DISTRICT COURT OF QUEENSLAND

CITATION:	*Christian Education Ministries – Qld Ltd v Thomson Adsett Pty Ltd* [2015] QDC 292
PARTIES:	**CHRISTIAN EDUCATION MINISTRIES – QLD LTD ACN 125 183 637** **(plaintiff)** **v** **THOMSON ADSETT PTY LTD ACN 105 314 654** **(defendant)**
FILE NO/S:	BD 5120/2011
DIVISION:	Civil
PROCEEDING:	Trial
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	26 November 2015
DELIVERED AT:	Brisbane
HEARING DATE:	18, 19 and 20 November 2015
JUDGE:	Samios DCJ
ORDER:	**1. Judgment for the plaintiff against the defendant for the sum of $505,000.04.** **2. The defendant's counterclaim is dismissed.**
CATCHWORDS:	ARCHITECTS, ENGINEERS AND SURVEYORS – NEGLIGENCE – BREACH OF CONTRACT – PROFESSIONAL NEGLIGENCE **Legislation** *Civil Liability Act 2003* (Qld) ss 9, 10, 11 and 12 **Cases** *Stormont Main Working Men's Club & Institute Ltd v J Roscoe Milne Partnership (a firm)* (1988) 13 Con LR 127 *Voli v Inglewood Shire Council* (1963) 110 CLR 74, 84
COUNSEL:	Mr A Morris QC with Mr D Katter for the plaintiff Mr J Sweeney for the defendant
SOLICITORS:	Corney & Lind Lawyers for the plaintiff Cartner Newell Lawyers for the defendant

[1] The plaintiff promotes Christian education. It operates a number of schools. One of those schools is the Australian Christian College Moreton at Caboolture (the school).

[2] The defendant is a registered architectural business (the architect).

[3] The school claims against the architect damages for breach of contract and/or negligence on the part of the architect.

[4] In about mid-June 2009 the school retained the architect to provide the school with architectural services for the construction by the school of a new multi-purpose assembly hall/sports building at the school.

[5] The school claims it gave an express instruction to the architect that the new multi-purpose assembly hall was to have a full-sized basketball court. The school claims the dimensions of a full-sized basketball court are minimum length 32000mm, minimum width 19000mm and minimum height 7 metres. The school claims that although the architect designed a basketball court with the correct length and breadth, the architect designed the height less than a minimum of 7 metres, namely as designed the minimum ceiling height was approximately 4.2 metres with an average height (including a height immediately above the basketball hoops, of approximately 5 metres).

[6] There is no dispute the school used the plans as designed by the architect to enter into a contract with a builder for the construction of the new building.

[7] In about November 2010 when the building was partly constructed Mr Fyfe, the CEO of the school, instructed the architect to redesign the roof of the new building so as to increase the height of the roof to 7 metres where the internal basketball court was to be located.

[8] On or about 15 March 2011 the school agreed to a variation of the building contract with the contractor in the total sum of $536,287.14 plus GST so as to raise the roof of the internal basketball court to 7 metres.

[9] The new building was completed in or about July 2011.

[10] The sum of $536,287.14 plus GST was paid in full by the school to the contractor.

[11] The parties agree that the quantum of the school's loss is $366,262.

[12] The school's case against the architect is that the architect was given an express instruction by Mr Fyfe to design a full-sized basketball court. The architect denies having been given such an express instruction. The architect says the school's principal, a Mr Woodward, instructed the architect that the school did not require a full-sized basketball court. Therefore the architect says it did not breach its retainer nor was it guilty of negligence.

[13] The school says that even if Mr Woodward gave the instruction relied upon by the architect the architect in any event breached its retainer and was negligent by failing to clarify the school's instructions before making the design that was given out to tender.

[14] Mr Fyfe is the group chairman and CEO of Christian Education Ministries. When he gave evidence he said that at the present time the school has 430 day school students and about 930 distance education students. In early 2009 the federal government announced a building education revolution program to enhance the facilities of schools around the country. So each school based on their student numbers (initially day school student numbers) were allocated some of the money to put towards enhancing the facilities at their school. He said there were some guidelines. They had to either build a library, classrooms, multi-purpose halls, sports halls or canteens. If you already had those facilities there was scope to go outside that by request. He was the person responsible for applying BER funds for each of the schools owned by the plaintiff. So initially they were allocated $850,000. He said he lobbied to have distance education students included in the count for the money. He was successful. The practical effect was the school received an increase from $850,000 to $3,000,000 in their allocation. He said initially their needs were seen to be more space for their teachers for distance education and they did not have a proper library and they were looking at adding a library and some administration offices. However with the increase in allocation the primary objective was that they would have an indoor sports facility, basically a basketball facility which he had seen in a number of other schools. He thought as they had that level of money that is what he wanted to achieve. He said having an indoor basketball facility is very common. He said it's just what you do. He said having an indoor basketball facility gives you so much functionality as well as being able to play basketball. It's very popular with the kids, whether you are just shooting hoops together or you are actually playing competitions or you are just playing within your own school. He said also with that size facility also gives you the ability to play other sports. He said so many schools that have these facilities they have an indoor

