering. The mezzanine floor was of

timber construction with a rimu floor. The first floor was also surfaced with rimu.

As it has turned out, the building could not be exactly duplicated because the applicable standards required the mezzanine floor to be concrete and this would involve strengthening its supports. Further the plaintiffs advisers thought a lift was necessary. As there were insufficient funds from the insurance to meet these extra costs, the plaintiff built a two storey building comprising a ground floor and a mezzanine totalling 1010m^2. This building effectively replaced the top two floors of the old building with an extra 273m^2. (The old building had a total area on three floors of 1242m^2).

The expert valuers called by the parties reached a substantial degree of agreement. However the assessment of the "reinstatement estimate" could not be agreed. Mr Plested estimated $636,200 and Mr Simkin $566,400. Each selected the appropriate building "modal" and applied multipliers he considered appropriate to calculate the cost of replacing each floor separately. Mr Simkin however separately calculated the cost of the basic structure and the cost of furbishing. The selecting of multiples is a matter of judgment. The only true measure would be the actual cost. The assistance of a quantity surveyor operating on actual plans could be a useful and more accurate guide. Mr Eddy gave evidence as a quantity surveyor. However he had surveyed the original plans and the plans of the plaintiff's upgrading and modification. He added to these the requirements that the mezzanine floor had to be concrete, and that a lift was needed. The parties agree that the cost of a lift was $100,000 as at September 1990 when it would have been installed.

Mr Eddy included $9,000 for glued carpets, and calculated rimu flooring to cover 742m^2 would cost $53,205 (or at least this can be calculated from his figures). So his comparative figure would be (albeit nine months later) $741,300. It was suggested the figure in December 1989 would be $703,000.

Mr O'Dwyer, supported by his former partner Mr Harvey, maintained that his estimate was a careful and accurate one employing the same techniques. As to the requirement of a lift, Mr O'Dwyer knew of the code and enquired of Mr Redman, an architectural draughtsman of considerable experience, whether a lift would be required. Mr Redman said he considered the code requirements NZ Standard 4125:1985 with which he was already familiar. He said he telephoned Mr Hales, the Napier City Engineer, and he confirmed that no lift would be required. While Mr Hales had no memory of this telephone conversation, he confirmed his view was then that no lift would have been required.

As to the requirement that the mezzanine floor be concrete, Mr O'Dwyer stated that he had proceeded on the basis of a wooden replacement, but made a generous allowance in selecting his multiplier which would have covered the cost of a concrete floor with a particle board floor laid on top.

Some argument was addressed as to the replacement value of the improvements affected by the plaintiff when it set up the top two stories as a gymnasium. Mr Hilterscheid said it cost about $150,000 and that was conservative as his own labour was included at only $10 per hour. Mr Eddy preferred to allow a round $100,000 on top

of interior finnishings which he allowed for separately. Mr Plested included it in fixing his multiplier for each floor. Mr Simkin used a separate multiplier for each floor. Mr O'Dwyer was well aware of the improvements from his previous inspections and he too included them in his valuation.

The Lift

The plaintiffs argument is that a lift is necessary to comply with the Disabled Persons Community Welfare Act 1975. Section 25 required that in new buildings to which the public are to be admitted, or major reconstruction of existing ones; the:

> "means of access both to and within the building or premises, and in the parking facilities and sanitary conveniences to be available (if any), ensure that reasonable and adequate provision is made for disabled persons who may be expected to visit or work in the building or premises to enter and carry out normal activities and processes therein".

Section 25 further declared that NZ Standard Specification 4121 should be deemed a reasonable and adequate provision in terms of the requirement. The obligation to provide such is on the owner and the local authority.

The appropriate parts of NZSS 4121 are:

> **"LIFTS**
> **304.1**
> Lifts complying with section 209 shall be installed provided that in the case of a two-storey building where the gross floor area of the upper floor is less than 400 metres squared, or a three-storey building where the gross aggregate floor area of the upper floors is less than 500 metres squared, a lift need not be provided if the ground floor complies with the requirements of

this Standard and the upper floors have access for the ambulant disabled".

The argument proceeds on whether the ground floor and the upper two are to be considered separately because they in fact were separate units with no internal connection. Each could have its own level access from the street, the ground floor to the carpark and Carlyle Street, and the first floor to Tennyson Street. The mezzanine floor would have a gross floor area of less than 400 m^2 and would have access for the ambulant disabled. The building would, it was submitted for the defendants, thus plainly comply with the spirit of the specification and so the Act. The specification is not absolute in its application in any event. For these reasons I have no difficulty in understanding Mr Hales' opinion that a lift was not necessary.

