



In The Supreme Court of Bermuda

APPELLATE JURISDICTION

2019 No: 32

BETWEEN:

PAUL RODRIGUES

Appellant

And

KATHRYN ADAMS

Respondent

JUDGMENT

Appeal from the Magistrates' Court- Section 3 of the Supply of Services (Implied Terms) Act 2003 – Professional Negligence –Legal Principles on Expert Opinion Evidence - Replastering of a Swimming Pool- Whether Service carried out with Reasonable Care and Skill

Date of Hearing: Tuesday 17 March 2020
Date of Judgment: Wednesday 15 April 2020

Appellant Mr. Peter Sanderson (Benedek Lewin Limited)
Respondent In Person

JUDGMENT of Shade Subair Williams J

Introduction and Procedural Background

1. This appeal stems from a dispute between the parties as to the quality of the replastering services of the Respondent's swimming pool in order to locate and repair a leak.

2. The Respondent, Ms. Kathryn Adams, commenced proceedings in the Magistrates' Court by an Ordinary Summons, dated 7 December 2018, for the rounded figure of \$25,000.00 in damages, which is the maximum sum permitted in the jurisdiction of the Magistrates' Court.
3. Further particulars of the claim were outlined in a letter from Ms. Adams which appears to have been filed in the Magistrates' Court on 8 February 2019 ("Ms. Adams' Statement" / "the Respondent's Statement").
4. On 21 February 2019, the Respondent's Counsel, Mr. Peter Sanderson, filed a Statement of Defence and Counterclaim.
5. Under a cover note dated 25 April 2019, the Respondent provided a compilation of documents described as a Reply. Ms. Adams purported that these documents were authored by expert witnesses in support of her case.
6. Also in preparation for trial, Mr. Rodrigues provided a witness statement dated 31 May 2019.
7. The trial subsequently proceeded before the learned magistrate, Ms. Maxanne Anderson, on 3 June 2019 and concluded on 31 July 2019. Judgment was handed down by Magistrate Anderson on 11 September 2019 in favour of the Plaintiff/Respondent.
8. On 24 September 2019, the Defendant/Appellant filed a Notice of Intention to Appeal in accordance with Rule 3 of the Civil Appeal Rules 1971. Pursuant to Rule 5, a Notice of Appeal was filed in the Supreme Court on 10 October 2019, advancing the substantive grounds of appeal against Magistrate Anderson's judgment.

The Facts

9. It was alleged in the Ordinary Summons that the Appellant, Mr. Paul Rodrigues, showed 'poor workmanship' in the provision of his services on Ms. Adams' 'new pool'. It is further averred in the Ordinary Summons that, in addition to 'other problems', the surface of the pool was 'rotting away' and that the 'compass tiled at (the) bottom of (the) pool (was) upside down looking'.
10. Ms. Adams' Statement, which was filed some two months after the issue of the Ordinary Summons, expanded on the details of her claim and appears to have been sensibly treated by the learned Magistrate as both a pleading of her claim and a witness statement. The content of Ms. Adams' Statement was also verified by her under oath and adopted as part of her evidence in chief.

11. In Ms. Adam's Statement, she states that she contacted the Appellant on 3 October 2016 for a quote on the following requested tasks:

- A. Locate and Repair Leaks
- B. Re-finish the pool surface
- C. Install tile
- D. Put pool back in working order

12. Mr. Rodrigues pointed to his quote dated 20 October 2016 which detailed the estimated costs of the work he would perform on her pool ("the Quote"). On its face, the Quote is signed by the Respondent and that signature is dated 24 October 2016.

