CITATION: *Thurlow & Innocenzi v The Architects Studio* [2007] NTMC 062

PARTIES:	ANDREW THURLOW AND SUZANNE INNOCENZI v THE ARCHITECTS STUDIO PTY LTD (A.C.N. 074 200 758)
TITLE OF COURT:	Local Court
JURISDICTION:	Local Court
FILE NO(s):	20307071
DELIVERED ON:	17th September 2007
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JUDGMENT OF:	Relieving Magistrate Fong Lim

CATCHWORDS:

Practice and procedure – pleadings – cause of action outside of pleadings

Negligence – professional negligence – architects duties – remoteness of damages

REPRESENTATION:

Counsel:

Plaintiff:	Ms Gearin
Defendant:	Ms Kelly

Solicitors:

Plaintiff:	Withnalls
Defendant:	Cridlands

Judgment category classification:	C
Judgment ID number:	[2007] NTMC 062
Number of paragraphs:	102

IN THE LOCAL COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20307071

[2007] NTMC 062

BETWEEN:

ANDREW THURLOW
Plaintiff

SUZANNE INNOCENZI
Second Plaintiff

AND:

THE ARCHITECT STUDIO PTY LTD
Defendant

REASONS FOR DECISION

(Delivered 17th September 2007)

Ms FONG LIM RSM:

1. The Plaintiffs commenced an action against the Defendant for breach of contract and negligent breach of duty of care. The matter was heard by Her Honour Ms Blokland CM in February 2005 with her judgment being delivered on the 21st of July 2005. Her Honour found in favour of the Plaintiffs on the basis of breach of contract. The Defendant appealed Her Honour's decision and His Honour Justice Angel found the hearing had miscarried on the basis of a pleadings issue and overturned Her Honour's decision. His Honour then referred the matter back to this court for a determination on the Plaintiff's claim in negligence. His Honour's decision was appealed to the Court of Appeal and was upheld on the 22nd September 2006 and the Plaintiff's claim in negligence was remitted to this court for determination.

2. **Facts**- The Plaintiffs and the Defendant were parties to a contract in relation to architectural services where the Defendant supplied architectural services to the Plaintiffs for the design and supervision of the construction of their house. It is agreed between the parties that the contract was a result of oral discussions between the parties culminating a written offer by the Defendant to provide architectural services to the Plaintiffs (see exhibit P2 letter of 9th January 2001) and an acceptance of that offer by the Defendant, which written acceptance could not be produced. It is agreed that there was some discussion about a budget of $250000.00 and Her Honour made some findings regarding that budget and that will be discussed in more detail later in this judgement.

3. It is further agreed that the fee offer incorporated a brochure entitled “You and Your architect”. The Defendant drew sketch plans as per the Plaintiffs indications of what they wanted in their house, the “wish list” and there was, as with any design project, discussions between the parties about what was required and what not to include in the design over a period of time. The Defendant recommended a cost estimate be obtained from Rawlinsons and when that estimate came in at the Plaintiffs’ indicated budget (see P7), plans were drawn up and sent out to tender. The tenders came in with the cost of construction double the budget indicated and the Defendant could not offer an explanation as to why this had happened and from then on there was a lot more redrawing of plans, cost estimates and tenders from builders etc. Finally the Plaintiff became so dissatisfied with the final design which was costed and decided not to build the house as designed by the Defendant. The Plaintiff then commenced an action for the recovery of all the fees paid by them to the Defendant and various agents and authorities on the basis that they received no value for those fees because they ended up with a design that didn’t meet their requirements.

4. **The Pleadings** – It is important in this matter to set out the pleadings in relation to the negligence claim. The duty of care alleged by the Plaintiff was set out in paragraph 4 of the Amended Statement of Claim:

> (a) to provide a service in a professional and timely manner
>
> (b) to inform the plaintiffs' regularly and seek instruction as to any design and/or design modifications
>
> (c) to inform the plaintiffs before tendering documentation of the probability of failing to comply with budget estimates
>
> (d) to design a house with the express budget estimate provided by the plaintiffs to the defendant
>
> (e) to design a house in accordance with the plaintiff's instructions.

5. The Defendant accepted that they owed a duty of care to Plaintiff but described that duty of care as:

> (a) to provide its services in a professional and timely manner
>
> (b) to inform the plaintiffs regularly and seek instructions as to any design and /or modifications; and
>
> (c) to ensure that relevant building and constructions codes or regulations applicable to the building were complied with.

6. The breaches of the duty of care pleaded by the Defendant was contained in paragraph 15 of the Statement of Claim as follows:

- Failure to provide a serve to the plaintiffs in a timely manner.
- Failure to inform the plaintiffs regularly and seek instructions as to design modifications.
- Failure to inform the plaintiffs before tender documentation of the probability of failing to comply with the budget estimate.
- Failing to design a house within the express budget estimate

- Failure to amend design to meet the budget specifications having knowledge from the Rawlinsons Group Pty Ltd of the proposed estimate construction costs.

7. The Plaintiff's provided particulars of what they say the breach of the duty of care was and they were contained in their answers to questions 53 ,55 and 58 of the request for particulars that is that:

> "A53 the schematic design was prepared by the defendant pursuant to the defendant's expertise and professional skill for the plaintiff pursuant to the contract. The schematic design was purportedly within budget restriction, however not able to be engineered and contracted in accordance with the schematic design. Specifications and scope.
>
> A55 The plans, specification and documentation was tendered and tender results obtained based on documentation necessary for the schematic design, prepared by the defendant was between $162,500 and $280,297 in excess of the plaintiff's required and stipulated budget, a term of the contract.
>
> A58 The defendant failed to prepare and design a home pursuant to the plaintiff's instructions including schematic design and documentation with revised proposed design meeting the plaintiff's budget, the tender result of 29 September 2001 confirming the same."

