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IN THE HIGH COURT OF NEW ZEALAND
DUNEDIN REGISTRY

NO. M.86/82

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BETWEEN MICHELLE ALIDA MORRISON

Appellant

A N D ROBERT ALEXANDER MACPHERSON

Respondent

Hearing: 20 October 1983

Counsel: C.S. Withnall for Appellant
H.J. Ross for Respondent

Judgment: - 7 FEB 1984

JUDGMENT OF COOK J.

In the District Court, the appellant sued the respondent for damages alleging that the latter had not completed the building of a house for her and that work done had not been carried out in a proper or workmanlike manner; that in addition to the main contract a further separate agreement had been made between them to the effect that, in consideration of the appellant paying to the respondent the balance of the contract price less the 10% retention, the respondent would complete the contract; that such payment had been made but the respondent had refused to do anymore work to the house. The damages claimed were expressed to be $4,320 as the cost of completing the building in accordance with the plans and specifications, an amount of $487.67 which the appellant had paid to plumbers and a further sum of $3,000 for distress, worry and time and trouble. A notice of intention to defend was filed, but no statement of defence.

At the conclusion of the evidence, counsel for the respondent had made two basic submissions; first, that a term of the contract, clause 18, relating to the taking of possession by the owner, relieved the respondent from further

obligation under the contract and was an answer to the appellant's claim, but that, in any event, the appellant had not proved the loss for which damages were claimed.

The learned District Court Judge, while accepting that the builder who had given evidence in support of the appellant's case was a builder of considerable experience, found that there was nothing before the Court to justify a quantification of the claims for damages and that, had it turned on that aspect alone, the appellant would have been non-suited. He went on to consider the terms of clause 18, however. This sets out the obligations with which the owner must comply prior to becoming entitled to possession of the property and then continues as follows:-

> "Possession taken by the owner in non-compliance with this clause will operate to absolve the Builder from liability for maintenance in terms of Clause 15 hereof, and in such case shall be deemed that the works have been completed to the satisfaction of the Owner in all things and the Builder shall be entitled to full recovery of the balance of the contract price unpaid."

Having found that no fundamental breach of the contract had been demonstrated and that the appellant had taken possession of the house without complying with the obligations set out in the earlier portion of the clause, the Judge reached the conclusion that she was bound by this provision. Consequently, he dismissed the claim outright.

The appeal is brought on the grounds that the District Court Judge was incorrect in holding that the appellant's action was barred by clause 18 of the contract; it was submitted that the clause had ceased to apply for either or both of the following reasons:-

(a) that an arrangement reached in July 1978 between the parties constituted either a new contract, or a variation of the original contract, which excluded the provisions of clause 18, or

(b) that the actions of the respondent, in permitting and encouraging the appellant to go into possession of the house prior to the completion of the work, amounted to a waiver of the

respondent's rights under the clause.

The possibility of a new agreement had been pleaded and some brief reference made in the submissions before the District Court Judge, but no reference was made to him as to the possibility of the clause being waived by the respondent.

While it was conceded that the appellant had not proved the damages claimed, it was submitted that this was a defect which could be cured and that the appropriate course for the District Court Judge to have adopted was to have entered a non-suit.

The facts upon which these submissions must be based are not extensive. The decision to build the house was made some time in 1977, and it seems that work was started in that year prior to the parties signing the contract in December. According to the evidence of the appellant, she was told in March 1978 that the place was ready for her occupation. While she states that she did go to live there, there appear to have been some delays. She had been living in a state house but, after having first given notice, had to withdraw the notice because her new home was not ready. She gave further notice but when she went to the house she found it was still not completed and that the respondent was still working there. In her evidence she said that the builder worked for another week or so until she moved in but that this by no means completed all the work to be done. There is no need to list or comment upon the items of work which it is claimed was not done or not done in a satisfactory manner. It may be noted, however, that problems arise with the supply of water for the house and the appellant states that she was told the water would be on within a day or two at the most of her moving in.