basketball facility but often they will have a stage attached to it. He said it might be off to the back of one wall. It also gives you the opportunity to have performing arts, to do large meetings at the school, to do assemblies, to have awards nights in them. He said they are big facilities. They can house a lot of people. He said he certainly had that in his mind as well. He also gave consideration to tiered seating and change facilities. He said they also wanted a little bit of storage room and a canteen attached to it as well.

[15] Mr Fyfe also said that at either a first meeting or a subsequent meeting with the architect some quite preliminary plans were looked at. He said he made it very clear to them that we wanted this facility to be a full-sized basketball facility. He said to them "this must be a full-sized basketball facility". He said either Mr Don Marshall or Mr Chad Brown or both from the architect were present. He said they had a subsequent meeting after the initial meeting where they came back and he said to them is this a full-sized basketball facility. He said I wanted to make sure that it met all specifications. He said when they came back he said is this a full-sized basketball facility and they said yes, it's there written on the plans. Mr Fyfe said he had a look at the plans and sure enough it was. He said he did not think it could fit on the site with the stage. It was too close to the demountable that was behind it, and he thought it got removed for that reason, so that they could still have a full-sized basketball facility. He said when he received the floor plans in January 2010 the thing that gave him the most comfort was when they had that meeting they had confirmed to him that it was a full-sized basketball facility. He identified a copy of a drawing that was relevantly identical with the drawing he received in January 2010. That became Exhibit 1. Exhibit 1 does have on it "full-sized basketball court".

[16] Mr Fyfe said if further funds were required over and above the allocation the school was financial enough to provide additional funds if need be. Additional $500,000 could have been provided. However he said he looked at savings that could be made. However he would never have agreed to having a building with inadequate height to play basketball. Mr Fyfe said he also played some part in selecting the flooring for the hall. He also raised issues about the ventilation louvers at the floor level. He thought they should be up high enough so they would not be damaged. There were also to be big ASS fans installed. However Mr Fyfe wanted the Pulastic flooring so the fans were dispensed with. He wanted the better flooring instead.

[17] Mr Fyfe also said in November 2010 he was on site. The steel frame had been erected for the building. He took one look at it and thought it was really low. He said to the meeting we have a problem. The roof's way too low. He said Mr Jenner from the constructor thought there had been a mistake in the specifications for the steel. Mr Brown from the architect said that basketball could still be played in there. He said you can still shoot hoops. However Mr Fyfe said there was no way that basketball could be played in there. He said how can you shoot a hoop when the ceiling is so low. Mr Fyfe said it was quite obvious during these discussions that nobody had any idea himself included what the actual specifications were. Mr Fyfe said the ceiling height was thought to be around 4.4 to 4.2 on the slope, something like that. He said he had seen a lot of other facilities. His kids go to a school where there is one and they have awards presentations and he actually played with his daughter netball in that facility. So from experience looking at many other schools as he goes and visits them. He said it was just really, really low. He said and then on top of that was just a steel structure you then had to hang the light down below that, which meant the lights would be – I

mean, kids would just kick the balls and hit the lights and throw the balls and they'd be hitting – it was just – you'd virtually have to say to the kids no ball sports in that facility. It was just too low. He said he left that meeting with the intention that everyone would do some research. There was another meeting in December 2010 on the site. On this occasion what people had found out was discussed. But the exact measurements were not found out at that stage. He asked them to go away and contact Basketball Australia and get the exact specifications. Eventually all agreed that the minimum height was 7 metres clear of anything. He said his research from Basketball Australia was that it does not matter whether it is competition or non-competition, there is a standard height for all. Mr Fyfe said he gave instructions for all the work to proceed to increase the height to 7 metres.

[18] Although Mr Fyfe said in his evidence Mr Woodward had little authority to make decisions off his own bat during the proceedings the school conceded that Mr Woodward was armed with the appearance of authority and had authority to both make and receive communications on behalf of the school and therefore the school is bound by anything said to or by him in that role.

[19] When Mr Fyfe was cross-examined he agreed there was a meeting between himself, Mr Woodward and Mr Marshall at Mr Fyfe's offices at Narangba on 9 September. Mr Fyfe said that it was at this meeting that he said this must be a full-sized basketball facility.

[20] When it was suggested to Mr Fyfe that Mr Marshall did not discuss the dimensions of the basketball court with him at this meeting I consider Mr Fyfe seemed confused. He

did not seem to understand that he was being given an opportunity to comment on what was being suggested to him. However he repeated that he conveyed to them what he wanted and said then subsequently they came back. He said they got the message because they wrote on it "full-sized basketball court".

