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IN THE HIGH COURT OF NEW ZEALAND

AUCKLAND REGISTRY

A. No. 803/82.

1383

BETWEEN JOHN ROBERTSON of Auckland, Gentleman

PLAINTIFF

AND NIVEN INDUSTRIES LIMITED a duly incorporated company having its registered office at 147 Hobson Street, Auckland, Engineers

DEFENDANT

Hearing: 8th and 9th February, 1984.

Counsel: Gould for Plaintiff
Everard for Defendant

Judgment: 1 NOV 1984

JUDGMENT OF MOLLER, J.

This action was heard on 8th and 9th February of this year, and thereafter counsel were to lodge written submissions. The last of these reached the Registry on 2nd April. I regret that, since that time, there has been such a long delay before the delivery of this judgment. This, however, was due to matters of ill-health which, for some months, precluded my working upon this and other reserved judgments.

The hearing took an unusual course because Mr. Gould, counsel for the plaintiff, had a difficulty arising out of the fact that his only witness could not, for good reason, be

available until the afternoon. Mr. Gould and counsel for the defendant, Mr. Everard, therefore agreed that Mr. Gould should present his opening of the plaintiff's case, this to be followed by an opening by Mr. Everard of the defendant's case. This was done, and Mr. Everard called the first of his three witnesses, then Mr. Gould called his witness, and, finally, Mr. Everard called his two remaining ones.

The basic facts are these:-

1. In the month of October 1980 the defendant ("Niven"), as vendor, and the plaintiff ("Robertson" as purchaser, entered into an agreement for the sale and purchase of a property at 53-59 Cook Stree Auckland;
2. There was a building upon the land;
3. Clause 7 of the agreement read: "The Vendor warrants he has not received nor has he any notice of any requisition or outstanding requirement imposed by any local or government authority in respect of the property which he has not disclosed to the Purchaser.";
4. Clause 15 read: "That the agreements obligations and warranties of the parties hereto herein set forth insofar as the same have not been fulfilled at the time of completion of this transaction shall not merge with the giving and taking of title to the said land and with delivery of the said chattels (if any).";

5. The transaction was settled on 19th November 1980;

6. On 13th March 1980 (which, of course, was about 7 months before the agreement was signed) the Auckland City Council wrote a letter addressed to the secretary of "Jas J Niven & Co Ltd", this being the name of Niven at that time;

7. This letter arose out of a survey by the Auckland City Council ("the Council") of the building on the land which was the subject of the agreement;

8. The letter reads as follows:

" AUCKLAND CITY COUNCIL

Please quote: 51/110 Mr Oldnall/EL

13 March 1980

The Secretary
Jas J Niven & Co Ltd
P O Box 5543
AUCKLAND 1

Department of Works
Administration Building
Civic Centre,
Private Bag,
Wellesley Street,
AUCKLAND, New Zealand.
Telephone: 792-020

Director of Works:
B.T. Anderson

Dear Sir

FIRE PROTECTION - 53 - 59 COOK STREET

I have to inform you that a resurvey of the above premises has been made in order to determine whether the building complies with Council's present Building By-law-Fire Resisting Construction and Means of Egress and related documents.

I advise that the buildings surveyed are deficient as follows in Schedule 'A'.

It is appreciated that it is difficult to bring old buildings up to by-law requirements in a short space of time. The items in Schedule 'B' are made up on the basis of first priority which must be attended to urgently. The remainder of items in Schedule 'A' should be considered in future programming to bring the building up to by-law requirements.

Schedule 'B' has been compiled, bearing in mind the type, use, age and economics of the structure. Included in Schedule 'B' are recommendations on possible ways to achieve the By-law requirements and

some alternatives which it is felt will provide suitable safety and bring the buildings into reasonable compliance with the By-laws.

This schedule will undoubtedly require time to organise and carry out. I ask that you supply to Council a timetable outlining when and in what order this work will be carried out. To assist you, items have been marked with an asterisk to indicate which require the greater priority.

It is important before commencing work as a result of this notice, to obtain a building permit from this office. It will be necessary for the Inspector to be satisfied from the plans and specifications submitted that the proposal is in accordance with the requirements of the By-law.