However the plaintiff's evidence was that its experts had consulted City officials and concluded when setting about rebuilding, that a lift was necessary. At best the evidence was hearsay and I am satisfied that up to the day of giving evidence Mr Hales always thought a lift was not necessary and so would not have said it was. However when it was put to him that the spirit of the Act and Standard Specification was that the disabled should not be disadvantaged in the matter of access, he had to concede that a disabled person parking in the carpark would have to travel some distance by footpath to reach a level access off Tennyson Street. On this basis he was inclined to agree that a lift would have been required.

My reading of s25 as then enacted, is not to impose standards creating complete equality of access for the disabled: the mezzanine exception is an example. The wording is flexible requiring "reasonable and adequate" provision. Further, NZSS4121 is not an absolute requirement. I understand that in cases of doubt, the matter may be referred to the Director-General of Social Welfare for dispensation. I was not referred to any statutory or regulatory authority for that.

In my view a valuer in Mr O'Dwyer's position, asked for an urgent estimate, and knowing of the possibility that a lift would be required, should have looked at the Standard and the Act and if in doubt enquired of Mr Hales. He was told of Mr Hales' opinion, and relied on Mr Redman's knowledge of the Standard Specification. It would have been wise for Mr O'Dwyer to have stated that he was concerned to know whether a lift would have been required and relied on Mr Hales' opinion that it was not. I think if he had done so the plaintiff and its broker would have relied on Mr Hales' opinion too and so would not have enquired further. Again in hindsight the requirement of a lift is not a straightforward one. It may be that on a proper construction of the Act and Standard Specification, and a consideration of any flexibility ano dispensation that may be possible, the conclusion would be that a lift is not required.

However, applying the standard of care I will shortly discuss, I consider a prudent valuer placed in Mr O'Dwyer's position, knowing what he did, should have alerted the plaintiff to the possibility that a lift may be required, and leave it to his client to take the matter further if it wished.

The Duty of Care

I accept that Mr O'Dwyer's obligations can be expressed in his own words:

> "In conducting a reinstatement valuation, the task is to ascertain and define how much it would cost to replace the existing premises with a building which is of the same, or if that is not possible, similar, construction, has a similar standard of appointment, and which will comply with present day building codes imposed either by Parliament or by local bodies. If the existing building complies with the building codes then the reinstatement valuation relates to an exact replacement of the existing building. If the building does not comply then the reinstatement estimate must take into account the additional cost of rebuilding in accordance with the codes, but must otherwise reflect the cost of simply replacing the existing building. Such an approach has nothing to do with the market value or utility of the property, or the rental which such a property might obtain. It is an estimate of the current in-place cost of replacement. Depreciation is not relevant and is only taken into account with respect to the indemnity value as opposed to the reinstatement estimate."

He is only required to make an estimate, but in doing so he must exercise reasonable care and skill. In a situation such as this I accept the evidence that the estimate should tend to be at a higher rather than a conservative figure, as future costs are subject to influences that cannot be predicted with certainty and it is common experience that things, and buildings, seem always to cost more than one expects. Anyone who has built a house knows that. In recent years inflation has been a prime cause of such uncertainty and it is expressly allowed for separately in the certificate.

On the other hand, the estimate is constrained by the terms of the certificate and is not expressed to make allowance for contingencies and risks. While to overinsure may be desirable in one sense, it increases the premium. The insurance broker and client should turn their minds to that after receiving the valuer's estimate.

Further I accept, as correctly setting out the test, the passage from the judgment of Watkins J. in Singer & Friedlander Ltd v. John D. Wood & Co (1977) 243 EG 569 at page 574:

> "The valuation of land by trained, competent and careful professional men is a task which rarely, if ever, admits of precise conclusion. Often beyond certain well-founded facts so many imponderables confront the valuer that he is obliged to proceed on the basis of assumptions. Therefore, he cannot be faulted for achieving a result which does not admit of some degree of error. Thus, two able and experienced men, each confronted with the same task, might come to different conclusions without any one being justified in saying that either of them has lacked competence and reasonable care, still less integrity, in doing his work. The permissible margin of error is said by Mr Dean, and agreed by Mr Ross, to be generally 10 per cent either side of a figure which can be said to be the right figure, ie so I am informed, not a figure which later, with hindsight, proves to be right but which at the time of valuation is the figure which a competent, careful and experienced valuer arrives at after making all the necessary inquiries and paying proper regard to the then state of the market. In exceptional circumstances the permissible margin, they say, could be extended to about 15 per cent, or a little more, either way. Any valuation falling outside what I shall call the 'bracket' brings into question the competence of the valuer and the sort of care he gave to the task of valuation."

