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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

M.857/82

NZLR

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BETWEEN ROBERT WALKER LIMITED a duly incorporated company having its registered office at Auckland and carrying on business as Real Estate Agents

Appellant

AND CARTER MERCHANTS LIMITED a duly incorporated company having its registered office at Auckland and carrying on business as timber and builder supplies merchants

Respondent

Hearing: 2nd February, 1984

Counsel: Yolland for Appellant
Marsh and Podwin for Respondent

ORAL JUDGMENT OF SINCLAIR, J.

In the District Court at Auckland the Respondent sued to recover an amount said to be owing by the Appellant in respect of materials which had been supplied in relation to the building of a house by the Appellant. The Appellant counter claimed alleging that certain materials which had been supplied by the Respondent were not up to standard and after a defended hearing the District Court found in favour of the Respondent.

In essence what occurred was that the Appellant had employed an architect to draw up plans and specifications in relation to a proposed construction of a pole house and in the plans and specifications reference was made to a

Bondeck floor. In consequence Mr Walker, a representative of the Appellant company which ultimately took over construction of the house itself, attended upon the Respondent with a view to making enquiries in relation to the Bondeck floor. In consequence a Mr Gilmore of Carter Merchants attended and it is as a consequence of the conversation which then took place between Mr Walker and Mr Gilmore that the proceedings arose.

Stated shortly it can be said that the discussion centred around the Bondeck flooring and the use thereon of a preparation known as Woodzone and it was such flooring and so treated which was subsequently purchased by the Appellant from the Respondent and which was delivered.

In June 1978 the first floor was laid and in a weekend shortly after the laying of the first floor there was apparently heavy rain. In consequence there was distortion of the floor apparently through the water getting into the Bondeck flooring with the result that there was considerable distortion not only to the floor but also to the poles of the pole house. By reason of the nature of the construction of the pole house the roof was not then in position.

Not only was the first floor affected, but later when the second floor was laid it apparently also suffered from a similar complaint because at the time of the heavy rain the flooring for this second floor had in fact been delivered to the site but had not been laid.

Throughout this action the main thrust of the Appellant's claim has been the provision of S.16(a) of the Sale of Goods Act 1908. I quote from the subsection (a) of that Section

and exclude the proviso because I do not think that the proviso plays any part in a determination of this action. Subsection (a) provides as follows:

> "Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the courseof the seller's business to supply (whether he is the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose:"

It is necessary therefore to have a look at the evidence in relation to the conversation between Mr Walker and Mr Gilmore to see what occurred.

As one would expect with the action not being heard until March, 1982 Mr Gilmore's memory was not as good as Mr Walker's and it is little wonder that in relation to the conversation the District Court Judge found himself in a position where he preferred Mr Walker's version to that of Mr Gilmore. In relation to this particular aspect of the matter Mr Walker said:

> "I questioned him on the water proofing qualities of Bondeck. Mr Gilmore knew that there was a product out which could be used. He was not too sure about the full details. He rang a representative in his office at the time I was sitting there and was given more details over the telephone. He told me the name of the product which would be used to cover it - to waterproof it - and he told me what it was made of and why it was. he told me it would be suitable to cover the material and satisfied my queries at the time. This product was Woodzone. We discussed the question of the Bondeck floor panels being Woodzone treated. The reason for the Woodzone treatment was to repel moisture be it in the form of rain or atmospheric moisture for a period for which the floors would be exposed."

Mr Gilmore's evidence on the same topic, as I have already

said, was not quite so specific. He said:

> "I know that there was a discussion about Bondeck floors but I am not too sure on the Bondeck beams. I would have told Mr Walker in relation to the Woodzone water repellant qualities that it was a temporary water proof that is applied to particle board. At the time that it is manufactured it can be applied up to three months normal exposure and then it is not guaranteed any further. When I say 'normal exposure' I mean the exposure to normal weather conditions. In adverse weather conditions, storms or anything like that, that would not be considered normal exposure."

