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NZLR

MEDIUM PRIORITY

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

C.P. NO. 27/96

BETWEEN RW LAWRENCE and SP LAWRENCE

Plaintiffs

A N D GA POWER and ME POWER

First Defendants

A N D THE RODNEY DISTRICT COUNCIL

Second Defendant

Hearing: April 14, 1997

Counsel: Denese Bates QC for Plaintiffs
B Henry for First Defendants

Judgment: 15 MAY 1997

JUDGMENT OF MASTER ANNE GAMBRILL

Solicitors for Plaintiff

Lewis Callanan
PO Box 35361, Browns Bay

Solicitors for First Defendants

DJ Gates
PO Box 222, Whangaparaoa

Solicitors for Second Defendant

Heaney & Co
PO Box 105391, Auckland

The Plaintiffs seek to strike out paras 11 and 12 of the first amended Statement of Claim which read as follows:

> "11. THE following were implied terms of the Contract.
>
> (a) That the Existing House was structurally sound;
>
> (b) That the Existing House was safe to live in;
>
> .....
>
> (e) That the first defendants would pass good title to the land on settlement.
>
> 12. PERFORMANCE of all or any of the terms referred to in paragraph 11 hereof was essential to the plaintiffs."

Both Counsel accepted that the principles set forth in Her Majesty's Attorney General v. Equiticorp Group Limited & Ors CA.188/95, 11 December 1995, are the principles applicable to a striking out. The Court has a jurisdiction to strike out a pleading if disclosing no cause of action:

> "The discretion is one to be sparingly exercised. Striking out is justified only if, on the material before the Court and in the present state of evolution of the common law, the case as pleaded is so clearly untenable that the plaintiff cannot possibly succeed. If disputed questions of fact arise, the case must go to trial. If the claim depends on a question of law capable of decision on the material before the Court, the Court should determine the question even though extensive argument may be necessary to resolve it."

There appears to be no dispute to the factual background herein. The Plaintiffs purchased a residential property on 10 April 1995. The property was purchased with a view to altering the existing house which had been built

pursuant to a permit issued by the Second Defendant on 15 November 1974. They received a permit to carry out alterations on 27 October 1995. The proposed alterations were to make use of the existing house and in particular the foundations, including the concrete floor, plumbing and central heating. During the initial stages of construction of the proposed alterations the Plaintiff became aware the existing house was defective and after the Second Defendant inspected the site, it found the house to be structurally unsound and unsafe and ordered work to cease. The structural engineers recommended the house be demolished and new foundations, concrete slabs and walls, complying with the New Zealand Building Code, be constructed.

The Plaintiffs' case is that the dwelling which they purchased was structurally unsound, unsafe to live in and not built in accordance with the by-laws and the original building permit issued, although a cause of action arising from the failure to comply with the building permit is statute barred. The Plaintiffs' case is a breach of the contract for sale and purchase against the First Defendants, ie a contractual case, and against the Second Defendant a claim in negligence.

The Second Defendant took no part in the proceedings today and did not enter an appearance and the issues should be tested in Court as to whether or not it can be found to have been negligent.

The First Defendants seek to strike out on the grounds that the contractual terms in para 11 above, are contrary to the express terms and intention of the written agreement.

I turn to Mr Henry's submissions for the Defendant Applicants. He analysed in depth the agreement for sale and purchase. He noted that the alterations and building of this house were not under the 1990 Building Code. He addressed the first two causes of action and the pleading; it was not possible for the Defendants "to give good title". He noted para 5 of the agreement for sale and purchase. He said that the only basis of a claim by the Plaintiffs could arise through a contractual breach of Clause 5 of the agreement. By Clause 5.2 the purchaser is deemed to accept the title. No error or omission or misdescription of the property shall annul the sale. There was no suggestion of an implied term in the contract as to the quality of the building. He noted the warranties in the contract under Clause 6. He noted particularly the provisions of Clause 6.8:

> "Where the vendor has done or caused or permitted to be done on the property any works for which a permit or building consent was required by law, such permit or consent was obtained for those works and they were completed in compliance with that permit or consent and, where appropriate, a code of compliance certificate was issued for those works."

He noted that there had been inspection, permits for all works done on the property and there had been no issue about completion of the works. He noted the doctrine of caveat emptor and the common law and put before me a case relating thereto of Bottomly v. Bannister [1932] 1 KB 458. He submitted there

is nothing to indicate an obligation on the First Defendants which could sustain a cause of action. He submitted the property sold, was safe to live in and he said there was no implied right of the Plaintiffs to sue for a breach, taking into account the express terms of the contract. He said that implied terms could not be implied by predecessors in title and that it is important to note the works had not been carried out by the Defendants. He said the Court was having to imply terms that went beyond what was agreed, beyond the control of the Defendants, it was not in the contract and there had been compliance throughout with the vendors' own permits. Although he noted the Plaintiffs relied extensively on Watkin v. Wilson [1985] 1 NZLR 666, he noted there was a factual background which was distinguishable from the case herein. He noted that in that case:

> "The contract here embraced land and buildings. As it transpired, good title to the building was not given because a portion of it had been erected without a permit and did not comply with the relevant bylaws."

He suggested therefore the case was not applicable, was distinguishable because, inter alia, no permits existed and that the Plaintiffs did not have a cause of action.

The Plaintiffs' case is that the action is not so untenable that the Court should strike the Plaintiffs' claim out. The Plaintiffs rely on the pleadings that (a) the existing house was structurally sound; (b) that the existing house was safe to live in; and (c) that the First Defendants would pass good title to the land on settlement to meet the relevant tests.

