IN THE HIGH COURT OF NEW ZEALAND
INVERCARGILL REGISTRY

No. M.26/86

15/9

BETWEEN JOSEPH EDWARDS and JANETTE EDWARDS

Appellants

305

NOT RECOMMENDED

A N D IVAN HENRY SELL and MERYL BETTY SELL

Respondents

Hearing: 28 August 1986

Counsel: W.N. Dawkins for Appellants
S. Harrop for Respondents

Judgment: 28 August 1986

ORAL JUDGMENT OF HOLLAND, J.

The appellants were the builders and vendors of a house property in Invercargill sold by them to the respondents under an agreement for sale and purchase dated 4 May 1983. At the time the contract was entered into work was not complete. A provision was contained in the contract that:-

> "the vendors shall complete at their cost on or before the date of settlement the construction of the dwelling house on the said land in accordance with the best trade practice ..."

One of the obligations on the appellants was to complete concrete drives and paths in accordance with this condition.

In the District Court the respondents alleged that in several respects the appellants had failed to carry out their obligations under the contract and the District Court Judge entered judgment in their favour for their claim amounting to $5,807 together with witness expenses, costs and solicitors fees to be fixed by the Registrar. It is common ground that in accordance with the reasons of the

learned District Court Judge there is an arithmetical error in that the figure should have been $5,087 and not $5,807. There is a further error in that the District Court Judge has allowed in this figure a sum of $532 in respect of spouting but it was conceded at the hearing that that matter had been attended to and the total amount of the respondents' claim in this regard should have been $38.05. It is accordingly common ground that if the reasoning of the District Court Judge is to be applied the amount of the judgment should be $4,593.05 and not $5,807.

The appeal proceeded essentially on two main grounds. The first was that the District Court Judge had failed to take into account a provision in the agreement for sale and purchase included in the condition requiring the completion of the work as follows:-

> "Any defects or faults appearing in the said works and notified in writing to the vendor within 31 days from the possession date shall forthwith be made good by the vendors at their own cost".

It was conceded that the respondents had within 31 days listed 14 items alleged to be defects or faults. Included in those items was reference to defects in the drive. There was, however, no reference to defects in the paths. The evidence made it clear that the alleged defects in the paths were not drawn to the attention of the respondents until they had consulted experts in the Master Builders Association of Southland in relation to the drive and other matters. The respondents had appreciated that the paths were narrow but had felt that they must accept that until the experts consulted by the respondents drew their attention to defects in the concreting of the paths. It was submitted by counsel

for the appellants that because these defects were not listed within 31 days from possession the appellants were relieved from any liability in respect of defects in the paths.

The essence of the submission advanced by the appellant was that the provision in the contract requiring the vendors to remedy defects or faults listed relieved the vendors from liability in contract for breach of contract in failing to carry out the work in accordance with best trade practice or in other respects. I reject that submission. Obviously some efficacy is to be given to a provision included in a contract but it is clear that the obligation to remedy defects or faults given in a list within a 31 day period was an obligation on the vendors to remedy defects or faults without any necessity to prove breach of contract or other justification for claiming damages. There is nothing within the contract from which it can be implied that the parties agreed to relieve the vendors from any breach of contract and there are no words of exemption in the contract. The vendors were required to remedy defects or faults regardless of proof of fault. It does not follow accordingly that matters not included in that list were to be exempt from any claim for damages against the vendors. The District Court Judge was accordingly correct in placing no significance on this provision of the contract.

It was not disputed before the District Court Judge or in this Court on appeal that the respondents had not established by way of evidence that the paths and driveway had not been constructed in accordance with the best trade practice. The evidence was overwhelming and was acknowledged to some considerable extent by the appellants themselves

and their witnesses. The most significant and telling piece of evidence was the acceptance by the appellants in a letter given by their solicitors dated 6 July 1984:-

> "That Mr Edwards will now commence work to continue to complete the remedial work to the driveway on the basis of Mr Sell's specifications and conditions of 23 February last as modified by 'your letter of 10 May'".

Those specifications clearly required the appellants either themselves or through their contractor to replace the drive and remedy defects subject to conditions. It is true that that agreement did not recognise an obligation to replace the paths but the evidence produced on behalf of the respondents as to the poor standard of concreting on the driveway applied equally to the paths as it did to the driveway.

Sadly the appellants, having agreed to carry out remedial work, did not do so. Nor did they give any satisfactory explanation to the respondent as to why they did not do so. Substantial periods of time were allowed to the appellants but they simply did not get the work done. The respondent then proceeded to have the work done by another contractor at the cost of $4,555.

It was submitted on behalf of the appellants that the respondents had not established that it was reasonable to break up the total driveway and paths and replace them and that damages should not have been awarded on that basis. The respective issues were fully and carefully considered by the District Court Judge in his reserved decision. Certainly there was no evidence that the drive had cracked, but there was evidence that it was expected cracks would appear within a year. The District Court Judge, like this Court, was influenced in the decision of the appellants

to replace the drive. Like the District Court Judge, I cannot help but believe that the only issue that would have motivated the appellants to have agreed to replace the drive was their recognition that such work was necessary.