8. The Defendant also claims that if the Plaintiff suffered any loss or damage arising out of any breach of the duty of care the Plaintiff contributed to that loss by:

   (a) the plaintiffs failed to instruct the defendant at any time that $250,000.00 was an absolute maximum upper limit of expenditure for the building of the proposed house.

   (b) The plaintiffs gave repeated instructions to the defendant for alterations to be made to the design of the proposed house which involved cost increases.

   (c) The plaintiffs failed to respond to requests for instruction form the defendant in a timely fashion.

   (d) The plaintiffs instructed the defendant not to proceed with the proposed house project at a time when negotiations with the lowest tenderer, Lassitude Pty Ltd, were still to be conducted.

(e) The plaintiffs failed to proceed with the lowest tenderer when there was an opportunity to finalise a building contract for a price of no more than $250000.00 before 31 December 2001".

9. It is clear that not all duties have been alleged to be breached for example there is no suggestion that the Defendant designed a house outside of building codes and regulations.

10. The main issues between the parties are whether there was an express budget and whether the services provided by the defendant were done in a professional and timely matter. Of course consequential to all of that, whether the Plaintiff has suffered any loss arising out of any breach of duty.

11. The present hearing was conducted on the papers with both parties accepting that the evidence as recorded by the transcript is the only evidence that should be before the court given the terms of the matter being remitted. The parties also agreed that apart from the finding that the Plaintiff's wish list was a part of the contract the findings of facts made by Her Honour Ms Blokland were not to be challenged.

12. **The Pleadings issue -** The submissions of the Defendant brought before the court an issue on the pleadings which must logically be decided before considering the merits of any claim for negligence. The Plaintiffs claim that the Defendant's negligence is manifested in a negligent misstatement that they could design a house for the Plaintiffs for $250000.00 inclusive of GST. The Defendant's written submissions were all based on a claim for negligent misstatement and the Plaintiffs' reliance on that negligent misstatement.

13. The Defendant's clear submission is that the Plaintiff has not pleaded negligent misstatement and therefore cannot seek to rely on that basis for a claim in negligence against the Defendant.

14. The law on the purpose of pleadings and the restriction they place on the evidence called by the parties is very clear and was explored by His Honour

Justice Angel and the Court of Appeal in this present matter relating to the contract claim of the Plaintiff. At paragraph 16 of his judgement , [2006] NTSC 25, his honour quoted a passage from the High Court decision in B*anque Commerciale SA in liqudation v Akhil Holidngs Ltd (1990)169CLR 279 at 286-289:*

> " The function of pleadings is to state with sufficient clarity the case that must be met. In this way, pleadings serve to ensure the basic requirement of procedural fairness that a party should have the opportunity of meeting the case against him or her and, incidentally, to define the issues for decision. The rule that, in general, relief is confined to that available on the pleadings secures a party's right to the basic requirement of procedural fairness. Accordingly, the circumstances in which a case may be decided on that basic difference from that disclosed by the pleadings are limited to those in which the parties have deliberately chosen some different basis for the determination of their respective right and liabilities."

15. Generally speaking the court should not allow evidence in or decide issues not pleaded if the parties have not been given the opportunity to answer those issues and put evidence to the contrary at hearing. If a cause of action or allegation fundamental to the dispute between the parties is raised for the first time at hearing then the court should not allow evidence of that allegation over the objection of the other party unless that party is not caught by surprise.

16. The requirement that pleadings establish clearly what the issues are before the court goes to the fairness of any hearing.

17. In the present matter the Plaintiffs' claim in contract failed on appeal in the Supreme Court and the Court of Appeal on the basis that Her Honour allowed the Plaintiffs to call evidence of the inclusion of a "wish list" into the terms of the contract when that "wish list" had not been pleaded to be part of the contract and the admittance of that evidence was over the objection of the Defendant. The Plaintiffs' must now be well aware of the

importance of pleadings and the need to ensure they alert the Defendant to all issues to be raised at hearing.

18. There is no specific pleading of negligent misstatement contained in the Plaintiffs' statement of claim or in the particulars provided. When the issue was raised with counsel for the Plaintiff she was of the view that the pleadings did not have to plead the actual misstatement and that it was enough for the Plaintiffs to plead the duty of care and the breach of that duty of care. Counsel suggested that the evidence of the misstatement was clear in the evidence in chief of Ms Innocenzi that is, she was told by Mr McNamara, a representative of the Defendant, that having received her "wish list" he thought designing a house within the $250,000.00 budget was achievable. Counsel suggested that with the evidence so clear the Defendant had notice of the claim and that was no surprise to the Defendant.

19. I do not agree with the Plaintiffs' counsel on that point, negligent misstatement is a specific form of negligence and if it is to be raised it must be raised specifically on the pleadings to allow the Defendant the opportunity to turn its mind to how to present its evidence in answer to that allegation. The Plaintiff should have pleaded a breach of the duty of care by the defendant by way of negligent misstatement and should have pleaded what the terms of that statement or representation. Counsel for the Plaintiffs stated in her submissions that the misstatement made by the Defendant was that they could design a house for the Plaintiffs within their budget and in a timely fashion. Making that claim and failing to do so should have been pleaded as part of the breach of the duty of care it was not.