Matters of complaint were discussed with the respondent and in July 1978 there was a meeting at the latter's solicitor's office. According to the appellant, the result of the meeting was that the respondent agreed that, if the appellant paid the money, he would do the things necessary to finish the painting and the wall-papering. She understood that the balance of the contract price less 10% was paid but said that nothing was done. A letter was sent from the solicitors to the respondents

on the 26th September 1978 and read as follows:-

> " Our understanding of the discussions that we had with your Mr. Ross was that once the contract price was paid in full your client would complete the house for Mrs. Morrison in accordance with the terms of the contract.
>
> The money has now been paid for over two months and we are instructed that nothing has been done.
>
> Would you please let us know whether or not your client intends to complete the contract."

It is pointed out for the respondent that the reference is to the price being "paid in full" and that there is no evidence that this has in fact happened; that the 10% retention was never paid over. As to the letter, no reply was received. When the appellant was being cross-examined there was this exchange between her and counsel:-

> "Prior to your moving in you were at the house painting? .... Yes.
>
> You were anxious to move into the house? .... Reasonably, yes.
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> You already gave notice on your State House in Brockville? .... Mr MacPherson told me the house would be finished by then. He started the house a long time before the contract had been agreed and before I got my loan for that fact. He said I will start the house now because it will be next year before I would be able to do it.
>
> You were asked to move into the house? .... I asked when I could move in and he said you can move in such and such a week and I will still have a few things to do and he said do you mind my doing them while you are there, which I didn't.
>
> Prior to your moving into the house did you make any complaints to Mr MacPherson? .... At different times, yes."

It is clear that, prior to going into occupation, there were a number of complaints about inadequacies in the work. She was asked by Mr Ross whether, notwithstanding these complaints, she had moved into the house and he replied that she had.

There is nothing to suggest that anything was said to her at any time in respect of clause 18 though she must be

deemed to have known of its existence. While the absence of reference to it alone does not weaken its force, the fact may be borne in mind when considering what was said between the parties and what inferences are to be drawn from the words spoken.

As to there being a novation which would constitute a new contract, or a variation of a contract so far as this particular aspect is concerned, I am unable to see that that can be the case. For there to be a novation, there must be an act whereby, with the consent of the parties, a new contract is substituted for an existing contract and the latter discharged (9 Halsbury 4th para. 580). There is no evidence sufficient to suggest that. In the case of a variation, certainly the original contract remains on foot but terms are altered by agreement of the parties. If there were a variation in this case, it would have had to be agreed upon at the meeting at the solicitor's office but the evidence is to the effect that the builder would complete the works and the owner would pay the balance owing. This may, by implication, have included an agreement by the builder not to enforce his rights under clause 18, but an agreement to vary a contract is in itself a contract. In this case, it is difficult to see what consideration was forthcoming from the appellant so as to render binding a promise by the builder to complete and forego the protection of clause 18. A promise to perform one's existing contractual obligations is not sufficient consideration: - Stilk v Myrick (1809) 2 Camp. 317; 170 ER 1168, applied by Mahon J. in Cook Islands Shipping Co. Ltd v Colson Builders Ltd. (1975) 1 N.Z.L.R. 422, 434-5, who declined to follow Lord Denning's contrary opinion in Ward v Byham (1956) 2 All E.R. 318.

It was submitted for the respondent that, assuming there was such an arrangement which was capable of binding force, the obligation upon the appellant was first to pay the contract price in full before the respondent was required to complete the house, but that the 10% had been retained and had never been paid. While I am not entirely satisfied that was the true effect of any bargain that was then reached, neither am I satisfied that any variation of the contract was negotiated which was binding on both parties.

There remains the possibility of waiver, however; that the respondent waived his rights under clause 18 when he permitted or encouraged the appellant to move into the uncompleted house. Although, under the contract, the builder's consent was not required for the owner to take possession before completion, clause 18 provided that the works would be deemed to be completed to the owner's satisfaction if the owner had taken possession without complying with her obligations under that clause. It would follow therefore that, once the owner moved in before completion, the builder was entitled to cease work altogether, although the owner was required to pay the balance of the money owing. In this case, however, it seems that the builder indicated to the appellant, before she moved in, his intention to continue to work on the house while she was occupying it. The question is whether, by reason of this, the builder may be held to have waived his rights under clause 18.

