IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2007-404-003349

BETWEEN	DONALD KEITH MUNRO & SLAVKA GEORGIEVA SHENTOVA Plaintiffs
AND	WAITAKERE CITY COUNCIL Defendant
AND	GARY CHARLES SEDDON AND BARBARA HELEN SEDDON Second Defendants

Hearing: 17 December 2008

Appearances: R Lawn on behalf of the second defendants in support
P J Stevenson on behalf of the plaintiffs in opposition

Judgment: 6 March 2009

JUDGMENT OF ASSOCIATE JUDGE ROBINSON

This judgment was delivered by me on 6 March 2009 at 3 pm,
Pursuant to Rule 11.5 of the High Court Rules

Registrar/Deputy Registrar

Date……

Solicitors: Titirangi Law Centre, 423 Titirangi Road, Titirangi, Auckland
Kumeu-Huapai Law Centre, PO Box 122, Kumeu

[1] The plaintiff purchased a property at 2 Bocage Lane, Hobsonville from the second defendants. Settlement of the sale occurred in November 2005. The plaintiffs claim that the dwelling they purchased leaks because of defects in the installation of the monolithic cladding system and the cost of remedial work is estimated to be $250,357.50, inclusive of GST. They bring these proceedings against the second defendants seeking recovery of that amount, together with damages for loss in value of property due to stigma and $30,000 by way of general damages.

[2] The claim by the plaintiffs against the second defendants relies on three causes of action, namely breach of warranty contained in the agreement for sale and purchase between the plaintiffs and the second defendants, negligence on the part of the second defendants, and breach of the second defendants' alleged fiduciary duties. The second defendants apply under r 186 of the High Court Rules to strike out the plaintiffs claim against them on the basis that the claim is clearly unsustainable.

Facts

[3] On 13 September 2005, the plaintiffs agreed to purchase a home at 2 Bocage Lane, West Harbour from the second defendants. The agreement provided for settlement and possession to take place on 13 November 2005.

[4] Pursuant to clause 14 of the agreement, clauses 6.1 and 6.2 of the general terms of sale contained in the contract were deleted and other clauses substituted. It appears the deletion was necessary because reference to the Building Act in clauses 6.1 and 6.2 were to the Building Act 1991, whereas the clauses substituted are to the Building Act 1991 and/or the Building Act 2004.

[5] Included in the warranties contained in clause 6.1 as substituted by clause 14 is a warranty and undertaking from the second defendants that at the date the agreement was entered into they had not received any notice or demand and had no knowledge of any requisition or outstanding requirement imposed by any local or government authority.

[6] Included in the warranties and undertakings contained in clause 6.2, as substituted by clause 14, is a warranty and undertaking that any works they have undertaken on the property for which a building permit or building consent was required had the appropriate permit and consent and were completed in compliance with that permit or consent. The warranty further provides that, where appropriate, a code compliance certificate had been issued for those works, and all obligations imposed under the Building Act 1991 and/or the Building Act 2004 were fully discharged.

[7] The agreement also contained the following further terms of sale:

> CONDITIONAL ON SPECIALIST REPORT
>
> 15. This agreement is conditional on the purchaser being satisfied with a report on construction obtained from a builder on or before 4.00 pm on 16/09/05. If any defects arise from the report, then the Purchaser must notify the Vendor of the defect or defects to allow the Vendor opportunity to remedy the defect(s). Upon receiving the notice of the defect(s) the Vendor will advise the Purchaser within 5 working days as to whether they will remedy the defect(s). If the Vendor fails to respond or advises the Purchaser within the 5 day period that they shall not remedy the defect(s) the Purchaser may at their sole discretion cancel this agreement.
>
> 16. The Vendor warrants to obtain a code of compliance certificate for the property prior to settlement date.
>
> 17. This agreement is subject to the purchasers obtaining a property bag search to their satisfaction.

