NZLR

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

M.1757/84

NOT RECOMMENDED

BETWEEN GEOFFREY ROBERTSON HOSKING and BEVERLEY BEATRICE JOAN HOSKING

Appellants

AND JOAN EILEEN BELL

Respondent

Hearing: 2 December 1986

Counsel: Mr B. M. Grierson for Appellants
Mr P. H. Thorp for Respondent

Judgment: 4 February 1987

JUDGMENT OF WYLIE, J.

This is an appeal from part of a judgment in the District Court given on 6 December 1984 in so far as it dismissed the appellants' claim, as plaintiffs, for damages relating to alleged defects in a swimming pool forming part of a property purchased by them from the respondent, as defendant.

The dispute has a long - indeed too long - history. The appellants purchased the property by agreement dated 8 June 1979. The purchase was settled on 5 July 1979. The appellants did not physically move into occupation until 31

May 1980. From the evidence it seems the property was in a somewhat run-down condition. It appears the appellants were suspicious of the condition of some aspects at least of the swimming pool. They have said in evidence that they suspected the pool was leaking, but although they may have had good grounds for those suspicions after the agreement was signed when one or other of them was at the property more or less daily tidying up even though settlement date had not yet arrived, I am not persuaded by their evidence that their doubts about the swimming pool had crystallised to that extent prior to their signing the agreement to purchase. Nevertheless their concerns had resulted in two "special terms" being inserted in the purchase agreement (which was, apart from some other special provisions which do not bear on this appeal, in standard printed form). They read:-

> "19. Special terms. The swimming pool shall be cleaned and filled by the vendor.
>
> 20. The vendor warrants that the swimming pool filter lights and motor and the oil heating system and the ducting relating thereto and the dishwasher and wastemaster included in the sale will be in a proper and efficient working order on date of settlement."

When the time for settlement came on 5 July 1979, the appellants settled under protest, knowing, as they did, that the respondent had done nothing towards making good the obligation in Clause 19 and the warranty in Clause 20. It should also be mentioned that the agreement contained a provision that the obligations and warranties of the parties

would not merge on settlement. It was not until late December 1979 and January 1980 that they obtained some expert advice about the pool. They engaged a Mr McNair of a swimming pool servicing company - a man of considerable experience - who, over a period of several weeks established a number of defects which either were the cause of or contributed to the pool leaking. Nevertheless on his first visit Mr McNair was able to say that the pump (which is driven by the motor referred to in the warranty) operated, and as he put it, "the filter filtered". Subsequently by conducting a series of tests Mr McNair established that there was indeed a loss of water from the pool. First he discovered a fracture in a pipe between the skimmer and the filter. That is near the level of the surface of the water when the pool is full. With that repaired there was still a loss of water. It was then found that water was escaping from defective grouting around one of the underwater lights some 18 inches below the full water level. The probable cause of that was explained by Mr McNair in these words:

> "Inspection showed a fault on one of the under water lights, a cavity around it which was quite possibly not there when the pool was built but can form over the years from the ph being too low and the water turning acidy and dissolving plaster away."

After that there was found an air leak in the main drain, which was from the bottom of the pool. To repair the fracture causing this leak would have been a major operation. This [illegible] was overcome by blocking off the main drain, although

that affected the efficiency of the filtration system and resulted in the loss of the ability to drain the pool with its own equipment rather than having to hire a pump for the purpose. The final defect found was a fracture of one of the pipes returning water from the filtration plant to the pool. That too was blocked off but with a further loss of efficiency in the filtration system. All of this work appears to have been done by 24 March 1980 when a written report thereon was given by Mr McNair. The appellants complain amongst other things that these defects have resulted in an excessive amount of time and effort having to be expended keeping the pool clean. To overcome this they now propose a modification to the filtration system devised by Mr McNair, which will, in a somewhat patchwork way, give them the sort of system they should have had if there had been no defects.