13. In its pertinent parts, the Quote provides:

“QUOTE

Included in project following works described:

- Removal of existing pool plaster and tile*
- Prep under surface*
- Re-plaster any base plaster needed*
- Supply and Install new scum line tile*
- Supply and install new pool plaster (White Cement & Marble Dust)*
- Prep concrete for new plaster with prep concrete coatings*
- Plaster pool*
- Install new 1 1/2 Hayward 2 speed Pump*
- Pressure test pool lines, locate and repair leak*

TOTAL QUOTE: \$30,000.00

Please note no electrical or plumbing supply to the pool or water is provided in this quote. Owner responsible for chemicals for start up, must be in consistency with manufacturer's specs provided by Rodrigues pools on completion. Weekly balances must meet APSP standards as required for warranty by Manufacturer. Pool must be filled 24 hours after plastering.

Payment installations requested- Deposit (\$10,000.00) required to order materials and mobilization of work; 2/3 Due once leak is repaired, tile installed and pool plaster removed, third payment due on completion..."

14. Mr. Rodrigues started the pool work on 12 November 2016 and completed his services one week later on 18 November 2016 when the pool was filled. He confirmed that the A-D tasks requested by Ms. Adams were completed, leading to the charge and payment for his services.
15. The Respondent alleged that Mr. Rodrigues' work was substandard. In her 5 February particulars, she pleaded that on the following day she noticed that the floor tile compass lettering had been wrongly installed and that the pool light was malfunctioning. Notably, in her evidence in chief, Ms. Adams stated that she did not notice the lettering in the pool until several days later.
16. In explaining what occurred when Mr. Rodrigues returned to fix the pool light she stated on her pleaded case:

“Mr. Rodrigues returned to install a new light. At this point we discussed the compass and he argued that it was not incorrect, and that there was nothing he could do about it. I was then billed for a new light...and then charged again...to also find out that he had actually just re in-stalled (sic) the same light that was there before.”
17. The Respondent stated that some six months or so later in June 2017, she noticed some small spot marks in the lining of the pool near the steps which worsened over the course of a month. This was followed by a pool leakage in August 2017. Under cross-examination by Mr. Sanderson, the Respondent accepted that the pool was 'fine' for approximately 8 months before she first noticed any issues with the resurfacing of the pool.
18. She stated that she contacted Mr. Rodrigues but that he delayed in attending her residence for approximately one week. A dispute ensued about the cause of the leak and whether or not Ms. Adams had ill-advisedly used fresh water to refill the pool. She said that Mr. Rodrigues informed her that he would return with a camera to better investigate the source of the problem and that she should allow the water in the pool to be lowered to facilitate this inspection. However, Mr. Rodrigues failed to return to tend to the pool in the months which followed, despite the follow-up email chasers sent by Ms. Adams.
19. She pleaded that it was not until June 2018 that he returned when he finally located a leak source. This led to Mr. Rodrigues undertaking the invasive task of digging up the pool. Ms. Adams complained that Mr. Rodrigues left the pool and surrounding area in a 'horrible state of mess' with exposed open holes for a 3-4 week period, leaving her with no alternative but to personally cover the areas of concern with ply wood to mitigate the resulting risk of danger.
20. The total demise of the working relationship between the parties followed soon thereafter and Ms. Adams said in her Statement that on 16 July 2018, she emailed Mr. Rodrigues *“about a*

number of issues” which included her concerns about the lining in the pool and the condition of the diving board.

21. Ms. Adams subsequently reached out to Mr. Tony Figureido of Pimental Pools & Restoration. In his evidence, he explained the repair works he undertook on the pool following Ms. Adams’ termination of Mr. Rodrigues’ services. Mr. Figureido produced a final report dated 27 May 2019 which provides the details of his completed works.
22. In the magistrate’s note of his evidence in chief, Mr. Figureido described the pool as being ‘*so old*’ that it was necessary to remove the housing of the pool. Mr. Figureido also spoke about how the water in the pool was below the skimmer level when he visited the site.
23. Ms. Adams in her oral evidence explained that the loss for which she claimed damages arose out of her obligation to pay Pimental Pools’ invoice for \$42,000. Her evidence was that Pimental Pools re-did the work that Mr. Rodrigues was originally engaged to do and performed extra services which were not requested of Mr. Rodrigues. Given the ceiling for damages in the Magistrates’ Court and the extra services performed by Pimental Pools, she claimed the maximum \$25,000 permitted.
24. The learned magistrate had before her a copy of the estimate of work to be performed by Pimental Pools, dated 4 October 2018:

“
Estimate
Remove existing plaster from pool
Pressure test the plumbing Lines
Open 4-6 inch around the return lines, skimmers and pool light to inspect for any leak
Install a new Main drain
Apply a layer of Bond Kote before plaster with cement and sand
Plaster the pool with cement and sand
Apply a second layer of Bond Kote before plaster with Hydrazzo
Plaster the pool with Hydrazzo (Colour to determine by the Client)
Acid Wash the pool the following day

Estimated works to be between: ----- \$24,285 and \$27,285”

25. According to the 27 May report from Pimental Pools, the following services were undertaken:

“
REPORT

10/04/19- Pimental Pools Started to remove the Marble Dust surface from the pool

- 11/04/19- *It was noticed that the mortar underneath was hallow (sic) especially in the bottom of the pool because a wrong bonding agent was used. The entire surface was removed to bare concrete.*
- 12/04/19- *Upon removing the light to install a new niche it was noticed that the conduit pipe for the light was not glued and the concrete around it was all wet, indicating that the water was leaking from the conduit pipe.*
- 14/04/19- *The skimmer on the deep end of the pool (South West) had a hairline crack and the concrete around it was also quite wet, indicating that the water was leaking from the Skimmer.*
- 16/04/19- *After removing the skimmers and start working on the pressure testing, we found that the main drain pipe from the pool to the deck is 2 inch Sh40 PVC that connects to 1 ½ Flexible pipe and travels to the mechanical room, the skimmers and return lines were also connected to flexible pipe travelling to the mechanical room. The flexible pipe after a period of time will crinkle and affect the flow of water to the pool and possibly crack and cause a leak.*

The owner was advised to change all the plumbing to 2 inch SH40 PVC.

- All the plumbing was replaced and the mechanical room re-designed*
- The entire pool surface was acid wash(ed) and them (sic) pressure washed*
- A Layer of SGM bond Kote was applied*
- Cement sand base plaster was installed*
- New waterline tiled installed*
- Another layer of SGM Bond kote was applied to the newly base plaster*
- Pool was plastered with Hydrazzo”*

26. In his oral evidence, Mr. Figureido added that at least one pipe was losing pressure and that Mr. Rodrigues should have noticed this. However, he accepted that he was unable to say if the pipe was leaking at the point in time that Mr. Rodrigues was working on the pool. When challenged under cross-examination with the suggestion of the possibility that none of the leaks would have been visible to Mr. Rodrigues, Mr. Figureido replied that any such leak would have been apparent had Mr. Rodrigues pressure tested the pool. Under re-examination, Mr. Figureido stated that a main drain should be replaced if it is older than 10 years.
27. The Appellant, on the other hand, contended that his work was done to a correct standard, as evidenced by an email message from Ms. Adams herself confirming her approval of his services after the completion of the works.

28. Mr. Rodrigues denied causing the pool leaks. His case was that that he left the pool without having observed any leaking and that any such leaks developed months after he completed his own work. His case was that *“the leaks were due to an ancient plumbing system under the pool that was outside of the scope of the Defendant’s work.”*
29. Mr. Rodrigues further maintained that the compass cardinals were installed correctly as they were orientated to be read as a person enters the pool. He explained that the Responent had been off island during his carrying out of the works and that such design-type decisions had been left to his discretion. However, Ms. Adams addressed this point in her evidence stating that she did not give the Defendant permission to install the lettering without her prior approval.
30. Mr Rodrigues also confirmed that he installed a new pool light but denied responsibility for any damage to the diving board which was not raised prior to Ms. Adams’ payment of the invoices. He put the Responent to strict proof in respect of the spot marks in the pool and he further denied responsibility for the deterioration of the pool surface.
31. In his defence at trial, Mr. Rodrigues relied on the expert evidence of Mr. Ian Feathers who produced a report dated 27 April 2019, entitled *‘Independent report Prepared by Bermuda Project Managers Ltd’*.
32. A description of the author’s qualifications was stated as follows:

“We are experienced in the oversight of both pool construction and the repair of pools. Our expertise is not in the science of the pool plaster products nor water balance except to the extent that our experience causes us to have developed an awarenesss of chemical balance of the water and its impact upon the pool longevity and the avoidance of staining. Our research into the issues involved is largely from written and video documentation widely available on the internet and discussion with consultants overseas with whom we work regularly in design pools in Bermuda.

Over the twenty-two years of the company’s existence BPML has been engaged in the design and supervision of many pools and we have also been engaged on many occasions to investigate and advise upon problems experienced with pools during their operation and use. Prior to this date the author of this report was employed by D&J Construction Co. Ltd. and responsibilities during this period included pool construction and problem-solving tasks. This totals more than thirty years’ experience in Bermuda construction and during this time a great number of pools constructed (supervised) and inspected.”

33. On the witness stand, Mr. Feathers warned that only the builder of a pool is in a position to know how it is housed under the concrete of the pool. The learned magistrate was told at trial that there are two different layers of plastering to a pool, namely (i) the largely waterproof base plaster and (ii) the finish plaster which is intended to be seen.
34. Mr. Feathers said that it was standard practice to remove the finish plaster and leave the base plaster unless it appeared unsound. He said that to do otherwise would be to risk an introduction of ‘fine cracking’. He further spoke about the unavoidable risks of taking out the main drain which entails breaking the surrounding concrete and reiterated that this could introduce another risk of leakage. He said that the general rule here is; *“If it ain’t broke, don’t fix it”*.
35. Mr. Feathers stated in his report that he inspected Ms. Adams’ pool on 26 April 2019 after the pool finish plaster had been stripped and following the replacement of an appreciable portion of the plumbing. While he was, therefore, in no position to make observations on the pool finish plaster, he said that he did notice the troublesome presence of a blue bonding agent known as Weld Crete. He explained that bonding agents are commonly applied in preparation for pool plastering but that Weld Crete is no longer used in modern day practice because of its consequential failure to remain intact if wet for an extended period of time. He said that Weld Crete was common place in the industry some 20 years prior but that it is no longer the go-to bonding agent.
36. Mr. Feathers explained in his oral evidence that the relevant layers of a standard pool starting from top to bottom are as follows:

Pool Water

Finish Plaster

Base Plaster

Weld Crete

Concrete

Dirt/Rocks/Ground

37. Mr. Feathers gave factual hearsay evidence in his Report that Mr. Rodrigues was not the person who used the Weld Crete and that Mr. Rodrigues said that he did not strip this base plaster off because it was sound at the time of his work.
38. At the conclusion of Mr. Feathers’ report on the subject of the blue bonding agent, he states:

“We conclude the bond failure found by Pimental Pools was not caused by Rodrigues Pools but by the original pool contractor which we understand to be F Lewis. The fact that the work

by Rodrigues Pools may have caused moisture to subsequently attack the blue bonding agent and cause a bond failure is not the fault of Rodrigues Pools. Firstly Rodrigues was not aware of the incorrect (and concealed) application of the incorrect bonding agent and secondly Rodrigues only chipped off the finish plaster to a sound base plaster (compliant with industry standards when re-finishing pool plaster) which, indeed, is exactly as Pimental Pools have just done except to the area of the failed pool bottom which they found to be hollow or de-bonded.”

39. Mr. Feathers also opined on the degradation of the pool finish plaster and explained that this was most likely caused by what he termed as “mottling”:

“The pool finish plaster degradation described is almost certainly mottling. The cause of mottling is a failure to maintain chemical balance. We cannot determine the exact cause of this chemical imbalance but both the Plaintiff’s and the Defendant’s statements are consistent with a situation in which there is likely to be a reduced ability to maintain chemical balance.”

