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NZLR

NOT RECOMMENDED

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CP No. 27/96

BETWEEN **RICHARD WILLIAM LAWRENCE** and **SUSAN PENELOPE LAWRENCE** both of Auckland, Company Directors

Plaintiffs

A N D **GERALD ALDWORTH POWER** of Gervin Road, Silverdale and **MURIEL ELAINE POWER** of Gervin Road, Silverdale, both retired

First Defendants

A N D **THE RODNEY DISTRICT COUNCIL** of 100 Centreway Road, Orewa, Territorial Authority

Second Defendant

Hearing: 20th November 1997

Counsel: Denese Bates QC for plaintiffs
B H Henry for the Defendants

Judgment: 10 December 1997

JUDGMENT OF SMELLIE J

Solicitors for the Plaintiff: Denese Bates QC, 152 Anzac Avenue, Auckland
Solicitor for the Defendant: Dennis J Gates, DX 3354, Whangaparaoa

INTRODUCTION

This is an application to review the decision of Master Gambrill delivered on 13th May last, dismissing the first defendants' application to strike out paragraphs 11 and 12 of the second amended statement of claim filed on 22nd September 1997.

I remind myself of the correct approach to such an application of review, as set out in my own judgment in ***Ikon Graphics Limited v Holmden & Horrocks*** CP 296/96, Auckland Registry, Judgment 29 July 1997. In short, as I said at page 4 of that judgment:

> *"The Master's decision should not be disturbed unless the defendant/applicant is able to show that she was clearly wrong ..."*

It is also appropriate to recognise, as did both counsel appearing in this matter, that there are restrictions on the circumstances under which pleadings can be properly struck out. Before the Master and before me both counsel relied upon the following passage from ***Attorney-General v Equiticorp Industries Group Limited*** [1996] 1 NZLR 528 where McKay J, delivering the judgment of the Court of Appeal at 533 between lines 30 and 37 said:

> *"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."*

It is also clear that upon such an application the allegations in the pleadings must be taken as capable of proof and the case should be decided on that basis. Only exceptionally should additional evidence adduced by affidavit be taken into account.

It is necessary to keep all the matters set out above clearly in mind in this case.

THE HEARING BEFORE THE MASTER

The second amended statement of claim pleads broadly that the plaintiffs purchased from the defendants a property for $575,000 with the idea of adding to and renovating the house on the land, variously estimated at about $250,000 worth of the total value. Attempts to add a second storey were halted when it was found that in a whole range of ways the house failed to comply with statutory requirements and good building practice. Indeed, when officers of the second defendant were called in a demolition order was imposed. I am not concerned here with the cause of action in negligence against the second defendant for failure to supervise the building of the original house and any alterations made to.

The cause of action against the first defendant with which we are concerned, is one in contract. Pleading that cause of action in paragraphs 11 and 12 of the second amended statement of claim, the plaintiffs allege 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 life in;*
> *(c) That the Existing House had been built in accordance with the relevant by-laws of the second defendant;*

(d) That the Existing House had been built in accordance with the building permit issued.

(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."*

Thereafter it is pleaded that the implied terms referred to in paragraph 11 were breached and as a consequence, damages suffered. I should say immediately that the implication of terms pursuant to paragraph 11 (c) and (d) was abandoned before the Master and not revived before me. So that strike-out application applies only to the remaining three alleged implied terms set out in 11 (a), (b), and (e).

The first defendants have not yet filed a statement of defence but in response to the second amended statement of claim an application was filed to strike out paragraphs 11 and 12. The grounds set out in the application in support of the orders sought read as follows:

"(a) The Plaintiff is pleading implied terms in a contract for the sale and purchase of land inconsistent with express terms in the written contract.

(b) The defects relied upon by the Plaintiff for the breach of the implicit terms relate to latent defects in the building in respect of which the First Defendants had no reason to suspect existed.

(c) The First Defendants had not received any notice nor had any knowledge of any requisition or outstanding requirement on the part of the Second Defendant at the time of the settlement of sale.

(d) The full terms of the written agreement for sale and purchase dated the 10th day of April 1995.

(e) The amended Statement of Claim and all documents referred to therein which the First Defendant has required the Plaintiff to produce pursuant to Rule 306."

I have set the above grounds out in order to draw attention to the fact that all of them save the last involve reference to, or assumptions about facts which are not supported by affidavit evidence at this stage and may or may not be established at the substantive hearing. So far as the requirement to produce pursuant to R.306 is concerned, that Rule involves production for inspection and is not a means for getting documentation before the Court for consideration on a strike-out application.

Despite the requirement that strike-out application should be considered on the pleadings the Master apparently allowed Mr Henry to produce, in particular, the contract referred to in paragraph 2 of the second amended statement of claim and he apparently took her through its provisions in some detail. I question the legitimacy of that procedure and do not myself propose to go beyond the pleadings, approaching them on the basis that what is alleged can be established.

Before the Master the defendants argued that the implication of the pleaded terms would be inconsistent with clauses 5 and 6 of the Sale and Purchase Agreement; that the doctrine of caveat emptor would prevent their implication in any event; and that the decision of Henry J at first instance in ***Watkin v Wilson*** [1985] 1 NZLR 666 by which the Master felt herself bound, had been wrongly decided.

The plaintiffs, on the other hand, submitted that following ***Ware v Johnson*** [1984] 2 NZLR 518 and ***Gabolinscy v Hamilton City Council*** [1975] 1 NZLR 150, ***Watkins v Wilson*** [supra] had been correctly decided and should be followed.