A summons was issued in the District Court in August 1980. There have been a variety of interlocutory applications, there have been negotiations, and, obviously, delays. I do not intend to traverse the lamentable history of the matter, or to attribute blame.

The case eventually went before the learned District Court Judge on a "Further Amended Statement of Claim". In order to appreciate some aspects of the criticisms of the judgment appealed from it is desirable to set out verbatim the allegations as to breach of the warranties in Clause 20.

"7.(b) The warranties contained in clause 20 were not performed by the defendant in the following respects:

i. The swimming pool filter was not on the date of settlement in a proper and efficient working order nor is it in such order to this day because the bottom suction pipeline to the filter was fractured.

ii. The swimming pool filter system was further not in a proper and efficient working order on the date of settlement nor to this day because the return pipeline to the pool at the southern end of the pool was found to be fractured.

iii. The swimming pool filter was not in a proper and efficient working order on the date of settlement in the further respect that the return pipeline from the pool to the filter via the skimmer outlet was fractured and had to be repaired by the plaintiff.

iv. The swimming pool lights were not in a proper and efficient working order on the date of settlement in that they had not been, as under water swimming pool lights, properly grouted into the structure of the swimming pool but had merely been held in place by a thin layer of the surface plaster which allowed water to flow out of the pool freely and that had to be repaired by the plaintiff, or alternatively as to the leakage from the swimming pool around the swimming pool lights.

v. The swimming pool itself was not in a proper and efficient working order on the date of settlement in the respect that around the under water swimming pool lights it was leaking."

The appellants claimed repair costs totalling $963.16, electricity and water costs related to tests and repairs $209.13, $1,500 as the estimated cost of the modifications to the filtration system now proposed, and exemplary damages for legal costs totalling $1,835.75. In regard to the last two items, Mr Grierson sought amendments to the Further Amended

Statement of Claim to increase to those amounts the amounts originally specified therein. He also sought to amend "exemplary damages" to "general and/or aggravated and/or exemplary damages". Those amendments were objected to by Mr Thorp. The learned District Court Judge did not find it necessary to rule thereon, and nor do I.

There was no evidence called for the defence. Only the appellants and Mr McNair gave evidence. It was explained that the respondent was very elderly and in hospital.

In his judgment the learned District Court Judge reviewed the evidence and under the heading Matters in Dispute and Findings Thereon said, so far as is relevant to this appeal:

> "Essentially the matters in dispute are whether the "special terms" in the agreement for sale and purchase already referred to, have been breached by the defendant and if they have what damages (if any) have been suffered by the plaintiffs.
>
> I am satisfied on the evidence:
>
> 1. That the swimming pool was not cleaned and filled by the vendor prior to settlement of the purchase of the property.
>
> 2. That the swimming pool was leaking at the time the plaintiffs took possession of the property."

He then went on to say, in relation to Clause 20, that it was necessary to decide "whether the leaking swimming pool is a defect covered by Clause 20."

Counsel for the appellants argues in effect that the Judge misdirected himself at this point - that the real issues were those contained in para.7(b) of the Further Amended Statement of Claim, and that the issue of the leaking of the pool was only one (and the last) of five separate and distinct allegations. He went so far as to say that the Judge must have decided the case on one or other of two earlier statements of claim which did not plead the issues so specifically. That, I think is unlikely as the learned Judge specifically refers in his judgment to the Further Amended Statement of Claim. Counsel for the respondent conceded, I think, that the Judge may have over simplified the issues. Be that as it may, the learned Judge then went on to consider whether the warranty in Clause 20 extended to leaking of the pool, giving particular consideration to the question of whether there was a warranty that the swimming pool itself should be in proper and efficient order on the date of settlement, or whether the warranty was limited (so far as the pool and its equipment were concerned) to the filter lights and motor, the words "swimming pool" being used adjectivally to define those items of equipment. It must be emphasised that there are no commas used in Clause 20. Had there been, for example, a comma between "swimming pool" and "filter" there would probably have been no room for argument. The draftsman was not sparing in his use of commas in the schedule of chattels forming part of the agreement, each chattel being separated from the next in that way. The learned Judge also found that the draftsman showed a tendency in his descriptions