[8] The second defendants acknowledge that they supplied the plaintiffs with a pre-purchase inspection report for the property dated 17 October 2003. Paragraph 7.1 of that report contained the following:

> The exterior cladding is sand and cement plaster "stucco". There have been issues with water tightness prior to the purchase by the current owner. These issues were identified and comprehensive remedial works undertaken to remedy the situation. On completion of the remedial works the exterior has been completely recoated using "Acra-tax Elasticomeric 201 Exterior Acrylic membrane. This is a high build paint system that comes with a 10 year guarantee. These remedials were carried out prior to our engagement to prepare this report. There were no visible signs of weakness to the cladding system at the time of this review. As mentioned in the section titled "inspection" a Humitest Moisture Meter was used on the internal side of the external walls. All moisture content readings were within the range of being considered normal (6 to 14%).

[9] Paragraph 12.1 of that pre-inspection report stated:

> As previously stated this dwelling has been the subject of some external cladding issues. The current owners have completed remedial works and this dwelling is now of sound appearance. These remedials were carried out prior to our engagement therefore we can pass no comment on the condition of the building frame and associated components. There are no visual signs of moisture ingress as a result of these remedial works. This dwelling is presented in good condition.

[10] On 16 September 2005, the plaintiffs' solicitor advised the defendant's solicitor that clauses 15 and 17 of the agreement for sale and purchase had been satisfied. On 20 September 2005 the plaintiffs' solicitor confirmed to the defendant's solicitor that the agreement had become unconditional and settlement of the sale was to proceed.

[11] On 4 November 2005 the solicitor for the second defendants wrote to the plaintiffs' solicitor advising as follows:

> I refer to clause 16 made by our respective clients. I am instructed that the vendors assumed that clause 16 would have been rendered nugatory by the purchasers having made the contract unconditional which they have done.
>
> I am further instructed that because the contract was made unconditional the vendors reiterated to your client purchasers that by clause 18, the vendors were in no way guaranteeing that they would have any code of compliance certificate available in time for settlement or at any other time.

[12] On settlement, the plaintiff's solicitor held back $5,000 pending completion of certain outstanding works to the garage ceiling. Following a site visit the building surveyor employed by the Waitakere City Council, being the first defendant on the 9 December 2005, wrote as follows to the plaintiffs:

> There are some areas of concern with regards to the monolithic cladding system that has been installed, without any inspections having been undertaken.
>
> On this basis, the Council is unable to be satisfied that the cladding, as installed, complies with clause E2 (external moisture) of the New Zealand Building Code and has to refuse to issue the Code Compliance Certificate, on the dwelling, "as is".
>
> You therefore have two options, in the circumstances, for the purpose of achieving compliance with the New Zealand Building Code.

> We require you to elect to do one of the following, within one month, from the date of this letter.
>
> a) Apply to the Department of Building and Housing under Section 177 (b)(I) of the Building Act 2004, challenging Councils decision to refuse a Code Compliance Certificate.
>
> b) Address the areas of concern as per the attached (currently) draft copy of the Notice to Fix, requiring you to bring the dwelling up to a Code Compliance standard.

[13] Enclosed with the letter is a draft notice to fix issued pursuant to sections 164 and 165 Building Act 2004. That notice advises the plaintiffs that if they do not comply they are committing an offence under s 168 of the Building Act 2004 and may be liable to a fine of up to $200,000 and a further fine of up to $20,000 for each day or part of a day that they fail to comply with the notice.

[14] The particulars of contravention referred to in the notice are as follows:

> 1. Stucco cladding system installed without provision for a 20mm cavity.
>
> 2. Cladding not clear of ground at several points around Dwelling.
>
> 3. Movement control joints not installed.
>
> 4. Lack of inspections to show correct fixing of plaster substrate, placement of mesh reinforcing of installation of jamb/sll flashings.
>
> 5. No drainage plan above head flashing.
>
> 6. Penetrations (eg: pergola, meter box, exterior light fittings) not back flashed.
>
> 7. Insufficient lap over cladding at roof/wall junction, of roof barge cappings and fascia not installed as per plans.
>
> 8. No clearance between bottom of enclosed handrail cladding, wall cladding and deck surface.
>
> 9. Top of enclosed deck handrail not sloped.
>
> 10. Saddle flashings not installed where enclosed balcony handrail abut exterior wall cladding.
>
> 11. Downpipe bracket fixings not sealed.