40. Ms Adams disputed the high points made by Mr. Feathers. She took issue with Mr. Feather’s mention of the pool plumbing and retorted that the subject of plumbing had nothing to do with her claim. She also disputed Mr. Feathers’ account that the old plaster had been removed. Ms. Adams criticized Mr. Rodrigues for not having removed the Weld-Crete bonding agent and suggested that this omission explained why he had completed his services inside of a week.
41. Mr. Rodrigues consistently maintained that the Quote specifically excluded electrical or plumbing supply. He stated that he advised Ms. Adams in a verbal communication that the plumbing to her pool was antiquated and that it would fail in due course. Mr. Rodrigues told the Court that he had made it clear to Ms. Adams that plumbing services were outside of the scope of his work and that she proceeded with the re-plastering project, notwithstanding. However, Ms. Adams informed the Court during her evidence at trial that Mr. Rodrigues never gave her any such advice.
42. In response to Mr. Feather’s findings of mottling, Ms. Adams stated at trial that the PH balances in her pool were controlled by her pool cleaner, Mr. Mello, whose cleaning services came highly recommended by Mr. Rodrigues before the start of his work. Ms. Adams said that Mr. Mello never topped up the pool, contrary to Mr. Rodrigues’ insuations that the mottling was caused by topping up the pool with fresh water and throwing off the PH balance of the pool. Under cross examination, Ms. Adams accepted that she was the one who put the chemicals in the pool but explained that she did so under the direction of Mr. Mello who would subsequently check the chemical balance of the pool.

43. Mr. Rodrigues also counterclaimed for the expense of his unpaid services arising from his visit to the Plaintiff's pool on 11 April and 15 August 2018.

The Magistrate's Findings and the Grounds of Appeal

Summary of the Magistrates' Key Findings

44. The learned magistrate expressly found in favour of Ms. Adams in resolving the conflict as to whether Mr. Rodrigues advised her of the need to replace the plumbing works of the pool.

45. Magistrate Anderson also declined to treat Mr. Feather's evidence as expert evidence on pool plastering. At paragraph 7 of her judgment she stated:

"...In determining whether the leaking pool within one year of the Defendant's work was a result of defective work or due to the Plaintiff's actions, the Defendant called as a witness Mr. Ian Feathers. Mr. Feathers, although a Chartered Surveyor and an expert in construction, his "expertise is not in the science of the pool plaster products nor water balance" (i.e. his expertise is not in the day to day maintenance and ongoing repairs of a pool). Mr. Feathers' evidence was helpful, but I do not classify him as an expert in pool maintenance and repairs, and therefore I reduced the evidential weight of his report in assisting with the issues at hand."

46. Leading up to her final findings, the magistrate found that the Defendant did not exercise reasonable care and skill. She found that Mr. Rodrigues' conduct and services demonstrated poor workmanship and that he was not thorough in the performance of his work, leaving the Ms. Adams with only a 'band-aid' solution to a major problem.

47. Magistrate Anderson decisively made no ruling in respect of the diving board, the compass, or the fixture of the pool light on the reasoning that these were minor issues which were overshadowed by the leakage in the pool.

48. In the end, she entered judgment in favour of Ms. Adams in the sum of \$25,000 plus \$70.00 in Court fees. Accordingly, she dismissed Mr. Rodrigues' counterclaim and made no order as to Costs on the basis that Ms. Adams' was unrepresented by Counsel.

The Grounds of Appeal

49. The Appellant relies on three substantive grounds of appeal:

Ground 3a)

The learned judge erred in holding that a primary issue was whether prior to or during the work being carried out, that the Appellant advised the Respondent that the plumbing / pipes may need to be changed. The contractual scope of work was set out at a paragraph 3(ii) of the judgment. It plainly stated that the scope of work included locating and repairing the leak (which is not disputed that the Appellant did), and no plumbing supply to the pool was included in the quote. Accordingly, it is irrelevant whether the Appellant advised the Respondent that the plumbing/pipes needed to be changed prior to the contract being concluded, when the scope of work was clearly defined in the contract.