[21] On a different topic during cross-examination Mr Fyfe was asked about his discussion with Mr Woodward after the meeting when Mr Fyfe discovered according to Mr Fyfe the height was too low. It was suggested to Mr Fyfe that Mr Woodward told him after this meeting that Mr Woodward had agreed for the school to a space suitable only, in effect, for shooting of hoops. Further that he expressed to Mr Fyfe his understanding after discussions with the architect that the school was getting full-size length and breadth full-size, but not height full-size. Mr Fyfe would not agree with those two propositions. According to Mr Fyfe what Mr Woodward expressed to him was that he was surprised. That Mr Woodward was definitely surprised that the height was not adequate or what we were expecting.

[22] Later in the cross-examination Mr Fyfe was asked to express his memory of what his discussion was with Mr Woodward after that meeting. Mr Fyfe said we discovered the height. It was an issue, and he said to me I think I've made a mistake. And I said to him why do you say that? He said because I had a discussion with Don Marshall at some point earlier, quite a lot earlier. He said I remember having a discussion with Don Marshall, where Don asked him whether they would be playing – need the facility for competition, and he told me that he said, well, listen, we've only got about 60 students in the school. No, I don't believe we would be playing competition. But he did say – he said – but he never made any point to me that that meant that he would be

lowering the roof. It was just a question whether we would be playing socially or whether we would be playing competition, at which point I said to him well, it doesn't really matter about the conversation you had all the way back then. We made it very, very clear, and I made it very, very clear to Thomson Adsett that it was to be a full-sized basketball facility. They knew that, we all knew that, it was clear. There was plenty of evidence to suggest that that's what we wanted, that was our intention. The plans came back saying it was a full-sized facility. And that was pretty much the extent of our conversation.

[23] Mr Kent Jenner who was the project manager for the constructor gave evidence. However his evidence does not for me resolve the issues between the school and the architect.

[24] It is not in dispute the architect's terms of engagement are contained in a letter from the architect to the school dated 15 June 2009. I find nothing in the terms of engagement that assists in resolving the issues between the school and the architect in these proceedings. It is accepted that Mr Woodward wrote to Mr Marshall what were his thoughts by email dated 17 June 2009. In this email under the heading "attributes" the following appears "large enough for an indoor volleyball or basketball game".

[25] The school called Mr Alan Jordan an expert architect to give evidence.

[26] He concluded based on his review of supplied documents and based on his experience as a registered architect working on education projects for 28 years that the architects have justified their position on the grounds that they clarified verbally what are clearly

critical factors in the design of a hall. He states such critical factors would customarily be confirmed in writing and he can see no evidence of such record keeping. He states in addition, the architect's actions in this way, led to their client paying a cost premium to arrive at what they had briefed their architect for initially. When cross-examined Mr Jordan said that he couldn't see a clear written brief to commence the design process from. He said that would be in either direction (client and architect). He stated neither did he see a clear brief from the client expressing in vivid and detailed terms what the requirements were for. He states they were more broad descriptions. And neither did he see from the architect's position a clear return brief that defined what they understood was the requirements.

[27] Mr Marshall an architect and director of the architect gave evidence. He said Mr Woodward's email was the most detailed brief that they had received from the school. He said he sought clarification from Mr Woodward and said at a meeting out on the site he noted the original Hangar Building they had a basketball hoop hanging off one of the columns. He said he said to Mr Woodward "in the multi-purpose hall are you looking to have, you know, some basketball hoop or hoops" and Mr Woodward replied "yes". Mr Marshall went on to say that he said to Mr Woodward "would you be looking to have actual basketball games here" and he said "I'd very much doubt it. We've got a population of 60 students from P to 12". Regarding Mr Woodward stating in the email "large enough for an indoor volleyball or basketball game" Mr Marshall said he took that as the guidance to try to make the footprint of the building as close as they could to HA3 compliance. Mr Marshall went on to say that with Mr Woodward he had specific discussion about whether basketball games would be played and the answer was no. A little later in his evidence Mr Marshall said regarding his discussion

with Mr Woodward "sure. In essence, we were looking at the hoop in the existing Hangar Building. I said, 'do you want to have basketball hoops in the building?' He said yes. I said, 'would you like to shoot some' – 'the kids to be able to shoot some hoops', and he said yes. I said 'is it likely you would ever had formal basketball games in the' – 'in the facility', and he said no."