[15] The plaintiffs' solicitor advised the solicitor for the defendants of the service of the notice by letter of 14 December 2005. The solicitor for the defendants in reply pointed out that special clause 16 relating to obtaining a code of compliance certificate prior to settlement could have no application because settlement occurred and no such certificate had been supplied. The solicitor also pointed out that the warranties in the contract had no application because, as the building was thirteen years old, the Building Act 2004 did not apply.

Basis of Plaintiff's Claim against Second Defendants

[16] The first cause of action is based on the second defendants' alleged breaches of contract. The plaintiff relies on clause 6 of the contract whereby the second defendants warrant and undertake:

a) That at the date of the agreement they have not received any notice or demand and have no knowledge of any requisition or outstanding requirement imposed by any local or government authority.

b) That at the giving and taking of possession, where they have 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 had been obtained, the works were completed in compliance with that permit or consent, where appropriate a code compliance was issued for those works and all obligations imposed under the Building Act 1991 and/or the Building Act 2004 were fully discharged.

[17] Clause 6.5 of the contract provides that any breach of any warranty or undertaking does not defer the obligation to settle and that settlement is to be without prejudice to any rights or remedies available to the parties at law or in equity.

The plaintiffs claim the second defendants breached the warranties in that:

a) They had received notice and had knowledge of a requisition or outstanding requirement of the first defendant concerning the first

defendant's decision not to issue a code of compliance certificate and this was a breach of the warranty in clause 6.1(1).

b) The second defendants had undertaken or caused work to be done to the property for which a permit or building consent was required by law and a code compliance certificate was not issued and the obligations imposed on the second defendants under the Building Act 1991 and/or the Building Act 2004 were not fully discharged being a breach of warranty in clause 6.2(5).

c) As at the date of settlement the second defendants had received notice directly affecting the property from the first defendant that it would not issue a final code compliance and this was a breach of the warranty in clause 6.3(2).

[18] The second cause of action pleaded by the plaintiffs against the defendants is in negligence. The plaintiffs claim the second defendants owed a duty of care to them in one or more of the following respects:

a) To advise the plaintiffs of any information as to whether the first defendant would or would not issue a code of compliance certificate in respect of the property.

b) To advise the plaintiffs the first defendant had informed the second defendants that it would not issue a final code of compliance certificate.

[19] The plaintiffs claim the first defendant had told the second defendants that no code of compliance certificate would be issued and that the second defendants failed to inform the plaintiffs of this fact.

[20] The third cause of action alleges breach of fiduciary duty. The plaintiffs claim that when the agreement for sale and purchase became unconditional, the second defendants, as vendors and owners, owed a duty to the plaintiffs as equitable

owners to promptly inform the plaintiffs if they became aware of any reason why the first defendant would not issue a final code of compliance certificate. The plaintiffs claim the second defendants breached that equitable duty in failing to inform the plaintiffs of the first defendant's decision not to issue a final code of compliance certificate.

Case for Second Defendants in support of application to strike out plaintiffs' claim against them

[21] Counsel for the second defendants points out the inconsistencies between clause 16 of the agreement whereby the second defendants warrant to obtain a code of compliance for the property prior to settlement date with clauses 6.1 to 6.5 which contain a warranty that such code of compliance certificate existed when the agreement came into force. In summary, the plaintiffs must have known there was no code of compliance certificate because of the insertion of clause 16 where the vendor, namely the second defendants, were to obtain a code of compliance prior to settlement. Such inconsistency can only be resolved after ascertaining the real intention of the parties. The real intention of the parties ascertained from their knowledge that there was no code of compliance certificate, evidenced by the insertion of clause 16, was clearly not to rely upon the warranties in clauses 6.1 to 6.3. Consequently, a claim based on a breach of those warranties cannot succeed.