Ground 3b)

The learned judge erred in finding that the Respondent had adduced sufficient evidence to show that the Appellant did not exercise reasonable care and skill and conducted themselves (sic) in a poor workmanlike manner in carrying out the work on the pool to fix the leaks, and was not thorough in his work. The learned judge failed to recite what evidence of the Respondent she relied on in making this finding and, indeed, there was no sufficient evidence provided by the Appellant upon which she was entitled to rely.

Ground 3c)

Consequently, if the learned magistrate was wrong to find that the Appellate is liable for poor workmanship, then she also erred in dismissing the Appellant's counterclaim for further work that was properly carried out and invoiced.

Decision and Analysis

50. Mr. Sanderson submitted that the real issue is whether the work was carried out with reasonable care and skill. In his written submissions he pointed to section 3 of the Supply of Services (Implied Terms) Act 2003 which provides:

“In a contract for the supply of a service where the supplier is acting in the course of a business, there is an implied term that the supplier will carry out the service with reasonable care and skill.”

51. Ms. Adams, if represented by an able attorney, might have also pointed to section 4 of the 2003 Act which provides a ‘reasonable’ test for implied terms about the time for performance of the service. Here, she would argue that the delay in Mr. Rodrigues’ return to tend to the open holes in the floor plastering of her pool fell short of the section 4 threshold. Mr. Sanderson, of course, would necessarily seek to refute this point with Mr. Rodrigues’ evidence that such delay was a deliberate measuring tool to observe the extensiveness of the leak.

52. Mr. Sanderson, falling on his bottom-line argument, contended that the learned magistrate made no findings of fact which could have supported her conclusion that Mr. Rodrigues was negligent. He produced the English High Court decision delivered by Coulson J in *Pantelli Associates Ltd v Corporate City Developments Number Two Ltd* [2011] P.N.L.R. 12 [para 17]:

“Save in cases of solicitors’ negligence where the Court of Appeal has said that it is unnecessary and the sort of exceptional case summarized at paras 6-009 to 6-011 of the 6th edn of Jackson & Powell, which does not arise here, it is standard practice that, where an allegation of professional negligence is to be pleaded, that allegation must be supported (in writing) by a relevant professional with the necessary expertise. That is a matter of common sense: how can it be asserted that act x was something that an ordinary professional would and should not have done, if no professional in the same field had expressed such a view? CPR Pt 35 would be unworkable if an allegation of professional negligence did not have, at its root, a statement of expert opinion to that effect.”

53. In the *Pantelli* case, the pleadings which alleged professional negligence against a quantity surveyor were struck out for lack of input by expert opinion evidence. In this case, no application was made before the magistrate for the case to be struck out or dismissed on the grounds that the Court lacked expert opinion evidence from the Plaintiff. Instead, the Defence introduced the evidence of Mr. Feathers.

54. Notably, there is no challenge under any of the grounds of appeal to the magistrate’s findings that Mr. Feathers lacked the necessary expertise to give expert opinion evidence on the plastering of pools. Equally, the Appellant did not plead in any of his grounds of appeal a complaint about the magistrate’s acceptance of Mr. Figureido’s opinion evidence. This defect in the presentation of the appeal could not fairly be cured by Mr. Sanderson’s passing oral submission that Mr. Figureido lacked the independence required of an expert witness.

55. Notwithstanding, I will explore the position on the hypothesis of an appeal ground challenging the admission of Mr. Figureido’s opinion evidence.

56. I am reminded of my previous decision in *Derk Koole v HG (Bermuda) Ltd* [2019] SC (Bda) 89 Civ (17 December 2019) [para 50] where I observed that section 27L of the Evidence Act 1905 (which governs expert opinion evidence) is not engaged by the question of admissibility of factual evidence, even if it is given by an expert. This is similar to the English law position under section 3 of the Civil Evidence Act 1972 but unlike the position under Scots law as seen in the UK Supreme Court appeal *in Kennedy v Cordia (Services) LLP* [2016] 1 WLR 597.