[28] A little later in his evidence-in-chief Mr Marshall was asked whether there was discussion about what was proposed as available to be built for – dimensionally – length, breadth and height for the budget was available. He said "yes". However when it came to Mr Marshall saying what was said he did not to my mind answer the question. Rather he said "we asked whether there was additional budget over than the funding to which Stephen answered no, we knew that we had to get everything built for approximately 2.5 to 2.6 million – both buildings. So we were very mindful of that because we were actually trying to get quite a lot of building footprint for 2.6 million or 2.5 million". When I asked why Mr Marshall asked Mr Woodward if there was additional funding available Mr Marshall on a number of occasions referred to the budget.

[29] When cross-examined Mr Marshall agreed it was probably not typical to find the words "full-sized basketball court" on an architect's drawing. It is not in dispute a Mr Dawson who was an architectural student in the architect prepared the drawing. Mr Marshall could not recall ever seeing another plan with a notation like that on it. He said he could only assume it was to give the builder some guidance on the dimensions of the floor. He accepted it was an understandable conclusion that the reason the notation "full-sized basketball court" was on the plan was because Mr Fyfe had said

he wanted a full-sized basketball court and whoever prepared the plan was providing him with that reassurance. With regards to the words in Mr Woodward's email "attributes large enough for an indoor volleyball or basketball game" Mr Marshall said it was not his understanding based on the discussions they had that necessarily meant width, length and height appropriate for a basketball game. However Mr Marshall said in the context of early discussions it had been made very clear that there was no requirement to play formal games. He agreed if what was actually said that it wouldn't be professional games or wouldn't be competition or wouldn't be formal that would have a significant impact on the design brief. Regarding whether it would be a critical matter to write down he said in hindsight yes.

[30] Mr Woodward was called by the architect and gave evidence. He was the principal of the school at all relevant times. He said the sort of basketball game he had in mind in June 2009 was social, amongst kids, in lunchtimes. He said they did not have enough students to form two teams let alone one team. So in terms of a lesson in sport on basketball he said that was not in his mind. Regarding his email where he wrote large enough for an indoor volleyball or basketball game he said his idea was large enough would be long enough and wide enough. He had not cast his mind on the question of what would be high enough. He said there was a facility over at Hercules Road Primary School that had a hall with a stage at one end. He would have put the ceiling at about 6 metres. I took him to be referring to this hall when he said that it would have been the same size as what was designed originally. He said he had never thought it necessary to have a building with a ceiling height of a competition level basketball court because 10 minutes down the road was Morayfield where there are indoor and outdoor basketball courts. He said so if we wanted to do something on a

more professional level we would go down and use that because they'd have all the scoreboards and everything else. He said Mr Fyfe never told him that he wanted him to make sure that the basketball court was of a competition standard. He said he had discussions about the plans and the entire program. He said he had conversations with Chad, Billy and Don. He said we talked about whether we'd be having professional level basketball games there. He said his concern was that we have the length and the width so that if they're practising for a game and they go off to somewhere else that you know they're used to running a full-sized court, not a three-quarter court. They showed me a picture of a fellow throwing a ball into hoop, so that's an arc, which – because we were talking about, you know, was height an issue and as long as we could get it in, you know from the half way mark that was fine by me. He said like I said if we needed to play professional we'd go down to Morayfield. He said with Thomson Adsett giving him any clarification about height that they were proposing he said with a picture they were demonstrating that the height that they were proposing was going to be sufficient for a reasonable game of basketball – a social game of basketball.

[31] When Mr Woodward was asked about his discussion with Mr Fyfe when there was something wrong with the height Mr Woodward said that was the day when the steel work was up Mr Fyfe walked on site and looked at and said "that's not what I asked for" – "that's not what I" – yeah "not what I asked for". Mr Woodward went on to say we walked into the meeting where he made it plain to Thomason Adsett that that's not what he asked for. The first conversation he and I had had about height was after that meeting where I walked out and said, "you" – "you need to know that I did have a meeting with Thomson Adsett 9 months ago". Whatever it was, "where we talked about", and I talked about that image and where that was where the – where – so

Thomson Adsett and I talked about height but the first conversation with Mr Fyfe was about height was that one there. He said he did not recall saying "I think I've made a mistake". He said he recalled saying to Mr Fyfe you need to know I had a meeting with these guys previously where we talked about height and that – because height had never been raised prior to that with Mr Fyfe. So what had been raised was staying within budget.

[32] When Mr Woodward was cross-examined he said in his discussions with the architect he was shown the arc of the ball being thrown. He said we made statements about that we would not be playing competition and professional games and that budget was an issue and we needed to stay within budget. Later in his cross-examination Mr Woodward said there were discussions about the height with the architect but his answers were in terms of saying they would not be playing competition games for example or budget was an issue for example. T2-69/40-45. Senior Counsel for the school asked Mr Woodward to answer the question about what was said about height. Mr Woodward's answer accepted there had been a conversation about the hall height however his further answer was in terms of "that we wouldn't be playing competition games". I took this exchange to indicate that Mr Woodward was saying no one was talking about 6 metres or 7 metres or something like that in these conversations. Regarding Exhibit 1 Mr Woodward's evidence was that he took the reference to "full-sized basketball court" to mean length and width. He said he was interested in length and width.