20. It should also be noted in His Honour Justice Angel's decision he turns his mind to the issue of misrepresentation and at paragraph 13 he states:

> "Significantly the respondent pleaded no misrepresentation claim against the Defendant."

21. The inevitable conclusion I must come to in relation to any claim for negligent misstatement is that it is outside the Plaintiffs' pleadings and it would not be fair for this court to rule on that claim because the Defendant has not had opportunity to answer that allegation in evidence. On that basis I disregard any submissions made in relation to negligent misstatement and will not be making a ruling in relation to that form of negligence.

22. That is not the end of the Plaintiffs' case, the pleadings still seek to establish as breach of a duty of care as specified in the Statement of Claim and it is for this court to examine the evidence and decide if the Plaintiff has been successful in that task.

23. This court now has to determine what was the Defendant's duty of care in relation to this particular Plaintiff.

24. To establish the Defendant's duty of care it is necessary to look at the facts established about the relationship between the Plaintiffs and the Defendant.

25. It is agreed that the Defendant was to provide to the Plaintiffs architectural services in relation to the design and construction of their new home. The agreement is evidenced in the Defendant's letter to the Plaintiffs of the 9th of January 2001. There was a proposed timetable set for the design and construction of the house and discussion about a budget. It is also agreed that architectural services were provided to the Plaintiffs but the house as designed was not constructed at the Plaintiffs' option.

26. **The Budget -** The issue of the budget was a vexed issue in the contract case. Her Honour found that it was a term of the contract that the Defendant design a house for the within a budget of $250,000.00. That ruling was overruled by His Honour Justice Angel at paragraph 17 of his decision:

> " The learned Magistrate found that it was tem of the contract that the defendant design a home within the plaintiff's budget of $250,000.00, that is for that sum of less. <u>There was no evidence to support that finding. Indeed it flies in the face of all of the evidence</u>

(my emphasis) The learned Magistrate expressly rejected a finding that the budget was "in the order of " $250,000.00, even thought that was the uncontested evidence of both Mr MacNamara for the Appellant and the Respondent Innocenzi. The witnesses variously spoke of "around', "approximately" , "in the order of " the sum of $250,000.00. The Respondent Innocenzi specifically gave evidence that $250,000.00 was not a maximum budget and that upon receiving a costing of $257,000.00 for the main part of the house she requested additional changes that added – albiet slightly – to that cost."

27. It was agreed by the parties and this court's ruling that the terms of the remittance of this matter to this court bound this court by the evidence given on the previous occasion and that any findings of fact made by Her Honour should stand. Of course it must follow that any findings of fact that Her Honour made that have been overturned by the appeal court must not stand.

28. The Plaintiffs' counsel submitted that His Honour's ruling only related to the finding that the budget of $250,000.00 related to the contract only and she bases her submission on the following paragraph of His Honour's decision where he says:

> "Exhibits P1 and P2 when read together do not contain any contractual term that the appellant promised to design a house incorporating all the features on the wish list could be built for $250,000.00 or less. Yet the learned Magistrate apparently reached that conclusion."

29. I do not accept the Plaintiffs' submission on this point. It is clear from His Honour's comments in paragraph 17 that he was of the view that the evidence did not support a finding that there was a budget of $250,000.0 or less at all. Having read the transcript of the evidence of Ms Innocenzi and Mr MacNamara I have confirmed for myself that the evidence did not support the finding that there was a budget of $250,000.0 or less in any circumstance whether in contract or otherwise. It would be ridiculous to read down His Honour's ruling in any other way.

30. Consequentially the finding of fact by Her Honour in relation to a $250,000.00 or less budget does not stand. Instead I find the evidence

supports a finding that the Plaintiffs' budget was for around $250,000.00. This is of course a finding of significance given that three of the breaches of duty of care are in reference to the "budget estimate".

31. The evidence is that by October of 2001 the Defendant had designed a house for the Plaintiff which had been tendered at $274,000.00 by Lassitude Pty Ltd but that was not satisfactory to the Plaintiffs and they terminated their relationship with the Defendant.

32. The issue to be decided is whether there was a duty "to design a house within the express budget estimate provided by the plaintiffs to the defendant."

33. In the case in contract the parties agreed that the document entitled "You and Your architect" was part of the contract and it is certainly an indication of the industry's view of what should be expected of an architect.

34. The publication " You and Your architect is produced by the Royal Institute of Architects and is referred to by Mr Petrie, the expert architect who gave evidence in these proceedings. Mr Petrie also referred to Practice Notes prepared by the Institute which provide instructions to its members as to what is expected of them regarding certain issues.

35. In "You and your architect" there are several references which support a duty of the architect to ensure a project stays within budgetary constraints. At page 6 in the "Your architect's role in the building process" the text reads:

> "Throughout the project, your architect will control the design, planning and quality of workmanship and materials to meet time and budgetary constraints."

36. Further on in the publication it states:

> " From the outset , your architect will discuss and determine a project budget with you. During these discussions you should be very

specific as to whether this budget includes professional fees, for example for your architect and/or other specialist consultants, or is related only to the actual cost of the works."