The ratio decidendi of the Master's decision is to be found on page 9, penultimate paragraph where she said:

> *"I am satisfied that it is arguable that the plaintiffs can imply the terms into the agreement that they seek to imply. The decisions are not clear, there are no comparable decisions based on the same or very similar sets of facts, the majority 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 DEFENDANTS' SUBMISSIONS ON THE APPLICATION FOR REVIEW

Mr Henry took me first to the leading authorities on the implication of terms. In particular, ***Devonport Borough Council v Robbins*** [1979] 1 NZLR 1 in the Court of Appeal; and ***BP Refinery (Western Port) Pty Ltd v Shire of Hastings*** (1977) 16 ALR 376 in the Privy Council. There was no dispute between counsel as to the criteria required to introduce implied terms and I need not discuss that topic further. There was, however, disagreement as to whether or not the criteria could be satisfied in this case. In that regard Mr Henry's argument tended to rely upon not only what is alleged in the pleadings but additional material such as that set out in the grounds supporting his original application for the strike-out. Counsel also placed before me, as he had in the hearing before the Master, the contract between the parties but as indicated earlier, I decline to take that evidential material into account.

The argument for the defendants, quite apart from the factual background however, was that caveat emptor would prevent the implication of the terms pleaded in paragraph 11(a), (b), and (e).

Additionally, Mr Henry argued that ***Watkins v Wilson*** [supra] could be distinguished on the facts of this case. Again there is a difficulty there because the facts of this case, apart from what is alleged in the statement of claim, have yet to be established. Additionally, however, counsel argued that the decision was wrongly decided.

Whether Mr Henry is right or not on that point, the difficulty is that the Master was bound by the decision. While I could differ from it, if I saw fit in other circumstances, I am on this occasion bound by the appellate approach to the review of a Master's decision and therefore not free to simply disagree with Henry J in the conclusion he reached in ***Watkins v Wilson***. I would have to hold that the Master was clearly wrong before I could interfere and that would be to go further than I consider I properly can in all the circumstances here.

THE PLAINTIFFS' ARGUMENT ON THE APPLICATION FOR REVIEW

Contrary to Mr Henry's submission Ms Bates QC argued that the criteria for the implementation of terms could be satisfied. Despite Henry J's conclusion in ***Watkins v Wilson*** [supra] that implied terms very similar to those pleaded in 11 (a)

and (b) could not be introduced because of the doctrine of caveat emptor, Ms Bates nonetheless argued that different considerations applied here and that Henry J's conclusion in the ***Watkins*** case was dictated in part by the evidence. I am bound to say that is not a strong argument but on the other hand at this preliminary stage it cannot be dismissed out of hand either.

So far as the implied term sought to be introduced by paragraph 11 (e) of the amended pleadings is concerned Ms Bates was on rather firmer ground. Counsel argued that there are cases going both ways and that the decision of Henry J in ***Watkins*** in respect of defect in title because of non-compliance with statutory obligations leading to orders for demolition, is strongly in her favour and therefore the requirements for striking-out had not been satisfied.

DECISION

The application for review fails for the following reasons:

1. The references to the Sale and Purchase Agreement and the other factual matters mentioned by counsel must be ignored in favour of considering the matter solely on the basis that the allegations in the second amended state of claim can be established - see the discussion of what may be relied upon outside the pleadings in ***Attorney-General v Equiticorp*** [supra] at 533 lines 40-45.

2. The implication of terms into a written contract is a sophisticated judicial task in the discharge of which one can easily go wrong unless all the facts are known.

3. Generally, a strike-out application will only be allowed if it will dispose of the whole proceedings. So that striking-out, for example, the implied terms pleaded in 11 (a) and (b) but leaving 11 (e) alive would not be satisfactory.

4. There is no real dispute that, absent an express term in a contract, caveat emptor provides a complete answer in the areas of quality and suitability in relation to the sale and purchase of realty particularly houses. On that basis implied terms 11 (a) and (b) look vulnerable. But the precise terms of the written contract have yet to be proved as have the surrounding facts which may have a bearing.

5. There is a divergence of first instance opinion whether, if a residence does not comply with statutory requirements, and as a consequence a local body orders demolition, that can amount to a defect in title. For myself I doubt that it does and I align myself firmly with Casey J in the reservations to similar effect that he expressed in the case of ***Souster v Craig*** (1986) 2 NZCPR 404, 410. But as earlier indicated that does not enable me to say that the Master in this case was clearly wrong.

6. As is shown in the ***Equiticorp*** [supra] case where the common law can be said to be evolving the cause of action, even though facing difficulties, should be allowed to run. The line of cases (New Zealand and Australian) culminating for our purposes in ***Watkins v Wilson*** show that the defect of title that is under consideration here is not title in the ***Torrens*** system sense, but in the common law sense. The kind of problem that this case throws up appears to be a recurring one on both sides of the Tasman. (See the comments under the heading "***Legality of Structures Included in the Sale***" in Issue 10 of the Australian and New Zealand Conveyancing Report, April 1980 commencing at pg 350).

7. In summary: Because the implication of terms should not be decided upon until all the facts are known and because the case appears to be in the area of evolving law it cannot be said that the Master was clearly wrong - as a consequence the application must be dismissed.

8. Like the Master I consider the appropriate approach to costs is to fix them now but reserve payment of the same until the outcome of the action is known. Costs are fixed in the sum of $1500 on the argument before me.

Robert Smellie J.