[33] Mr Brown an architect also gave evidence. He was an employee of the architect. He was asked about Exhibit 1. He said that particular drawing was the floor plan of the

multi-purpose hall. The purpose of the drawing was to provide the dimensions and the scope for the tenderers to price the building, hence, it's got all the dimensions, so that's what its purpose is. He could not recall Mr Fyfe ever saying that he had got an express assurance from anyone at the architect that the height would be full-size competition height. When cross-examined Mr Brown agreed with regard to Exhibit 1 that the added words referring to it being a full-sized basketball court don't tell the builders anything the builders wouldn't know from looking at the dimensions on the plan. He said that from a height perspective the building was designed to a specific height which would be reflected in other drawings which were issued at the same time. Mr Brown said if something along the lines of "height's not a problem for us – it doesn't have to be a full-height basketball court" that would be something you would write down in a note. He said any clear direction from a client would usually find its way into a note or a return brief. He noted for this project they were not commissioned to produce a return brief but notes of meetings are usually captured and filed using their electronic filing system. He agreed that in his professional experience if an instruction like that had been given a competent architect would make a note of it. Regarding the suggestion that the architect was instructed the hall would not be used for competition sports use (noted at page 1101 volume 3) Mr Brown agreed that it was not satisfactory to base everything on that comment and he said it should have been confirmed back to the client. It was suggested to him that in these circumstances what a competent architect does is to provide the client with the options Mr Brown agreed that often happens.

[34] Mr Marshall's diary note of the meeting on 9 September 2009 between himself and Mr Fyfe and Mr Woodward is in evidence at page 193-4 volume 1. It is correct that it

refers to a number of issues discussed between the parties regarding the project and there is no express record to the effect that Mr Fyfe instructed Mr Marshall that the school was to have a full-sized basketball court.

[35] Mr Scott Peabody an expert architect gave evidence.

[36] In Mr Peabody's report he expresses the opinion that the architect acted in a manner reasonably expected of a professional architect engaged by a client to provide the scope of service as outlined in the architect's proposal dated 15 June 2009. In his opinion the architect prepared plans and/or specifications for the tender and contract that specified a ceiling height consistent with the brief provided by the school. In his opinion the architect sought clarification with the school on the brief. Notably the functional and associated spatial requirements for the multi-purpose hall and it was understood by both the school and the architect that there was no intention for the school to play competition basketball in the future and as such, the brief did not reference any affiliations, documents or specific use guidelines such as the International Basketball Federation (FIBA) Official Basketball Rules 2008 Basketball Equipment or Basketball Queensland. In his opinion the architect designed the multi-purpose hall in accordance with the brief with a clearance consistent of a multi-purpose hall design solution to (HA2) which was the design template appropriate to the BER requirements for the school population and available funding. Further in his opinion the architect did communicate expressly to the authorised representatives, agents and/or servants of the school (namely Mr Woodward, principal of the school) that the design of the ceiling height was below the height appropriate for a full-sized indoor basketball court.

[37] When he was cross-examined it was evident Mr Peabody assumed Mr Woodward had given a binding instruction to the architect that the hall was not to be used for competition basketball. He sought to demonstrate with the diagram Exhibit 9 how shooting hoops could still take place in a hall with a ceiling height as originally designed by the architect. It is also apparent from his report and evidence that he was not expressing an opinion on the circumstance if it was found to be the case that Mr Fyfe gave an express instruction that a full-sized basketball court was to be designed for the project. However Mr Peabody did agree there was no document containing a record of Mr Woodward's instruction.

[38] It is correct the school's letter of demand through its solicitors dated 8 September 2011 does not expressly state Mr Fyfe told Mr Marshall or Mr Brown or both that Mr Fyfe made it clear to them that the school wanted this facility to be a full-sized basketball facility.

[39] Regarding the witnesses I was favourably impressed by Mr Fyfe. My assessment of him having considered all the evidence is that he was an honest and reliable witness as to the essential matters in this trial. I consider he had some trouble with the form of the questions being asked of him and understanding that he was being called upon to comment. I do not accept any difficulty he may have had answering some of the questions detracts in any way from his honesty and reliability.

[40] I consider on the critical issue in this trial namely whether Mr Fyfe gave an instruction to the architect that the design was to include a full-sized basketball court, Exhibit 1 supports the honesty and reliability of Mr Fyfe. I consider the architect has given no

satisfactory explanation for why the words "full-sized basketball court" were placed on this drawing unless as Mr Fyfe said there was the conversation with either Mr Marshall or Mr Brown or both that the school wanted a full-sized basketball court.