Waiver, being a forbearance by one party for the benefit of another, does not require consideration. Its binding force derives from estoppel. The principle was stated by Lord Cairns:-

> "It is the first principle upon which all Courts of Equity proceed, that if the parties who have entered into definite and distinct terms involving certain legal results - certain penalties or legal forfeiture - afterwards by their own act or with their own consent enter upon a course of negotiations which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced or will be kept in suspense or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable, having regard to the dealings which have thus taken place between the parties." - Hughes v Metropolitan Railway Co. (1877) 2 App. Cas. 439, 448.

Lord Denning, in the context of discussing a waiver of a stipulation as to time, said:-

> "If the defendant, as he did, led the plaintiffs to believe that he would not insist on the stipulation as to time, and that if they carried out the work he would accept it, and they did it, he could not afterwards set up the stipulation as to time against them. Whether it be called waiver or forbearance on his part, or an agreed

> variation or substituted performance, does not matter. It is a kind of estoppel. By his conduct he evinced an intention to affect their legal relations. He made, in effect, a promise not to insist on his strict legal rights. That promise was intended to be acted on, and was in fact acted on. He cannot afterwards go back on it." - Rickards (Charles) Ltd. v. Oppenheim 1950 1 K.B. 616, 623.

There are two elements which the representee must establish before the principle can be invoked:-

> "(a) an unambiguous representation arising as the result of a positive and intentional act done by the representor with knowledge of all the material circumstances; and
>
> (b) the respresentee must have carried out the new arrangements in reliance on the representation." - (Cheshire and Fifoot, p. 464).

This was accepted as being correct by the Court of Appeal in Neylon v Dickens (1977) 1 N.Z.L.R. 595, a case in which the relationship between waiver and estoppel was discussed. In the present case, while no finding of fact had to be made by the District Court Judge, as the point was not raised before him, the evidence is sufficient to leave a clear impression on one's mind that the house was not completed when the appellant moved in; that the respondent acquiesced in her taking possession and accepted that he would continue to work on the construction of the house and do other work under the contract notwithstanding that she had moved in, and that this acceptance of the situation was understood and relied upon by the appellant. The appellant's evidence of the events in relation to moving into the house, coupled with the discussions in the solicitor's office, is sufficient to indicate, on the balance of probabilities, that the respondent was, in effect, representing that he would not invoke the latter portion of clause 18 against the appellant if she took possession without duly complying with the requirements of the earlier part of the clause.

I find that the appellant is entitled to succeed on this point and that the respondent could not rely on clause 18 to defeat a claim by the appellant for damages, subject always to there being adequate proof of loss. This can only be of

advantage to the appellant, however, if there is substituted for the judgment given against her in the District Court an order of non-suit; it being accepted that proof of damage was lacking.

When it became apparent that there was no proof of quantum, though a fair indication that damage to some extent had been suffered, counsel did apply for an adjournment to call further evidence. This was refused as the District Court Judge considered that it would be wrong having regard to the time which had already elapsed, to grant a further adjournment. Having considered the lack of evidence as to the loss to the appellant, he did state:-

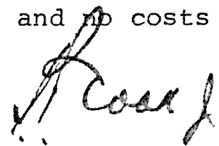
> "The plaintiff would be non-suited on the question of proof of damage."

but then turned to the other defences raised.

Full consideration of the law relating to non-suit, as opposed to judgment for the defendant, was discussed in McCabe v. Cassidy (1966) N.Z.L.R. 112 and among the cases cited is Hutchinson v. Davis (1940) N.Z.L.R. 490, where the following appears in the judgment of the majority of the Court of Appeal:-

> "'If the view that I have expressed is correct, then the case should have been withdrawn from the jury at the conclusion of the respondent's case. Ordinarily the proper course would be to nonsuit, but if the defect in the plaintiff's case is one which cannot be made good or repaired, then the authorities show that the proper course is to enter judgment for the defendant, and, in my opinion, that course should be adopted now in this case'."

In the present situation, there are indications that the appellant's case could be repaired; there is evidence of shortcomings in the work performed, but for some reason no proper evidence of the damage which the appellant had thereby suffered. Accordingly, in lieu of the outright dismissal of the appellant's claim, there is substituted an order of nonsuit. The order for costs in favour of the respondent must stand and no costs are allowed on this appeal.



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