37. Practice Note 3 specifically refers to an "Architects Estimate"

> " The estimate of costs of construction will normally be the largest component in the project budget. Getting the estimate right and managing the cost effects of change are the two most critical elements in successful management of a project budget."
>
> And later:
>
> "If the client requires more comprehensive estimating services, then a quantity surveyor should be engaged or authorisation should be given to the architect to engage a quantity surveyor on the clients behalf.
>
> Nevertheless, if a cost limit is stated by the client, then it is part of the architect's and client's interest to establish a costs budget as early as possible, to avoid wasted time and effort. Where this is not feasible the architect should notify the client accordingly."

38. Then under the heading "The Budget" the practice note states:

> " A client usually state the cost budget in one of the following two ways:
>
> (a) An approximate cost for the project, in which case the architect should aim at this figure.....
>
> (b) A maximum cost, in which case the architect should aim at a figure less than this be a reasonable margin. In the case of the stated cost limit, the figure given should be reconciled by the architect with the client's requirements as soon as possible to prove its feasibility..."

39. The Plaintiff referred the court to extracts of the judgment of the English Court of Appeal in *Nye Saunders & Partners (a Firm) v Alan E Bristow* [1987] Building Law Reports 97 in which the court found that the firm of architects were negligent in not advising the client the effect inflation might have on the cost estimate given. His Honour Stephen Brown LJ succinctly found that:

> "The parties accept that in undertaking to provided such an approximate estimate, Mr Nye was placing himself in a position where he was under a duty to take due care, reasonable care, in making his estimate, because it was made clear to him that Mr Bristow wished to have it in order to consider whether he might go ahead with his plans."

40. His Honour went on to say:

> " …in light of the figures relating to inflation set out earlier I would find that the disclosure of the risk of inflation upon the cost of the proposals was so obviously necessary to enable the client to make an informed decision that no reasonably prudent architect would fail to make it."

41. In *Nemer v Whitford [1983] 33 SASR 208* the Full Court of the South Australian Supreme Court summed up the duty of the architect in relation to budget estimates and the evidence that might be used to establish whether the architect has fulfilled that duty:

> "In order for an architect to recover his fee, the architect must have produced a design, which in his opinion genuinely arrived at by the exercise of proper care and skill, was capable of being constructed within or at approximately the specified cost. Evidence of the fact that the design proved to be incapable of being constructed within or at approximately the specified cost is admissible, but not conclusive, evidence on the question of whether the design was produced by the architect being of the requisite opinion genuinely arrived at by the exercise of proper care and skill (emphasis is mine). The extent of the difference between the architect's opinion and the actual cost of the construction and the presence or absence of an exculpatory explanation of the difference goes to the weight of the total evidence as to the exercise of no exercise by the architect of proper care and skill."

42. With respect I agree with His Honour in his assessment of the duty of an architect if given a budget estimate they must design a house which is in their expert opinion capable of being built within that budget.

43. Mr Petrie, an industry representative, produced at report for the present case and made comments about what a "prudent" architect should have done in relation to costing the project. On the 4th page of his report he stated that the

client's budget of $250,000.00 needed to be clarified at the beginning of the project and made a suggestion on how the Defendant could have set out the costings based on that budget. Mr Petrie then goes on to say that

> "prudent practice suggests that the schematic design should be accompanied by a cost estimate. Similarly an elemental cost analysis or cost plan should be provided at the completion of design development. Subject to the level of control applied over the design during documentation and the volatility of the market a pretender estimate may have provided significant value to both the architect and client. "

44. Mr Petrie confirms that the Defendant's suggestion to get a cost consultant, Rawlinsons, to cost the design sketch was "sound professional advice" however he then goes on to say that it may have been <u>more</u> prudent to suggest the need for the ongoing involvement of a cost consultant.

45. In his evidence in chief Mr Petrie clarifies those remarks by saying that costing is not an architect's area of expertise and the engagement of a cost consultant "allows a higher level of accuracy in accounting for estimates at the various stages of the architects concerns."

46. In cross examination Mr Petrie agreed that if a client gives an approximate budget then they should allow for a margin of 10% up or down on that figure however the architect should still work towards that figure. Mr Petrie also accepts that it is common practice for architects to give an estimate on the basis of square metres at the design sketch stage and based on his experience of the construction costs.

47. In conclusion the evidence supports a finding that there is a duty in an architect to design within a client's stated budget if it is clear that the budget is a maximum cost. The evidence also supports a finding that an architect has some leeway when the budget is in the form of an approximate cost and that is a 10% margin. In the present case it has been found by His Honour Justice Angel that the "budget" of $250000.0 was an approximate

budget and given that ruling the Defendant was required to design a house for the Plaintiffs for around $250000.00.

48. After acceptance of the brief on the 9th of January 2001 the Defendant's produced the initial design plan (P4), a second design plan (P5) and made a recommendation that the Defendant's to engage a cost consultant to cost P5. The quantity surveyors were engaged after quoting their fees to be $425.00. On the 16th February 2001 the quantity surveyors produced a costing (D3 and P7) and that cost plan priced the main house, stage 1, at $257600.00. Ms Innocenzi's evidence was that she was advised of this estimate and on the basis of that went to the bank to organise finance. Finance was organised for $250000.00 and then the Plaintiffs instructed the Defendant to proceed with the design documentation (D4).

49. Ms Innocenzi agreed in her evidence (page 50-51 of transcript) that at this stage she was happy for the design documentation to be produced and that satisfaction was evidenced in her paying the Defendant's invoice for that stage of the process (paid in March of 2001).