of chattels to use nouns in an adjectival way. He instanced "Moffat eye level stove" and "pool cleaning equipment". I am not with respect, inclined to take much from that. The learned Judge also considered that if "swimming pool" were to stand on its own as a noun, there was nothing to indicate to what the filter lights and motor related. At least in relation to "lights" and "motor" that seems to me to carry some weight, even if, in the context "filter" could refer to nothing but the pool. The learned Judge further expressed the view, with which I agree that to speak of a swimming pool being in "a proper and efficient working order" is not an ordinary use of English. As he put it, a swimming pool does not work, it is a passive object filled with water, whereas each of the other items is of a kind that do work. For those reasons the Judge found himself unable to interpret Clause 20 in such a way as to impose on the respondent an obligation to have the pool leakfree. He therefore did not find it necessary to consider the question of damages and, although not expressly, in effect dismissed that part of the appellants' claim.

Before I return to the argument of counsel for the appellants it will be convenient to express my own view on the aspect just discussed, which will in turn dispose of para.7(b)(v) of the Further Amended Statement of Claim. In my view the learned District Court Judge reached the right conclusion when he held that "swimming pool" was used adjectivally and not as a noun the subject of the warranty.

As well as by the reasoning he adopted, I am influenced to that view by the impression that had the appellants really been concerned about the ability of the pool to retain water (and by itself that is its only function in respect of which a warranty would be likely to be sought) they would have ensured that Clause 20 was much more explicit in that regard, or perhaps, as counsel for the respondent submitted, would have ensured that appropriate provision was made in Clause 19 which indisputably and exclusively relates to the pool itself, and not, as does Clause 20, to a number of diverse items which would more appropriately be regarded as chattels or equipment. I have earlier mentioned that I was not persuaded on reading the notes of evidence that the appellants suspected a leak at the time they signed for the property. Certainly, on the evidence Mrs Hosking began to suspect only between the signing and the date of settlement. There is no direct evidence as to when Mr Hosking began to suspect, but I should have thought his suspicions would have been aroused more or less contemporaneously with those of his wife simply as a result of communication between the two. He did say in evidence that he was told by the respondent over the telephone that the pool did not leak, but no time was put on that conversation. The giving of the assurance, if that is what it was, is, however, equivocal in the present context. If given before the agreement was signed Mr Hosking may well have accepted it at face value and thereafter did not have any concern on that matter. If given after it is not part of the matrix of facts and surrounding circumstances against which

the agreement should be construed. I am also influenced by the use of "and" on several occasions in Clause 20. The oil heating system, ducting, dishwasher and wastemaster have nothing to do with the swimming pool or its equipment. It seems to me a natural reading of the clause to bracket, as it were, "filter lights and motor" as qualified by the adjectival "swimming pool". If it were otherwise one would not, I think, expect "and" between lights and motor or, indeed, before "the oil heating system" or before "the dishwasher". So, I am in agreement with the learned Judge that the appellants cannot succeed on this limb of their claim.

However, it is necessary to consider in more detail the argument of counsel that the learned Judge, in effect, overlooked the first four sub-paragraphs of para.7(b) of the claim. If indeed he did, it is perhaps not surprising because the main burden of the evidence, and of the submissions of counsel for the appellants in the District Court (of which I had the benefit of a transcript) was directed towards the leaks. What counsel now says much more fully than was done before is that the evidence clearly establishes each of the allegations in the first four sub-paragraphs; that each of the first three constitutes a breach of the warranty as to the filter and the fourth a breach as to the lights; and the damages claimed relate to the making good of those breaches. I do not find it necessary to go into the argument of counsel for the respondent who questions whether a fracture in pipes leading to and from the filter is a defect in the filter

itself, and whether "filter" in Clause 20 extends to the system as opposed to the filter itself as an isolated piece of equipment. Nor do I propose to consider in detail a related argument as to whether "lights" extends to the grouting or plaster holding the light unit in position.