[41] My consideration of the evidence leads me to conclude there must have been some discussions between Mr Marshall and Mr Woodward about the ceiling height. Otherwise I consider there would be no reason at all for Mr Marshall to ask Mr Woodward what was proposed for the use of the MPH. I consider neither Mr Marshall nor Mr Woodward gave an express answer about what was discussed. While I accept there were considerations about the budget when the architect was designing the multi-purpose hall, I do not accept Mr Marshall's evidence that his reasons for asking if there was additional funding available was because of the budget only. In my opinion there must have been some other reason for asking if there was additional funding available. Before that questioning commenced Mr Marshall was asked if there was discussion about what was proposed as available to be built and reference was made to length, breadth and height for the budget available. As I said no answer gave any reference to height. In my opinion Mr Woodward did the same. I consider he had to be pursued by Senior Counsel for the school until he eventually said there was discussion about the height. However, he did not say what was said.

[42] However, I accept Mr Woodward did tell Mr Marshall that the school's use of the basketball court would not be for competition as the school only had 60 students.

[43] That is because I accept Mr Fyfe's evidence that Mr Fyfe and Mr Woodward had the conversation deposed to by Mr Fyfe after it was discovered the building was not being

built to the minimum 7 metres height. Further, as the building was designed with a height lower than the standard for a full-size basketball court suggests there was at least some discussion about the use of the MPH.

[44] However, Mr Marshall's evidence was that the conversation with Mr Woodward about the requirements for a basketball court took place after a formal meeting between Mr Marshall and Mr Woodward on the veranda of a demountable building at the school. However, according to Mr Woodward the conversation occurred in the course of a formal meeting at the architect's office in Brisbane. While having the conversation on the veranda might suggest no note was taken that does not explain why no note was taken in the formal setting in an office if it occurred in the office. Although I accept there was a conversation between Mr Marshall and Mr Woodward about the use of the basketball court, as no note was taken of this "instruction" by Mr Woodward that suggests to my mind that Mr Marshall was not exhibiting much care in recording the school's instruction. To my mind if Mr Marshall took no note of that "instruction", then it is not surprising he took no note of Mr Fyfe's instruction.

[45] I accept the evidence of Mr Jordan. I consider his evidence was careful and objective. His evidence also was supported by Mr Brown's evidence that in these circumstances one would have expected Mr Woodward's "instructions" to have been confirmed by the architect and if clarification was needed then clarification would have been sought by the architect.

[46] I also accept Mr Fyfe's evidence which was not in dispute that he proposed a special floor treatment for the surface for the court. This is something that Mr Woodward and

Mr Marshall remember having been stated by Mr Fyfe. I consider it is unlikely Mr Fyfe would have expended the effort investigating the special floor treatment unless he had a conviction that the facilities be special and therefore include a full-sized basketball court.

[47] Although a substantial number of documents have been tendered many relate to issues that are not controversial. That is many relate to correspondence between the parties regarding the budget and many relate to the design process. I do not consider I have to traverse all these documents because I do not accept they affect Mr Fyfe's honesty and reliability.

[48] It is correct that what Mr Fyfe says he told the architect about requiring a full-sized basketball court is not the subject of a note or letter and Mr Marshall's note of 9 September 2009 does not contain a reference to it. Further as I said earlier it is not expressly referred to in the letter of demand. The statement of claim also lacks some clarity about when this instruction was given and by whom and how. However the particulars given at paragraph 5 of the statement of claim do state that the defendant expressly described the indoor basketball court as a full-sized basketball court in the design. I do not accept that reference can be for anything other than the consequence of the discussion that Mr Fyfe says he had. I do not accept his evidence is implausible nor do I accept it has no internal logic.

[49] I do not accept the evidence of Mr Marshall nor Mr Woodward where their evidence conflicts with that of Mr Fyfe. I accept Mr Fyfe's evidence that Mr Woodward told him after they walked out of the meeting when they discovered the height and it was

an issue Mr Woodward said that he thought he'd made a mistake. Further, that Mr Woodward said he had a discussion with Don Marshall at a point earlier quite a lot earlier. That Mr Marshall asked him whether they need the facility for competition and Mr Woodward said we've only got about 60 students in the school. Further that Mr Woodward said I don't believe we would be playing competition.

[50] However I find Mr Woodward's statements to Mr Marshall were made before Mr Fyfe gave the architect his instruction that the school required a full-sized basketball court. I find Mr Fyfe made it very clear to Mr Marshall or Mr Brown or both that the school wanted a full-sized basketball court. I find Mr Fyfe's instruction was given in about September 2009. There is no dispute the architect accepted Mr Fyfe had authority over Mr Woodward. Further, the notation on Exhibit 1 shows the architect accepted Mr Fyfe's instruction. I find the architect therefore accepted Mr Fyfe's instruction superseded any previous conversation Mr Marshall had with Mr Woodward. I find Mr Fyfe's instruction was given to the architect before the design documents were given out for tender and before the school entered into the contract with the constructor to build the MPH. I find the school had enough funds to build a full-sized basketball court.