50. It was only after all the documentation was prepared, sent out to tender and the tenders returned that it was realised that the plans as drawn were well outside of the "budget". It is agreed by all parties that the prices by the builders on the first tenders came as a big surprise to the architect, the Plaintiffs and the quantity surveyors. There was no evidence produced either through Mr Petrie, Mr McNamara or the quantity surveyors to explain the significant difference.

51. It is accepted by both parties that after the cost plan and before the plans went out to tender there were some alterations to the plans and finishes required by the Plaintiffs however that was not established as the cause of the "blow out" evidenced in the tenders.

52. The Plaintiff's complaint is that the Defendant should have warned them that the construction would likely be well outside of the budget, that the Defendant failed to design a house within the express budget estimate, the Defendants failed to adjust the design so that it fit within the budget when they already had knowledge of Rawlinsons' construction cost estimate.

53. The difficulty with that argument is that the Plaintiffs and the Defendants were entitled to rely on the cost estimate as provided by Rawlinsons. The Defendant as an architect would be expected to have a good idea of the cost of construction arising from his experience in the market however he is not expected to have the expertise required of a quantity surveyor. Mr Petrie stated that it is prudent practice for an architect to recommend a cost consultant after the design sketch has been drawn. It is what is expected in the industry and it is what was actioned in the present case.

54. It is important at this point to note the experience level of the particular architect involved in this project, Mr Greg McNamara. The only evidence of Mr McNamara's experience was given in his cross examination and it was established that while he had been qualified for 2 years at the time of the contract his experience was one which related to extensions and renovations having only designed one house prior to the Plaintiffs house. There is an implication made by the Plaintiffs that because of his inexperience in designing houses he could not have given a considered estimate of the cost of building the house as designed. There is no evidence that supports the proposition that working the area of extensions and renovations gave a person less relevant experience in the cost of building a completely new house.

55. The evidence is that with the client's wish list in hand Mr McNamara sent fee proposal to the Plaintiffs indicating that, in the view of the company he represented, the house could be designed and constructed for that budget. The evidence of Mr McNamara is that he used a figure of $1300 per square

metre to work out roughly what the house would cost. His estimate was based on a previous dwelling he had done for about $1100 -$1200 per square metre. He apparently added $100 per square metre to allow for contingencies. There was no further elaboration on this issue. In his report, Mr Petrie suggested that given the 'wish list', and the sloping block should have registered a level of concern on behalf of the architect against the reality of building the desired house on the sloping site within budget. The suggestion being that the architect should have realised that it was unlikely the house, including those features on the wish list, could be built within budget. Mr Petrie was not asked to comment on the appropriate price per square metre that should have been used and indeed it would not have been possible to do so as he pointed out in his report that "construction rates in Darwin are unknown" to him.

56. It is a difficult task for this court to rule on whether Mr McNamara at this stage should have realised, and advised the client, that it would not be possible to build a house including those things on the wish list for the budget.

57. Even though the Court of Appeal found that the evidence of the wish list being part of the contract was outside the pleadings in contract for the purposes of the negligence claim it is important for the court to have regard to what was requested of the Defendant before it can decide what was produced by the Defendant was a breach of his duty of care or not. It is accepted that the wish list was provided to the Defendant's as part of the Plaintiffs' instructions and that it was a starting point in the design process. It is also accepted that from the first design sketch in which was produced by Mr McNamara included the features requested in the wish list. However it is not necessary for this court to find whether or not a house, including those features, could be built on that property because the Plaintiff's counsel was at pains to submit their complaint was that the Defendant had not designed "<u>a</u> house, <u>any</u> house" which could be built within the budget.

58. It is important to note at this stage that the Defendant by the end of the process designed a house which a builder had tendered at $274,000.00 however the Plaintiffs decided that they did not like the design, particularly because of the size of the rooms etc, and went elsewhere. They eventually had a house built on the block by Overlander Homes. There is no evidence of what sort of house was built and how it compared to the one designed by the Defendant particularly in floor size and finishes.

59. It is my view that on the face of it the Defendant took all necessary steps to ensure that the house designed for the Plaintiffs was within their budget. Mr McNamara used the an estimate on dollar per square metre basis, which is the method suggested by Mr Petrie, and advised that the house as per wish list would be achievable and once the design was approved went to quantity surveyors to have that design properly costed. When the quantity surveyors cost plan was produced that was discussed with the Plaintiffs, or at least Ms Innocenzi, and even though the cost plan showed the main house costed at $257600.00 the Plaintiffs instructed the Defendants to go ahead with the design documentation. The Defendant has at this point taken all steps a prudent architect would have, even though the tenders came in at double the price assessed by the architect and the quantity surveyor that is not conclusive evidence that the architect did not exercise proper care and skill in reaching his estimate.

60. Unfortunately there was little explanation by the architect for the significant difference in the cost estimate of the quantity surveyors and the tenders and a representative of Rawlinsons was not called to offer an explanation. The Defendant relied on the proposition that as architects they were not experts in the area of costing a project and they were entitled to rely on the cost consultants.

61. Given that there is a recognised profession called Quantity Surveyors it goes without saying that there are special skills are required to cost building

projects and given that the prudent architect should always recommend and involve a quantity surveyor in projects is a further indication that architects cannot be expected to be accurate in their cost estimates. It is expected however that the architect should have a fair idea of the cost of construction to be able to design a house within a client's stated budget. If the architect does not have that knowledge then it would be impossible for him to design a house with features and finishes with a budget in mind.