57. There could have been no reasonable objection to the factual evidence given by Mr. Figureido. Through his evidence, the magistrate was told that Pimental Pools (whether by one or more workmen) noticed a defect in the mortar underneath the Marble Dust surface of the pool. In their report it is expressly stated that the wrong bonding agent was used. The Court heard the same point made by Mr. Feathers in his evidence. Pimental Pools consequently removed the entire surface to bare concrete, a service not provided by Mr. Rodrigues in his re-plastering of the pool.
58. The magistrate had the benefit of Mr. Feather's evidence to which she was not only entitled but duty-bound to consider. In her final judgment, Magistrate Anderson stated that while she did not accept Mr. Feathers as an expert witness (for the purpose of expert opinion evidence) she found his evidence helpful. No doubt, she was assisted by Mr. Feather's evidence that the presence of a blue bonding agent known as Weld Crete is a troublesome matter carrying a consequential failure to remain intact if wet for an extended period of time.
59. On all of this evidence, it was open to the magistrate to reasonably find that the blue bonding agent would have been visible to Mr. Rodrigues in carrying out his plastering services and that in carrying out such services with reasonable care and skill, he should have removed that blue bonding agent. This is particularly so given that Mr. Rodrigues undertook to re-plaster any base plaster needed and to prepare the concrete for new plaster with preparatory concrete coatings.
60. The focus of the Appellant's submissions under the first ground of appeal was the scope of the Estimate and its exclusion of any reference to plumbing services. Mr. Sanderson emphasized that the Appellant was called upon to re-plaster the pool, not to repair the pool plumbing. Mr. Sanderson further highlighted the 8-9 month timeframe before Ms. Adams complained about a leak and the plastering of the pool.
61. A simplistic approach to contract law was what Mr. Sanderson urged this Court to apply in the analysis of the Estimate. He cogently submitted that the scope and terms of the agreement between the parties was unaltered by the magistrate's findings that Mr. Rodrigues did not advise Ms. Adams about the withering state of the pool plumbing.
62. What is missed on this argument is the question as to whether the service of carrying out a re-plastering job could be performed with the reasonable care and skill without mention of the failing state of the pool plumbing. Ms. Adams could not have expected Mr. Rodrigues to provide any plumbing services in accordance with the Estimate. However, she was entitled to expect Mr. Rodrigues to warn her that the plastering of the pool would not likely remain intact because of the poor state of the pool plumbing. At this point, Mr. Rodrigues had a duty to advise Ms. Adams to seek plumbing services before undergoing a re-plastering project. After

all, the stated and accepted purpose of Ms. Adams' request for Mr. Rodrigues' services was to *locate* and *repair* a leak.

63. I might have had pause in this position if it was Mr. Rodrigues' evidence that the poor plumbing state of the pool could have only been visible or obvious to a person with plumbing expertise. However, this was not his evidence. Mr. Rodrigues came to trial stating that he knew that the plumbing was in poor condition and would eventually fail altogether. His case was that "*the leaks were due to an ancient plumbing system under the pool that was outside of the scope of the Defendant's work.*" On his evidence, he knew this and advised Ms. Adams accordingly, albeit that the magistrate did not accept his evidence that he *passed the message* (in its colloquial sense) to Ms. Adams.

64. For all of these reasons, I find that the magistrate was entitled and did find on the evidence that the Mr. Rodrigues did not exercise reasonable care and skill in the carrying out of his services.

Conclusion

65. The appeal is dismissed on all grounds.

66. Costs for the Respondent on a standard basis to be taxed by the Registrar if not agreed.

Dated this 15th day of April 2020

**HON. MRS. JUSTICE SHADE SUBAIR WILLIAMS
PUISNE JUDGE OF THE SUPREME COURT**