[51] Regarding the duty of an architect Windeyer J said in *Voli v Inglewood Shire Council* (1963) 110 CLR 74 at 84:

> An architect undertaking any work in the way of his profession accepts the ordinary liabilities of any man who follows a skilled calling. He is bound to exercise due care, skill and diligence. He is not required to have an extraordinary degree of skill or the highest professional attainments. But he must bring to the task he undertakes the competence and skill that is usual among architects practising their profession. And he must use due care. If he fails in these matters and the person who employed him thereby suffers damage, he is liable to that person. This liability can be said to arise either from a breach of his contract or in tort.

[52] I have considered sections 9, 10, 11 and 12 of the *Civil Liability Act 2003*. These sections provide:-

> **9 General principles**
>
> (1) A person does not breach a duty to take precautions against a risk of harm unless—
>
> (a) the risk was foreseeable (that is, it is a risk of which the person knew or ought reasonably to have known); and
>
> (b) the risk was not insignificant; and
>
> (c) in the circumstances, a reasonable person in the position of the person would have taken the precautions.
>
> (2) In deciding whether a reasonable person would have taken precautions against a risk of harm, the court is to consider the following (among other relevant things)—
>
> (a) the probability that the harm would occur if care were not taken;
>
> (b) the likely seriousness of the harm;
>
> (c) the burden of taking precautions to avoid the risk of harm;
>
> (d) the social utility of the activity that creates the risk of harm.
>
> **10 Other principles**
>
> In a proceeding relating to liability for breach of duty happening on or after 2 December 2002—
>
> (a) the burden of taking precautions to avoid a risk of harm includes the burden of taking precautions to avoid similar risks of harm for which the person may be responsible; and
>
> (b) the fact that a risk of harm could have been avoided by doing something in a different way does not of itself give rise to or affect liability for the way in which the thing was done; and
>
> (c) the subsequent taking of action that would (had the action been taken earlier) have avoided a risk of harm does not of itself give rise to or affect liability in relation to the risk and does not of itself constitute an admission of liability in connection with the risk.
>
> **11 General principles**
>
> (1) A decision that a breach of duty caused particular harm comprises the following elements—

(a) the breach of duty was a necessary condition of the occurrence of the harm (***factual causation***);

(b) it is appropriate for the scope of the liability of the person in breach to extend to the harm so caused (***scope of liability***).

(2) In deciding in an exceptional case, in accordance with established principles, whether a breach of duty—being a breach of duty that is established but which can not be established as satisfying subsection (1)(a)—should be accepted as satisfying subsection (1)(a), the court is to consider (among other relevant things) whether or not and why responsibility for the harm should be imposed on the party in breach.

(3) If it is relevant to deciding factual causation to decide what the person who suffered harm would have done if the person who was in breach of the duty had not been so in breach—

(a) the matter is to be decided subjectively in the light of all relevant circumstances, subject to paragraph (b); and

(b) any statement made by the person after suffering the harm about what he or she would have done is inadmissible except to the extent (if any) that the statement is against his or her interest.

(4) For the purpose of deciding the scope of liability, the court is to consider (among other relevant things) whether or not and why responsibility for the harm should be imposed on the party who was in breach of the duty.

12 Onus of proof

In deciding liability for breach of a duty, the plaintiff always bears the onus of proving, on the balance of probabilities, any fact relevant to the issue of causation.

[53] As I accept the evidence of Mr Fyfe I conclude that the school cannot be refused relief against the architect. Not only has there been a breach of the contract of retainer there has also been a breach of the duty of care and this has caused the school's loss.

[54] I find the architect breached the duty of care owed to the school because the risk of harm to the school by not following Mr Fyfe's instructions was foreseeable. That is because by not following the instructions the school would receive a basketball court that was not full-size and the school could elect, as it did, to remedy the deficiency at a

substantial cost to it. In that way the risk was not insignificant and in the circumstances a reasonable person in the position of the architect would have taken precautions by designing the basketball court as instructed.

[55] I find it was obvious harm would occur if the instructions were not followed. Further, the seriousness of the harm would be significant, or it could require substantial expenditure to rectify the omission.

[56] I find the burden of taking precautions to avoid the risk of harm was minor as the architect could have designed the required size at the same time as the balance of the design.

[57] I do not consider the social utility of the omission of the instructions has any bearing on deciding whether a reasonable person would have taken precautions against the risk of harm.

[58] I find the breach of duty by the architect caused the school's loss. I find the breach of duty was a necessary condition of the occurrence of the harm and it is appropriate for the scope of the liability of the architect to extend to the harm so caused.