The District Court Judge referred to the alternative method of assessing damages. In matters of this kind there may be breaches of contract where the innocent party has to live with the breach of contract and be compensated solely on a diminution in value basis because the cost of repair or replacement would be so out of proportion as to be thoroughly unreasonable. There may be cases where the defect can be satisfactorily repaired and in those cases the innocent party will not be entitled to the cost of replacement. In this case the District Court Judge considered that it was reasonable for the driveway and paths to be replaced and that on the evidence was a conclusion he was well able to reach. Those were the two matters raised by the appellants in support of the appeal and the appellants fail in respect of both. It follows that the appeal must be dismissed.

The respondents, however, have reacted obviously to the appellants' appeal and although a notice of cross appeal has not been given, counsel for the respondents yesterday informed counsel for the appellants that the respondents would cross appeal.

The first matter raised is that the District Court Judge did not award interest on the amount payable. Certainly the respondents had paid for the work to be done on 8 October 1984 and had been out of pocket for $4,555 until the judgment was satisfied. Although it is not essential

for interest to be claimed in the pleadings, where interest is not claimed, and there is no suggestion that interest was specifically put before the District Court Judge, the circumstances must be rare indeed that a party can complain that interest was not awarded. Interest being a matter for the discretion of the Judge I am not satisfied in this case that it is proper for this Court to interfere in this regard.

The second issue is that the respondents claimed general damages of $500 and this was disallowed by the District Court Judge. I agree with the conclusion of the District Court Judge. There is no doubt that in cases of breach of contract of this kind general damages can in certain circumstances be awarded. But the right to general damages does not arise simply because of the breach of contract. There must be some additional element to justify general damages. On the evidence before the District Court Judge in this matter there was nothing other than the breach of contract relied on and the District Court Judge was correct in refusing a claim for general damages.

The third matter raised by the respondents is a question of costs. The Judge ordered that costs, disbursements and witness expenses should be fixed by the Registrar. The respondents claimed in this regard costs of $425.42 and Court costs of $110. They were allowed the full solicitors fees claimed and Court costs of $95. Nothing is raised in respect of those two items. However witness expenses of $652.50 were claimed and the Registrar has awarded only $203. In The Waiheke County Council v Frandi & Whiteley

Henry J. of this Court held that a District Court Judge did not have power to review a decision of the Registrar fixing costs, disbursements and witness expenses in these circumstances and the only remedy was one of appeal. With respect, that judgment appears to be clearly correct. The issues appear to have arisen over claims that builders were entitled to qualifying fees as experts and claims as to the number of days those witnesses were required to be in Court. I am satisfied that the witnesses Roberts and Gesick were experts. They were Master Builders called to give opinion evidence and the respondents are entitled to recover in respect of their expenses payment assessed as if they were experts. No reasons have been given by the Registrar, nor did he conduct any hearing.

I propose to refer the matter back to the Registrar to reassess the witness expenses and there being a dispute between the parties it is appropriate that those expenses be fixed at a hearing where both sides are represented. With regard to the witness Bonish who was also an expert I consider that the respondents will have to accept the decision of the District Court Judge where he said that a surveyor's evidence added nothing to the plaintiffs case and he declined to award by way of special damages the costs of the surveyor in taking levels in the concrete. The hearing took place over three days. It will be for the Registrar to determine whether it was reasonable for witnesses to be present for three days, but care must be taken in this regard not to be too niggardly. The Court expects counsel to be reasonable with regard to the claims on witnesses times and not to have them unnecessarily at

Court, but counsel is also under an obligation to see that witnesses are available to be called when required and the unsuccessful party should be required to pay witness expenses for the time the witnesses were actually at Court unless it can be demonstrated that such attendance was unreasonable.

The respondent has also sought $27.60 in respect of photocopying of documents. Such an expense will normally come within necessary payments, but it is neither a cost nor a disbursement in the ordinary sense of the word, nor a witness expense. No order was made in respect of other necessary payments and I am satisfied that in those circumstances the Registrar was correct in not including that claim.

The appeal having been dismissed the respondents would normally expect to receive an award of costs. This is a case in my view where the appeal should never have been brought, nor do I consider that the respondent should have cross appealed. However, I am prepared to hold in the respondents' favour that had the appellants not appealed the respondents might have let the matter rest. This appears to be the case because no notice of cross appeal has yet been given and the matter was only raised yesterday. In all the circumstances I consider that it would be just if I substantially reduced the award of costs which I would have awarded the respondents but for the cross appeal.

The appeal is dismissed, except that the amount of the judgment is varied from $5807 to $4,593.05. The cross appeal is dismissed except for the provision in relation to witness expenses which is referred back to the Registrar of the District Court for reassessment in accordance with

this judgment. The respondents are allowed costs of $75 and disbursements on the appeal.

T D Holland J