As I have already said, after considering those two portions of evidence the District Court Judge stated that he was satisfied that there were representations made by Mr Gilmore to the effect that the water repellant would under normal circumstances prevent damage to the floor panels during construction. Earlier in his judgment at page 3 the Judge had stated that he was satisfied that Woodzone was not represented as being anything other than a water repellant and was not alleged to have been a complete water proofing system. However, in the judgment there is apparently an inconsistency which has crept in and which may well have prompted the present Appellant to bring this appeal. At the foot of page 5 reference is made to the fact that the Respondent had contended that the conversation between Messrs Walker and Gilmore did not fall within S.16(a) of the Sale of Goods Act because Mr Walker was not relying on thePlaintiff's skill or judgment. Without more the District Court Judge said he could not accept that and went on to say that he was satisfied that the discussion about Woodzone took place because Mr Walker was concerned about possible water damage. That comment I would consider to be quite justified in relation to Mr Walker being

concerned about possible water damage, but there is nothing in the judgment which says on what basis the District Court Judge rejected the contention that the conversation did not fall within S.16(a) of the statute. Later in the judgment at page 6 a statement is made which is almost diametrically opposed to that which I have just referred to. When further discussing the conversation between these two men the Judge stated that he was not satisfied that the conversation between the two men resulted in any legally binding obligation upon the Plaintiff and he stated that it was in the nature of a general enquiry as to the use of a water repellant. If that was truly his finding then that would exclude the operation of S.16(a) of the statute. That that was his intention I think becomes clear because when one reads the following sentence he makes reference to the fact that the conversation did not result in a condition of the contract being arrived at similar to that referred to in Baldry v. Marshall (1925)1 K.B. 260.

I then go back to examine what was said by Mr Walker and I draw attention immediately to the fact that when Mr Gilmore was questioned as to something which could be used for water proofing the Bondeck, Mr Walker stated that Mr Gilmore was not too sure about the details of the preparation and that it was only in consequence of Mr Gilmore ringing someone else in the firm that he was able to give Mr Walker some information. How can it then be said that Mr Walker was relying upon Mr Gilmore's skill and judgment? He had none. He had had to go to somebody else to make enquiries and a conversation took place between Mr Gilmore and an un-named third person and Mr Walker, quite naturally, is not in a

position to say what exactly was said by the person on the other end of the telephone. All that was being handed on to Mr Walker was some information from a third person and it did not come from, according to Mr Walker, Mr Gilmore's knowledge and experience in relation to the product. But even that is not sufficient because the law makes it perfectly plain that the person of whom the enquiry is made must be aware that the buyer, that is Mr Walker in this case, was relying upon the seller's skill and judgment. This can often happen by persons simply stating: I want your advice as to what would be an appropriate way to deal with a particular problem as I have no experience of it. Once the person having the requested knowledge replies then if it is dealing with the sale of goods it can fall within the ambit of the statute.

As was said by Lord Wilberforce in Hardwick Game Farm v. Suffolk Agricultural Poultry Producers Association (1969)2 A.C. 39 at page 125:

> "If the buyer can show that a particular purpose was made known so as to show reliance, the condition may attach: and, because the transaction takes place in the context of a market, between two persons of generally equal competence and knowledge and on the basis of a standard contract which incorporates no such condition and the terms of which may indeed suggest that no such condition applies, the buyers' task may not be an easy one. In seeking to discharge it,it is not sufficient merely to show that the seller knew of the purpose; of course he may: business men do not work in a vacuum, they know their trade and their customers and they are not to be saddled with conditions merely because they are competent and knowledgeable."

Simple enquiries have been held time and time again not to fall within the ambit of S.16(a) of this statute and there must be language used to bring the conversation and the

implications of it within the ambit of this particular statute. That was recognised in Feast Contractors v. Ray Vincent Ltd (1974)1 N.Z.L.R. 212.

In the course of the judgment in the District Court reference was made to the heavy water damage to the floor panels not being within the contemplation of the parties and also that that factor was not one which became a term or firm condition of the contract. To my mind the problem is even more basic than that. It goes back to what was the actual conversation as found by the District Court Judge. That conversation, to my mind, was of such a nature that it never imported any condition which can be treated as coming within Section 16(a).

In those circumstances there is no necessity for me to go further in dealing with this appeal and accordingly I would uphold the judgment in the District Court and dismiss the appeal. The Respondent is entitled to costs. Having regard to the issues and the amount involved I allow the sum of $250.

P. D. Ivi J.

SOLICITORS:

Yolland and Romaniuk, Auckland for Appellant
Earl, Kent & Co., Auckland for Respondent