Statements of principle to the same effect were referred to by counsel: Professional Negligence (Dugdale and others 1992) para 17.44, and Jackson & Powell on Professional Negligence 3rd ed (1992) pp218, 219.

The comparable estimates given in evidence are therefore:

Mr O'Dwyer	$488,200
Mr Simkin	$566,400
Mr Plested	$636,200
Mr Eddy	$703,000

Each of the three valuers used the same building modal (the cost of a basic house expressed as a cost per m^2). Each then assessed the appropriate multiplier for his purpose.

Plainly the use of multiples of the building modal involves a subjective element and produces widely differing results. For example there is $148,000 between the O'Dwyer and Plested valuations or 23%. This must cast real doubt on the reliability of the technique. After hearing all the evidence I am satisfied that for the purpose of an estimate of reinstatement Mr O'Dwyer should have arrived at a figure of at least $80,000 more than he did, namely a figure in the order of that arrived at by Mr Simkin. I would have no criticism of Mr Plested's figure because I think it is wise and acceptable to make a generous estimate. I bear in mind that Mr O'Dwyer was asked for urgency, but he did know the building, and the standard and extent of the recent new work. He was criticised in some detail on such matters as the mezzanine floor, saunas and mirrors, carpets, and rimu flooring. His valuation is explained by his choice of multipliers. These were too low and in my view his choice fell below the standard of care required of a professional valuer. He would have met that standard if he had estimated a figure $80,000 higher or more. Mr

Simkin, the valuer called for the defence, agreed that to value below his own estimate would be risky.

I should make a further reference to Mr Eddy's survey. He was considering old plans and not modern ones. The evidence indicates that more modern building techniques would be cheaper. I think his figures confirm Mr Plested's assessment, which I would hold to be an acceptable estimate. However, I am to decide upon the lowest figure that Mr O'Dwyer could fix exercising a reasonable standard of care and judgment. Put another way, if a median is taken between Mr Simkin and Mr Plested, a figure of $601,300 is derived and the two figures differ from this by plus or minus 5.8%, which is an acceptable variation. Mr Simkin's value is nearly 11% less than Mr Plested's and I was told a variation of 5 to 10% was agreed by valuers as acceptable. This confirms my conclusion that Mr Simkin and Mr Plested are at the lower and upper end of an acceptable variation in valuation. The test of care is not to require Mr O'Dwyer to value at the middle of the range, but to bring himself within the acceptable range of valuation.

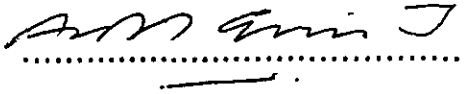
For completeness I refer to the inclusion by Mr Plested and Mr Eddy of a sum to cover a rimu floor, whereas Mr Simkin allowed for chipboard. As to the rimu floor, the evidence was that it was unobtainable and that chipboard was appropriate to the plaintiff's use. I consider that some flexibility of approach is realistic. I have borne this in mind and the controversial items of glued carpet and standard of fit out in arriving at my conclusion of an overall discrepancy of $80,000.

Conclusion

I conclude therefore that a prudent valuer in Mr O'Dwyer's position should have drawn attention to the possibility of a lift being required and that he had not included it, relying on Mr Hales' advice. Further he should have estimated the cost of replacement at not less than $568,200. I further conclude that on balance if Mr O'Dwyer had drawn attention to the lift, it is likely that the plaintiff and its broker would have relied on Mr Hales too and not increased the cover. As a result the plaintiff has succeeded in establishing a negligent underestimate which I have quantified.

The Loss

By consent the quantification of this is adjourned for further evidence and consideration. The parties are agreed on certain aspects of valuation which I need not record. The measure of damages will be that required to put the plaintiff in the position it would have been in had the estimate been $568,200. If the matter cannot be settled, the hearing should resume. The plaintiff is entitled to costs and the quantum of these is reserved.



Solicitors:

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A N D HARVEY FULTON & LONG

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