[59] I find if the architect had not been in breach of the duty of care there would not have been any action for the school to take as a full-size basketball court would have been designed and built.

[60] I find there is no good reason not to impose responsibility for the school's loss on the architect.

[61] I find the school has satisfied the onus of proof on the balance of probabilities that the architect's breach of duty caused the school's loss.

[62] Even if I were wrong to find Mr Fyfe gave the express instruction referred to I would find the architect breached the contract or was guilty of negligence in failing to clarify with the school the instructions that Mr Marshall said were given on the veranda that the basketball court would not be used for competition. I consider the weight of the evidence from Mr Jordan and Mr Brown which I accept is that it would be expected of a competent architect to at least clarify the instructions in this instance. Because I accept it was Mr Fyfe's intention the school have a full-size basketball court I consider if the architect sought clarification it is more likely than not the school would have given the very instruction Mr Fyfe said he gave. I accept Mr Fyfe's evidence that Mr Woodward rang him pretty much after every meeting Mr Woodward had with the architect so Mr Fyfe was well informed as to what the architect was doing and what they were designing. Therefore, if the architect sought clarification, as it should have, I am satisfied Mr Fyfe more likely than not would have become aware of that and give the instruction Mr Fyfe said he gave.

[63] Having regard to sections 9, 10, 11 and 12 of the Act the architect's breach of contract or negligence would be the cause of the school's loss.

[64] However I was referred to by Counsel for the architect to *Stormont Main Working Men's Club & Institute Ltd v J Roscoe Milne Partnership* (1988) 13 Con LR 127. In that case the Working Men's Club engaged an architect who had been involved in work for over 100 working men's clubs over a period of 20 years, to design and supervise alterations and extensions to the club premises. There were many changes in instructions, none of which were written, and the architect's drawings were exhibited at the club. After various meetings of the club and its committee, the club in committee instructed the architect that they required three full-sized snooker tables. The architect's plans were displayed in the club and were carefully explained by them at a general meeting having been previously considered in detail by the committee. The plans were unanimously approved. The club entered into a building contract on the basis of the architect's design including spaces for three snooker tables. Practical completion took place. When the snooker tables were delivered, the suppliers advised the club that there was insufficient space to allow the tables to be positioned in such a way as would comply with the requirements of the Billiards and Snooker Control Council because of the position of the pillars in the extension. The tables were repositioned at the architect's suggestion, but the club continued to complain that the space around the tables was inadequate. The club then sued the architect alleging negligence and claiming damages. It was common ground at the trial that the snooker tables had been in regular use since their installation, that the club never expressly instructed that the space for the tables should be suitable for competitions, that the club never expressly stated that the tables would only be required for recreational (i.e. non-competition) use; and that the architects never warned the club that the spaces for the tables did not conform with the Billiards and Snooker Control Council's recommendations. It was held that the architects had not been negligent in their

design. It was held by the trial judge that if the client has expressed his instructions in terms which leave the architect in doubt as to what his purpose is, the architect has a duty to ascertain what is the purpose he is instructed to achieve. However the trial judge did not accept that the architect should have been put on notice that competition snooker formed part of the club's intentions. Therefore the club's claim was dismissed.

[65] In my view the *Stormont* case can be distinguished in the present matter before me because I find the school's intentions were clearly made known to the architect by Mr Fyfe and the architect failed to carry out those intentions.

[66] However the architect claims the school was guilty of contributory negligence:-

(a) by not nominating Mr Fyfe as the person with authority to instruct the defendant with respect to the project;

(b) for not conveying to the defendant from the outset that it wanted, as a first priority, competition standard and height basketball court in the building and did not want an MPH;

(c) for failing to advise the defendant (assuming it had such funding) that it had funding available to it in excess of the BER funding to achieve a competition standard and height basketball court in the building as well as all the other things shown in the tender drawings.

[67] As I find the school gave the architect an express instruction which was not followed there is no basis for a claim that the school was guilty of contributory negligence. In

any event the basis for the claim of contributory negligence does not in the circumstances succeed.

[68] The architect also counterclaims for $32,560 for fees owing. I accept Mr Jordan's evidence that the architect seeking these additional fees for their services in resolving the matter is highly irregular and relies on an assumption that they carried out all their professional responsibilities to a demonstrable satisfactory degree. As Mr Jordan says this assumption is unsupported by the evidence. Further there was no particularity given as to what these architectural invoices related to specifically in terms of work. No evidence has been led at the trial as to these specific invoices.

[69] Therefore I dismiss the architect's counterclaim.

[70] I give judgment for the plaintiff against the defendant for $505,000.04. That is made up of $366,262 for the claim and $138,738.04 for interest. Interest has been calculated from the 17th of March 2011 to 26 November 2015, 1716 days.

[71] I will hear the parties on the question of costs.