The real difficulty I have in accepting Mr Grierson's argument is that of finding proof that all or any particular one of the defects existed at the date of settlement. It is true that the learned District Court Judge found as a fact that the pool was leaking at that date and I think there was ample evidence to support that finding. It may well be reasonable then to infer that one at any rate of the proved defects then existed. But, which one or more of the four? Mr McNair's inspection and work was not carried out until late December through to early March the following year - some six to eight months after the settlement date. Had that inspection and work been carried out within two or three weeks of settlement it might well have been reasonable to infer that all defects had existed at that date. I do not think, however, that it is safe to draw the same inference from facts not established until six months and more later. My reluctance to do so is fortified by the following passages from the cross-examination of Mrs Hosking:

> "Did it happen through the rest of July?..... We owned the pool then and we just stopped filling it. We could see very quickly that it was losing about an inch and a half to an inch at night. We were very disappointed of course"

and later

"After you actually settled the transaction I think you said that you found that the pool was leaking. What sort of time did it take for the pool once full to go down so that you could see it was leaking. Just roughly?..... It is a very frustrating thing. It doesn't happen quickly and it would lose about an inch and a half at night, keeping in mind it was mid-winter and we would get a very bad rain during the morning and it would fill up again. So it would have to drop another inch and a half before we would know it was going to drop and this would go on for weeks.

Without the rain you think it would take a whole night to lose an inch and a half?..... Yes, and if it was a sunny day, the next day it would probably drop two inches in the 24 hours. Perhaps not that much. It started to go down fast as the year proceeded and as we got into summer it was an inch and three quarters and on to the two inches as I mentioned, but it was not until January that we could find the pool dropping far enough for us to say, yes it is below the filter box. It is below the lights.

Do you think there was an increase in the rate that it lowered in January?..... Yes. It started to go more quickly. I guess because of the rain. We had a lot of rain in the early part of the year and we couldn't catch it at all."

It is apparent the rate of leakage increased over the six months. Whether Mrs Hoskings "guess" as to the cause is correct must be a matter of speculation. It may equally be that one or more of the defects contributing to the leaking did not occur until after settlement took place on 5 July 1979. Another matter that illustrates the danger of drawing the inference that all the defects existed at the date of settlement is that even though Mr McNair repaired the defective surround of the light in February or March, it appears from Mr Hosking's evidence that further problems occurred on a number of subsequent occasions over the next year or so. That, to me, illustrates at least the possibility

of the faults having developed spasmodically from time to time; and not necessarily all having existed at the date of settlement. I am simply unable on the evidence to draw the inference that all of the four defects particularised in para.7(b) of the Further Amended Statement of Claim or any particular one of them existed at the date of settlement.

I should at this stage say that counsel were content for me to draw such conclusions as I thought proper from the notes of evidence. There being no evidence from the respondent, the appellants' evidence being uncontradicted, and there being no real issue as to credibility it was agreed that I was in as good a position to evaluate the evidence and to draw inferences therefrom as the learned District Court Judge would have been had the case been remitted to him to consider the matters raised before me on behalf of the appellants. Having regard to the history of this case that seemed an appropriate stance for counsel to take and I certainly would not have wanted to prolong this relatively minor litigation even further by adopting the alternative course.

Being unable on the evidence to conclude that any particular one of the defects did in fact exist at the date of settlement even though it is highly probable that at least one such must have existed I am left in the position where I must hold that the appellants as plaintiffs have failed to discharge the onus which lies on them. That may seem hard on the appellants, but the warning signals were obvious in July

1979. It is their own delay in having investigations carried out that has resulted in my being unable to draw the inferences necessary for them to succeed.

The appeal is dismissed with costs of $350.00 to the respondent.

Laskin J.

Solicitors: B. M. Grierson for Appellants
Martelli, McKegg, Wells & Cormack for Respondent