The Council's Egress Inspector will be available between the hours of 9 a.m. and 11.00 a.m., to advise you or your Architect so that all possible expedition may be given to the work.

Your prompt action in this matter would be appreciated, as Council cannot permit substandard fire precautions to continue.

Yours faithfully

I.C. GIBSON

for C G GELDARD
CITY BUILDING SURVEYOR . " ;

9. Enclosed with the letter was a page dealing with the Schedule 'A" and the Schedule 'B' referred to in it;

10. The enclosure read as follows:-

" The building surveyed is of 3 stories (sic) in height, approximately 1,150m² in area, having a ferro concrete frame and floor construction. Egress is provided by an internal stair through all floors discharging to Cook Street. Basement and ground floors have alternative access direct on to the ground. The first floor has an alternative stair to the outside.

Schedule A

1. Walls perpendicular to the northern boundary have unprotected openings adjacent to that boundary.

2. Hatchways through the floors are not protected in a manner to maintain the required 2-hour F.R.R. between floors.

3. The electrical switchboard is not fire isolated from the exit stairway.

4. The smoke stop door frames to exitways do not

comply with NZS 1188 in that the frames are not 33 mm thick with 25 x 35mm screw fixed stops.

5. The door from the basement level to exit stair is not a solid core door having a ½-hour F.R.R.

6. Smoke stop doors to exitways are required to be self-closing. Some doors are not fitted with self-closing devices, others are held open.

7. External doors from the ground floor and the exit stair do not swing in the direction of exit travel, i.e. outwards.

8. The alternative exit from the top floor on the eastern side of the building is not protected against fire on the ground floor in that windows in the outside wall of the stair enclosure are adjacent to and exposed to unprotected openings into the ground floor. Also the exit discharge is adjacent to and exposed to windows into the ground floor.

10. External doors are difficult to open.

11. No access is provided for disabled persons.

12. In the basement care should be taken with the handling and storage of combustible liquids.

Schedule B

1. Fit to the opening from the exit stair to the basement a smoke stop door and frame having a ½-hour F.R.R.

2. Ensure that all smoke stop doors including doors to cupboards under the stair are fitted with self-closing devices in working order and that their function is not impaired by any means.

3. Ensure that all external exit doors are readily openable from the inside. "

11. Neither this letter itself nor any information about its contents was disclosed by Niven to Robertson before settlement of the transaction;

12. In September 1981 Robertson was negotiating with another company for the sale of the property to it at a price considerably higher than Robertson had paid for it, and this new agreement contained the same provision as appeared as clause 7 in the agreement between Robertson and Niven;

13. It was during these negotiations that the Council's letter of 13th March 1980 was made known to Robertson;

14. On 19th March 1980 the Council wrote a letter addressed in this way,

" Mr J Chinnery-Brown
Asset Realty
P O Box 4175
AUCKLAND 1 " ,

and a copy was sent to Niven;

15. This letter said that, at Mr Chinnery-Brown's request, "an inspection (had been) carried out on the building " with which this action is concerned, and it added that the inspection "was to determine whether or not the Council would serve any requisitions to upgrade the building in thenear future " ;

16. The other parts of this letter of 19th March 1980 which are of particular importance in the present case are in these terms:

"Fire Safety to NZSS 1900 Chapter 5

Structure:

There is one area where an unprotected hole in a floor exists. This hole requires to be filled in with concrete to a 2-hour fire resistance rating, or enclosed from floor to ceiling in a fire rated shaft.

Egress

The egress has been dealt with fully in a separate letter to Jas J Niven & Co Ltd, Ref 51/110 Mr Oldnall/EL,

dated 13 March 1980, and a copy is attached. You are reminded that before any work to upgrade the building commences, a building permit is required to be obtained.";

17. The reference in this letter to "NZSS 1900 Chapter 5" brings into consideration, in this present case, the booklet marked Exhibit B, which is entitled

"Model Building Bylaw
CHAPTER 5
FIRE RESISTING CONSTRUCTION
AND MEANS OF EGRESS" ;

18. Niven also failed to disclose to Robertson the contents of the letter dated 19th March 1980.

19. In May 1982 the work which was the subject of the two letters from the Council (with the exception of two items in Schedule A to the first of them, which items I shall mention later) was completed at the direction of Robertson and paid for by him;

20. The cost was $17,500 (a figure agreed upon by the parties).

By his Amended Statement of Claim Robertson alleges that Niven, in breach of clause 7 of the Agreement, did not disclose to him requisitions made by the Council in respect of the property, that he "remedied the said requisitions to the satisfaction of" the Council, and that he met the cost of the remedial work. His claim is for that cost together with interest.