Counsel acknowledged that the principle of caveat emptor generally excludes the application of any warranty but says that the quality and fitness of the house to be safe and habitable are terms to the character of the thing being sold and therefore could be distinguished from and were outside the prohibition against the implication of terms as to quality and fitness. She said if the Plaintiffs were not permitted to have these terms implied, the Plaintiffs would be compelled to accept something which is fundamentally different from what they contracted to buy, not just something of different quality or not fit for its intended purpose. They wished to obtain a house to live in. What they received was a house which was so structurally unsound and unsafe it had to be demolished.

Counsel's legal argument was that support for the proposition that the rule excluding the implication of any warranty as to fitness or quality does not exclude the possibility of an implied term as to the fundamental character of the interest being sold can be found in Ware v. Johnson [1984] 2 NZLR 518. This is a decision relating to the purchase of an orchard wherein the kiwifruit plants were apparently in the orchard and growing at the time of purchase but had in fact been sprayed prior to sale. They subsequently failed to grow and there was total loss of plants. The Court recognised there should be implied a term in the contract for the sale of the land with the kiwifruit orchard thereon that they were capable of growing and producing fruit in marketable quantities. Counsel asked the Court to apply the rationale in this decision to the house situated on the land the purchasers bought. She also relied on Gabolinscy v. Hamilton City Council [1975] 1 NZLR 150 where a warranty was implied with

which there was a breach. She said the terms thought to be implied do not contradict any express term of the contract. The requisitions clause has no applicability to the present circumstances. Counsel said the clause for compliance with building permits and bylaws does not preclude the implication of a term relating to the fundamental nature of the subject matter.

Counsel's argument was that if the house was structurally unsound and unsafe and did not comply with relevant statutory requirements, the First Defendants have failed to give good title. She relied on Watkin v. Wilson (supra); Vukelic v. Sadil-Quinlan & Associates Pty Ltd (1976) 26 FLR 457; Maxwell v. Pinheiro (1979) 46 LGRA 310; and Borthwick v. Walsh (1980) 41 LGRA 144. Whilst the factual background of each of these cases may be slightly distinguishable, it is still arguable that the rationale of the decisions could be applied in the substantive proceeding to the situation herein as the Plaintiff has had to demolish the house which was structurally unsound. The cases mentioned generally have proceeded on a basis that there has not been a building permit whereas in this case, there is a building permit, but the effect of that building permit and the apparent compliance therewith is not a matter in issue before the Court today as the Second Defendant has taken no steps in respect of the First Defendants' application.

McLelland, J in Borthwick v. Walsh (supra) said at page 150:

> ".....Any right exercisable against, or restriction affecting, the property or its owner to its or his detriment is a defect in title unless it arises solely by reason of the existence of a law of general application.....".

Counsel accepted there has been criticism of the decision and in the Court of Appeal of New South Wales Carter v. Hanson (1980) ANZ ConvR 354, the Court doubted whether there was non-compliance with relevant legislation and doubted, even if there was non-compliance, whether this was a defect in title. Counsel argued the defect in title depends on the factual circumstances of the case and the findings the Court would make at the substantive hearing. In Souster v. Craig (1986) 2 NZCPR 404, where improvements were made without the knowledge or consent of the Council, as is the case in most other cases mentioned herein, damages were awarded not only for the breach of warranty in the standard Clause 7 in the agreement for sale and purchase, but a breach of the verbal warranty as to the suitability of the basement for the purposes described by the purchasers.

Counsel referred also to Murdock v. Chiplin (1993) 2 NZ ConvC 191, where Fraser, J took the view as the legal issue was not extensively argued, and he found a clear case of breach of an express term plainly justifying cancellation, he did not propose to consider the alternative ground of relief sought based on an implied breach. In Willis v. Castelein [1993] 3 NZLR 103, the purchasers' cause of action was based on a latent defect in title because of the failure to comply with the bylaws and/or obtain a permit. This was held to be no more than defects of quality as the building had not been shown to be in such a state of on the verge of collapse or to be the subject of a probable demolition order. On a factual basis Watkin v. Wilson (supra) was distinguished but not overruled. Master Hansen (as he then was) noted in Martin v. Lingens

M.259/93 (Christchurch Registry) unreported, that on the factual basis of the case he had before him, it could not be described as a latent defect in title -

> ".....It was discovered well before settlement and if indeed it was a defect as to title the provisions of clause 5.2(1) could have been invoked."

Counsel's submission is that the Defendants have failed to demonstrate that the Plaintiffs' cause of action against them is so clearly untenable that it could not possibly succeed.

In considering this matter clearly the Plaintiffs had purchased a property which, because of Council requirements subsequent to the purchase, is or was unfit for habitation and has had to be demolished. Counsel for the Defendants acknowledged that if the First Defendants remained a party herein, it would fall on them to join the Third Party responsible for the quality of the building herein.

I am satisfied it is arguable that the Plaintiffs can imply the terms into the agreement that they seek to imply. The decisions are not clear, there is no comparable decisions based on the same or very similar set of facts, the major of the decisions are at first instance and accordingly I believe the cause of action is not so untenable as to justify a striking out.

The Plaintiffs have succeeded. I am satisfied that in normal circumstances the Plaintiffs would be entitled to costs on this interlocutory application. However, because of the nature of the application made and the arguable state of the

law herein, I am satisfied it is a case where I should fix costs of $1,000 and reserve them to follow the event.

MASTER ANNE GAMBRILL