62. There was an attempt to explain some of the difference in the figures by a suggestion that the Plaintiffs made changes to the finishes in the cost plan and the changing of walls in the design and a suggestion by Mr McNamara in his evidence that those changes could have added approximately $30000.00 to the cost of construction.

63. Mr McNamara also gave evidence that there had been a large increase in the cost of steel about that time but conceded that would not have caused the significant increase in cost. He then added that:

> " I can't account for that major –major blow out in cost apart from that initial estimate not reflecting the – correctly the sketch plan."

64. It is my view that in answer to questions about what was provided to the quantity surveyors to make their first cost assessment Mr McNamara was not able to give a satisfactory answer. He suggested that it was up to the quantity surveyor to interpret the detail to establish a budget, he says at page 127 of the transcript:

> "Although there was in that initial sketch design there obviously isn't a lot of detail shown but I think it is the job of the cost consultant to interpret that detail into that – and that's to establish a budget."

65. He takes no responsibility for what documents were provided to the quantity surveyor and places the responsibility to accurately assess the cost of the project at the quantity surveyor's door. If an architect could abrogate all

responsibility for the cost of a project then they would not have to take any care in ensuring their designs took into account their client's stated budget and that cannot be right.

66. It is my view that an architect must exercise some level of care when accepting client's instructions to design a house within an acceptable level of cost. In the present case it is my view that the architect did exercise that level of care required at that point, he took the floor area and applied a relevant per square metre cost to that space. The architect then got a cost estimate on the initial design from the quantity surveyors, which accorded with his view and he was entitled to rely on that cost estimate. The Plaintiffs were also entitled to rely on that cost estimate. If the quantity surveyor was not satisfied with the detail provided to him at that stage he should have advised the architect accordingly. Interestingly Mr Petrie did not suggest it was unusual to ask for a cost estimate without the detailed engineering drawings.

67. Therefore up to the point of the first tender the architect had not in my view breached his duty of care to the Plaintiffs he had no knowledge that the tenders would be so high nor is there any evidence to support the claim that he should have known. While the evidence of the tenders shows that the architect was wrong in his estimate and while evidence supports the fact that the original "design proved to being incapable of being constructed within or at approximately the specified cost" (see Nemer v Whitford supra) that is not conclusive evidence that the architect did not genuinely arrive at his figures with the exercise of proper care and skill. There is no real explanation of why there was such a difference and with no evidence to show that Mr McNamara ought to have known there would be that difference the Plaintiffs have not proved their case that on the balance of probabilities he ought to have known. In his report Mr Petrie suggested that the difference could have been explained by (but not limited to) such issues as:

" – The Nominated tender period including provision for liquidated damages being too onerous,

- The proportional increase in the wet area zones of the house
- Higher was to floor ratio for the house
- Construction detailing requiring particular or prolonged construction process
- Rising prices within the construction industry
- Particular allowances for site difficulties"

68. In providing these possible explanations Mr Petrie has given an indication of the fact that there are many factors which can affect the price of construction and not all of them would necessarily be within the architects knowledge. For example how can an architect be aware of a possible premium builders may place because a particular site is difficult.

69. It was further submitted by the Plaintiffs, supported by the evidence of Mr Petrie, that the Defendant should have arranged for the cost consultant to give a pretender estimate before going to tender and had that occurred it would have been evident that the design was not able to be constructed for around $250000.00. Even if that was prudent practice it is difficult to see what loss could be associated with that failure. The Plaintiffs would still have had to pay the Defendants for drawing the plans ready for tender (otherwise the quantity surveyors would not have been able to provide a pretender estimate) and would have had to pay for the quantity surveyors for another estimate therefore spending more than they actually had given that the builders provide tenders without charging the Plaintiffs. The submission by the Defendant is that they received the information about the true cost of the project through the tender process and if they had required a pretender estimate by the quantity surveyor they would have got those figures but would have had to pay for it. I accept that submission there is no loss to the

Plaintiffs from the Defendant's failure to obtain a pretender estimate from the quantity surveyors.

70. In relation to the alleged breach of failing to design a house within the express budget estimate the evidence does not support that allegation because it is clear that when the tender was received from Lassitude Pty Ltd for $274000.00 that was within the "around the $250000.00" taking into account the 10% margin normally allowed in the industry.

71. Given the above the Plaintiffs fail to establish their case on the balance of probabilities in relation to breaches alleged referring to the budget estimate.

72. **Failure to inform regularly and seek instructions on design modifications**. It is clear from the evidence of Mr Petrie, the publication "You and Your architect" and the practice notes produced that an architect is expected to liaise very closely with the client regarding design and any design modifications. It goes without saying the architect must of course design to his client's wishes it is highly unlikely a client would leave everything entirely up to the architect. That certainly was not the case in this instance Ms Innocenzi took an avid interest in the development of the plans for her house and it is the evidence of both Ms Innocenzi and Mr McNamara that there was a lot of communication between them leading up to the first tender even though that communication was not documented (a criticism made by Mr Petrie.)

73. Once it became clear that the initial design (with some amendments by the Plaintiffs) was not within the Plaintiffs budget then things started to go awry.