Before I deal with the Further Amended Statement of Defence filed by Niven, it is necessary to refer to certain aspects of the letter of 13th March read together with that of 19th March. It is to be noted that Schedule A enclosed with the first letter, purports to contain twelve items, but that in fact it contains only eleven items, there being none with the number 9. Then, that letter says that certain items "have been marked with an asterisk to indicate which require the greater priority"; in fact no items are so marked. These are comparatively unimportant matters. However there are two very important matters to be noted about the two letters First, it is accepted by both parties that the three items comprising Schedule B are also contained in Schedule A; item 1 in Schedule B corresponds with item 5 in Schedule A; item 2 in Schedule B corresponds withitem 6 of Schedule A; and item 3 of Schedule B is covered by items 7 and 10 of Schedule A. Secondly, it is also accepted by both parties that the portion of the letter of 19th March referring to the "unprotected hole in a floor" corresponds with item 2 in Schedule A attached to the first of the letters.

I can now deal with the details of Niven's Further Amended Statement of Defence. Some of the points to which I shall now refer have already been mentioned to some extent.

The first thing to be noted here is that, at the hearing, counsel agreed that paragraph 5 should be struck out, as also should b the final paragraph dealing with an alleged " further defence". As to the remainder of the document: Niven admits receiving the letter of 13th March; asserts that Schedule A "did not constitute requisitions"; admits that "the items in Schedule B did constitute requisitions"; admits that those last-mentioned items were not disclosed to Robertson; admits that Robertson carried out the work necessary to satisfy those items conceded by Niven to be "requisitions"; admits that Robertson has demanded the cost of the

work from it, and that it has refused t o pay the amount agreed upon as the proper figure; says that it has offered to pay to Robertson the cost of remedying the items appearing in Schedule B and item 2 of Schedule A the cost of which was $3,031.25 (an amount with which Robertson agrees); and says that this sum "has, by agreement between the Plaintiff and the Defendant, been paid into the Defendant's solicitors' trust account to be treated as if it were a payment into Court with a denial for any greater sum". This last mentioned statement is accepted by the plaintiff as correct.

The result of all this is that the question for my decision is whether or not the letter of 13th March amounts, in respect of the items in Schedule A other than items numbered 2, 5, 6, 7 and 10, to a "requisition", or a "requirement" imposed by the Council, or "notice" of any such "requisition" or "requirement". In other words I am called upon to construe that letter and its annexure to determine whether or not the two documents, read together, can be said, as far as the disputed items are concerned, to fall within any of the descriptive words that I have just quoted.

I have to remember that one must, in construing a document, consider primarily the document itself, although assistance can be drawn from certain types of admissible extrinsic evidence. But I take the view that, in the present case, evidence of the subjective intentions or opinions of the witnesses as to what the documents were meant to convey to the recipient are not admissible for this purpose. This rules out of consideration a very great deal of the evidence that I have heard, and, in my opinion after a careful study of the notes of

evidence, there is very little in them, extrinsic of the documents themselves, which is properly admissible to assist me towards their construction. Moreover, the relevant time for ascertaining the meaning and legal effect of the documents is, as counsel agreed, the date of the agreement for sale and purchase.

At this point I remind myself that the onus of satisfying me, on the balance of probabilities, that what Niven received in those two documents was, as to the disputed items, a "requisition", or a "requirement", or "notice" of any such "requisition" or "requirement", lies upon the plaintiff.

I mention here that only two cases were cited to me. These were Kersey v. Thomson [1947] N.Z.L.R. 392, and Gallagher v. Young [1981] 1 N.Z.L.R. 734. The first is a decision of Callan, J. , and the second one of Greig, J. Neither case is directly in point as far as its facts are concerned. The first of them involved a lease and not an agreement for sale and purchase; but the second was certainly case in which the learned Judge had to consider a clause in an agreement for sale and purchase in exactly the same terms as clause 7 in the present one. In my respectful view, Greig, J., was correct when, in describing such a clause and distinguishing Kersey's case, he said that a vendor, to become liable for a breach of it, must, "by action of the local authority", have actual knowledge or notice of the specific "requirement" imposed by it, and that the wording of clause 7 is not apt to describe the duties imposed in a general way by a by-law or regulation, which duties "apply at all times" without any special "requirement" or "requisition" in respect of them.

Against this background I can now discuss the documents with which I am here concerned.

I therefore now look in detail at the letter of 13th March:-

(A) The first points to be noticed are that the letter is headed "FIRE PROTECTION - 53-59 COOK STREET", that its first paragraph refers to a "resurvey" of the premises, and says that the resurvey was done for the purpose of determining whether the building complied with "the Council's present Building By-law - Fire Resisting Construction and Means of Egress and related documents".

The "present Building By-law" is a reference to the booklet mentioned in paragraph 17 of the statement of basic facts that I have set out earlier in this judgment, and it now becomes necessary to consider certain parts of it.

To begin with, there is no dispute over the point that the premises come within the definition of "EXISTING BUILDING " appearing in the bylaw.

That being so, the next portion of the booklet to be considered is at page 55, where clause 5.55 appears. For the purposes of this case, clause 5.55.1 reads:-

" The owner of any existing building which does not comply with any or all of the relevant requirements of this bylaw for:

(ii) Fire partitions enclosing vertical

openings as set out in clause 5.22.

(iv) Means of egress as set out in clauses 5.27 - 5.54 inclusive shall, upon receipt of a written notice from the Engineer and within the period stipulated therein, cause the building to be brought to that degree of conformity with the requirements of this bylaw as may be stated in such notice, and until he has done so to the satisfaction of the Engineer shall comply with any requirements as to the use of the building (including limitations on the numbers of persons to be permitted in the building at any time, limitations on type and amount of goods and chattels to be permitted in the building, and other relevant limitations)that the Engineer shallinclude in such notice."

And clause 5.55.2 is in these terms:-

" When formulating such notice the Engineer shall give prime consideration to safety of life, and subject to that consideration shall have the due regard to all matters peculiar to the building, such as structural limitations, economic factors, and functional requirements."

(B) The second paragraph of the letter simply advises Niven that the buildings "are deficient as follows in Schedule 'A'".

(C) The third paragraph acknowledges that "it is difficult to bring old buildings up to by-law requirements in a short space of time", and, as far as the disputed items in Schedule A are concerned, does no more than tell Niven that they "should be considered in future programming to bring the building up to by-law requirements".

(D) The fourth paragraph does not deal in any way with the disputed items.

(E) The fifth paragraph begins with the words "This schedule". I have given close attention to these two words, and to what follows in the rest of the paragraph, in order to reach a decision whether the paragraph applies to Schedule B only or to Schedule A as well. As a result I am of the opinion that their application is solely to Schedule B. In this paragraph therefore, the Council appreciates that the Schedule B items will "require time to organise and carry out", requests Niven to supply it with "a timetable outlining when and in what order the work will be carried out", and then makes reference to items "marked with an asterisk", although, as I have already mentioned, no asterisks appear anywhere in the documents.

(F) The sixth paragraph stresses the necessity to obtain a building permit from the Council before work is commenced "as a result of this notice".

(G) In my view, the remaining two paragraphs of the letter takethe question of its construction no further.

I turn now to Schedule A, and I refer first to items 11 and 12

Item 11 reads: "No access is provided for disabled persons". It is perhaps splitting hairs to say that the reference is to "access" and that the bylaw deals with means of "egress"; but, be that as it may, I have searched the booklet and have been unable to find any specific reference to "disabled persons". When I say this I am not losing sight of that part of clause 5.55.2 which requires the Engineer to give "prime consideration to safety of life". Then, item 12 has nothing to do with fire-resisting construction and means of egress except to any extent that it can be brought within that part of paragraph 5.55.1 which refers to the Engineer's power in respect of "limitations on type and amount of goods and chattels to be permitted in the building". I find that item 12 does not come within such "limitations", and is no more than advisory.