74. It is at this point it is important to note that where their evidence conflicted Her Honour, Ms Blokland preferred the evidence of Ms Innocenzi over Mr McNamara on the basis that even thought both parties were attempting to do

their best to recall the evidence of Ms Innocenzi was given in a more forthright manner whereas Mr McNamara was a little evasive at times.

75. Ms Innocenzi's evidence is that she did not instruct Mr McNamara to make further amendments to the plans and was not happy with the amendments made. At paragraph 88 of her decision Her Honour Ms Blokland accepted Ms Innocenzi's evidence that:

> "It was Mr McNamara who made changes to the design and had them re-costed by Rawlinsons. The plaintiff was not happy with the suggested changes and she was clear in her evidence that she did not instruct Mr McNamara to tender on the basis of that plan."

76. It is at this stage that the communication between the parties fell down. I find that the Defendant did fail in its duty to the Plaintiffs to communicate and consult subsequent to the tender prices coming in. Mr McNamara designed changes, put those changes to Rawlinsons, and retendered all without consulting with the Plaintiffs. Whether or not that failure to communicate resulted in a loss is a matter to be discussed later.

77. **Timeliness**- the further complaint by the Plaintiffs is that even if a design was finally produced within the budget estimate (none of which is admitted) it was not produced in a timely manner and because of that delay the Plaintiff suffered loss. In particular the loss of eligibility for grants available for first home owners.

78. The Plaintiffs' complaint that it was represented to them the whole process would take approximately 35 weeks, which it clearly did not, cannot be considered in the context of a negligent misstatement as previously ruled. However the time quoted can be taken as a statement by the Defendant as what is considered to be the reasonable time frame for a design and construction of a new home.

79. I note that in her decision Her Honour Ms Blokland found that although there was an indication by the Defendants that the house typically takes 35

weeks from design to the completion of construction there was not enough evidence to support the view that construction be completed in 35 weeks was an essential term of the contract.

80. Mr Petrie was not asked any questions about the time issue nor did he address that issue in his report. Therefore there is no independent evidence of what is considered a reasonable time frame given the circumstances.

81. The Plaintiffs submit that they provided instructions to the Defendant in early January 2001 and by October 2001 they still did not have a design that they were happy with and that could be built within their budget and because of that delay they missed out on eligibility for first homeowners grants.

82. It is useful at this point to set out a chronology of the steps taken during the relationship between the parties:

Late 2000	Plaintiffs initial discussion with Peter Fletcher and provision of wish list.
9.1.01	Fee offer letter Defendant to Plaintiff
Jan 01	Production of initial sketch designs (P4 & P5)
Feb 01	Quantity surveyor contracted to do fee estimate
15.2.01	Rawlinsons provide cost estimate of $315643.00 with Stage 1 (main house) at $257,600, Stage 2 (downstairs guest room) at $18400 and Stage 3 fencing landscaping and pool at $39643 (P7 & P8)
29.3.01	Approximate time frame provided to Plaintiffs (P3)
Feb – Aug 01	Discussions between the parties amending the design and finishes, eg position of some walls, material used in flooring and glass replacing plastic. New plan produced including changes (P9) Plaintiff obtains finance. Plaintiff advises Defendants to go ahead with the documentation.
31.8.01	Engineer account for design and documentation

31.8.01	Plumbers invoice for design documentation
3.9.01	Hardware schedule for doors and taps etc
17.9.01	Tender Documents finalised and sent out
Sept 01	Plaintiffs advised of first tender price (Innocenzi's evidence at page 33 of the transcript)
19.10.01	Defendant's advice to Plaintiffs of the tenders (P11)
Oct 01	Defendant requests Rawlinsons to recost Stage 1 and produces documents prepared by Rawlinsons which costed the house as designed at $442996.00 (P10). Defendant advises he could make changes and redesign to bring cost back into line with budget. Some discussion of changes to be made.
29.10.01	File note indicating Ms Innocenzi's instructions to go ahead with design documentation (which was accepted by Her Honour Ms Blokland as instruction to redraw the plans not to go out to retender).
Nov 01	New Tender documents drawn and sent out to builders
Early Dec 01	New tender prices advised to Plaintiffs
Dec 01	Plaintiffs advise Defendants that they were not going to go ahead with the construction of the house as designed for them.

83. There was no indication by the Plaintiff that the delay had caused them loss of the possibility of grants at the time that they terminated the contract with the Defendant, the complaint was that the house as designed was not to their liking and still not within their budget.

84. Between February and August 2001 the time was used for settling the design, obtaining of finance, obtaining permission from the Bayview body

corporate and drawing up of design documentation. There was no complaint at that stage from the Plaintiffs about delay in fact a lot of that delay was not due to factors within the Defendant's control. There was no knowledge by the parties at that stage that the design would not be within budget.

85. Once the Plaintiffs gave the go ahead in August 2001 to the Defendants to draw the design documentation the defendants did so immediately including arranging for engineering and plumbing to go with the tender documents. Those documents were sent out to tender within a month in September 2001. After the tenders came in (timing over which the Defendants had little control), in October 2001, at almost double the cost estimate the Plaintiff then went about getting further estimates from the cost consultants and making alterations to the plans to bring it back into the budget that took a further month and the plans were sent out for retender in November with prices returning in December 2001. There is no suggestion that any one of these steps should have been done sooner, in fact there is a complaint by the Plaintiff that the Defendants acted with too much haste preparing and sending the second set of tender documents without their instruction to do so.