In connexion with the disputed items in Schedule A there is no "stipulation" by the Engineer as to the time within which any required work is to be done; and, since I have already held that the fifth paragraph of the letter applies only to Schedule B, the Council's request for a timetable cannot be said to have reference to any of them.

Looking at all the material properly available to me, I have reached the decision that the plaintiff has failed to satisfy me, even on the balance of probabilities, that the documents, in respect of the disputed items, amount to a "requirement", or a "requisition", or "notice" of a

"requirement" or "requisition". They draw Niven's attention to certain deficiencies, but do no more than require them to be "considered" by the company at some future time.

In my study of the material available to me, two matters that I have not yet mentioned have very considerably exercised my mind.

The first of these is that there is no proof that either of the two letters involved was signed by the Engineer. That of 13th March has at its top the name of a Mr. Oldnall, and is signed by " I.C. Gibson", apparently on behalf of "C.G. Geldard". Mr. Oldnall gave evidence for Niven, and, at the relevant time, he was an officer of the Council responsible for matters of, as he put it, "the fire and egress side for the safety of buildings in the City Council area". According to Mr. Oldnall's evidence, Mr. Gibson was Mr. Oldnall's immediate supervisor, and Mr. Geldard was, as is also mentioned at the foot of the letter, the Building Surveyor. It was Mr. Oldnall who carried out the survey and prepared the letter. Then, as far as the letter of 19th March is concerned, it has the name of a Mr. Breen at its top, and is signed by Mr. Geldard. Mr. Breen gave evidence for Robertson, and was, at the material time, a Building Inspector.

If I had to rely upon these matters in order to reach a decision in favour of Niven, I should probably have to hold that, considering the provisions of clause 5.55.1, neither letter was an effective notice of a requirement or requisition. However, I have been able to reach such a decision without having to decide the point. And, in any case, Niven appears to have accepted that, in respect of the letter of 19th March (in connexion with the "unprotected hole in a floor"), and in respect of the items in Schedule B of the earlier letter, the method of signing the letters has not prevented them from being effective as a

notice under clause 5.55.1.

The second matter is that there is not, even in respect of the items appearing in Schedule B of the letter of 13th March or in the letter of 19th March, any "period stipulated" (in the sense of days, weeks or months), within which the work involved must be carried out. It is true that, in the earlier of the two letters, it is said that the items in Schedule B are a "first priority" and must be "attended to urgently". And, in the next paragraph, Niven is asked to "supply to Council a timetable outlining when and in what order the work would be carried out". Again, if it had been necessary to reach a decision upon the point, I should probably have had to hold that these references did not amount to a stipulation as to the period of time within which the notice had to be complied with, and that, consequently, neither letter was an effective notice of a requirement or requisition. However, as was the case in connexion with the first of the two problems, I have been able to reach my final decision without having to make a finding on this issue. And, moreover, Niven, in this area also, seems to have accepted that the letters were effective notices.

The position therefore is that, if there had not been the arrangement between the parties as to the matters mentioned in paragraph 9 of the Statement of Agreed Facts, the plaintiff would be entitled to judgment in the sum of $3,031.25, together with proper interest and proper costs. The payment of this sum into the trust account of Niven's solicitors is "to be treated as if it were a payment into Court with a denial for any greater sum". I am anxious to

avoid making any mistake as to exactly what these quoted words were meant by counsel to convey, because, for instance, there is no date mentioned as to when the payment into the trust account was made, and this, if I am to apply the Rules as to payment into Court, may possibly affect the questions of interest and costs.

I should greatly appreciate it, therefore, if counsel would discuss this aspect of the matter as soon as possible, and, in view of my basic decision, attempt to agree upon the orders that should now be made. When they have had these discussions, I should also appreciate it if, whether or not agreement as to the form of the order has been reached, they would approach the Deputy-Registrar and ask him to make an appointment for counsel to see me in Chambers. I shall certainly make myself readily available.

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Solicitors for the Plaintiff: Jamieson, Wilkinson, Castles of Auckland.

Solicitors for the Defendant: Nicholson, Gribbin & Co. of Auckland.