86. Given the above it is my view that there was no undue delay on behalf of the Defendant and therefore the Defendant has not breached his duty to provide its services in a timely manner as pleaded by the Plaintiffs.

87. **Loss claimed** – The Plaintiffs originally claimed two types of loss, the cost of the services they have paid for, architects, engineers, quantity surveyor and plumber, for which they say they have received no value, and the loss of the opportunity to take advantage of the NT First Homeowners grant, the New Home Quickstart grant and the Hot water system rebate which they claim were not available to them because the Plaintiff took too long about the design.

88. At the hearing the before me the Plaintiffs conceded that they did obtain the NT First Homeowners Grant and the Hot water System Rebate upon the building of the house they finally constructed and therefore abandoned the claim for those amounts.

89. The question for this court is, that given the only finding of negligence in favour of the Plaintiffs is the failure of the Defendants to properly consult and communicate with the Plaintiffs once the first tender prices came in, whether the losses claimed can be attributed to that failure.

90. In relation to the payment for services for which the Plaintiffs claim they have received no value. Up to the time of the tenders the Plaintiff had paid and incurred the following expenses:

13.6.01	TCM Engineers	572.00
15.8.01	Architect studios	2109.75
29.8.01	Architect Studios	7500.00
31.8.01	TCM Engineers	4004.00
31.8.01	Hydrotech Pipeline	275.00
19.9.01	Architect Studios	1875.00
30.9.01	TCM Engineers	1144.00
	Total	**$17479.75**

91. Setting aside the fees to the defendant, all of the other fees were required for the preparation of the tender documents which were prepared at the Plaintiffs request and which were the basis of the parties discovering that the design was not able to be built within the approximate budget.

92. Even if I had found that the Defendant should have been aware, without the tender prices, that the design would not be constructed for the budget then, the Plaintiffs would have to prove that those costs would not have been

incurred had the Defendant had advised the Plaintiff of that fact. There was no evidence by the Plaintiffs of what they would have done had they been told of the possibility. There is no evidence that they would not have gone ahead with building a house clearly they would have as they did. It is my view they would have in all likeliness adjusted their ideas of what they wanted and asked the Defendant to redesign within the budget. In any event I did not make that finding.

93. In relation to the failure to communicate subsequent to the tenders it cannot be said that those costs have been incurred because of that failure as they have all been incurred before the communication breakdown.

94. In relation to the Defendant's fees, it is clear that until the tenders came in the Defendant was of the view that the design produced could be constructed within the budget. The fees were incurred in the design stage and the preparation of the tender documentation they would have been incurred whether or not the Defendant failed to communicate after the tender. Invoices issued and paid for were in relation to the design phase of the project and the preparation of the tender documentation and therefore did not relate to work done subsequent to those tenders and therefore cannot be claimed as damages consequential on that breach.

95. There was no evidence from Ms Innocenzi that she had been concerned about any delay in finalising the design between February and August of 2001 even though the original estimated program (P3) suggested that stage would be completed by mid March. Nor was there any complaint that there was any lack of communication between the parties in that time.

96. During the period of the dealings between the parties in this matter the NT government announced a grant, in addition to the First Homeowners Grant, called the New Home Quick Start Grant. Relevantly there were two sets of grants announced, the first for contracts to be executed between 9 March

2001 and 30 April 2001 and the second for contracts executed between 28th November 2001 and 31 January 2002.

97. Even if the time line proposed by the letter of the 29th March 2001 (P3) was adhered to it would not have been possible for the Plaintiffs to qualify for the March grant as the contracts would, on the best case scenario have been signed at the end of June 2001.

98. In relation to the later grant the Plaintiffs have a difficulty of remoteness of damage, in that they have to prove that it was the Defendants failure to communicate with them from September 2001 which was the cause of them not qualifying for the grant.

99. The evidence of Ms Innocenzi is that had the Defendant communicated with her further about the proposed changes he was going to make then she would not have authorised those changes going out for retender. It is in fact the evidence of Ms Innocenzi that she did not authorise a second tender although she did authorise a further design change because the Defendant had advised that it would not cost her anymore. However there is no evidence to support the proposition that had there been proper consultation a contract would most likely have been in place by January 2002 and the Plaintiffs would have been able to avail themselves of the grant. There are too many possibilities for this Court to accept that was the most likely scenario on the balance of probabilities. In short the loss of the grant is not sufficiently connected to the failure to communicate.

100. **Failure to mitigate** - The Defendant submitted that the Plaintiffs had failed to mitigate their loss by not negotiating with the lowest tenderer on the second occasion. In light of the fact that I did not find any damages in favour of the Plaintiffs it is not necessary for me to rule on this point. However I will note that if I am wrong about not finding in the Plaintiffs favour it is my view that the failure of the Plaintiffs to take up the lowest tenderer cannot be held to be a failure to mitigate because it would clearly

be unfair to expect them to negotiate on a contract for a set of plans that they did not approve.

101. **Conclusion** – To prove a case in negligence a plaintiff has to establish a duty of care, a breach of duty of care and damages arising from that breach. The Plaintiffs has established a duty of care of the Defendant, and in one aspect established a breach of that duty of care, however they have not established any loss arising from that breach and therefore their action based in negligence must fail.

102. I order the following:

1. Plaintiffs claim in negligence is dismissed
2. Costs are reserved.

Dated this 17th day of September 2007.

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Tanya Fong Lim
STIPENDIARY MAGISTRATE