[22] It is also pointed out that prior to settlement, no formal notice had been issued by the first defendant of a refusal to issue a code of compliance certificate pursuant to s 43(5) Building Act 1991. Such notice is mandatory and the issue of such notice brings with it a procedure available to the second defendants to have the first defendant's decision not to issue a code of compliance certificate reviewed. As no formal notice had been issued, the second defendants cannot be in breach of the warranty contained in clause 6.2(d) of the agreement to the effect that no notice has been issued under the Building Act advising that a code of compliance was not to issue.

[23] It is therefore submitted for the above reasons that the cause of action arising out of breach of contract cannot succeed and must be struck out.

[24] The second defendants also point out that the duty of care upon which the plaintiff bases their claim in negligence is to advise the plaintiffs of the first defendant's decision not to issue a code of compliance certificate. However, as no formal notice had been issued by the first defendant to the second defendants advising that no code of compliance certificate would issue, the first defendants cannot be held to be in breach of the duty of care.

[25] It is also submitted on behalf of the second defendants that there being no formal notice issued by the first defendant, a code of compliance certificate would not issue. The second defendants cannot be in breach of any fiduciary duty to advise the plaintiffs that a code of compliance certificate would not issue. In any event, the situation was made clear by clause 16 of the agreement. That clause establishes the parties knew a code of compliance certificate had not been issued.

[26] With regard to the plaintiff's claim based on negligence and breach of fiduciary duty, counsel for the second defendants relied on *Rolls Royce New Zealand Ltd v Carter Holt Harvey Ltd* [2005] 1 NZLR 324 Glasebrook J at paragraph [68] and *Body Corporate 2002254 v City Rental Trustees Ltd & Taylor* [2008] NZCA 317 (CA 205-06) decision of William Young P and Arnold J at paragraph 16 to the effect that the obligations in negligence between the second defendants and the plaintiffs are co-extensive and effectively limited by the terms of the contract. Similarly it is submitted that any fiduciary obligations arising from a constructive trust must be subject to the terms of the contract. In effect, the second defendants are submitting that the plaintiffs cannot rely on negligence or a constructive trust to impose obligations on them which are excluded by the terms of the contract they entered into.

Case for Plaintiffs

[27] The plaintiffs submit that clauses 6 and 16 are co-existent and continue to bind the second defendants following settlement. It is pointed out that the warranties in clause 6 apply at separate points of time namely, at the date of contract with regard to clause 6.1, the giving and taking of possession with regard to 6.2 and at settlement with regard to clause 6.3.

[28] Clause 16, it is submitted, is an additional warranty providing an obligation on the second defendants to be performed by them prior to settlement.

[29] It is also pointed out that there is evidence of the second defendants undertaking remedial works on the building. Those works relate to the exterior cladding which the first defendant claims in its notice to the plaintiffs of 9 December 2005 does not comply with the Building Code. Consequently, it is claimed the second defendants have breached the warranty that the works they have undertaken on the property comply with all obligations imposed under the Building Act 1991 and/or the Building Act 2004 contained in clause 6.2 of the agreement.

[30] Furthermore, there is evidence that Mrs Barbara Seddon, one of the second defendants, had been advised by the first defendant that a code of compliance certificate would not issue. According to evidence produced by the plaintiffs, two inspectors employed by the first defendant visited the property at 2 Bocage Lane, Hobsonville on 12 October 2005 for a final inspection. Their evidence is that they informed Mrs Barbara Seddon that building consent could not be issued at that time due to a possible problem with the monolithic cladding system. Consequently, it is submitted there is evidence that the second defendants were aware a code of compliance certificate would not issue.

Decision

[31] A striking out application proceeds on the assumption that the facts pleaded in the statement of claim are true even though they are not all admitted by the second defendants. Before the Court may strike out the proceedings, the causes of action must be so clearly untenable that they cannot possibly succeed. See *Attorney-General v Prince & Gardner* [1998] 1 NZLR 262 at page 267.

[32] If, as the second defendants contend, clause 16 of the agreement is inconsistent with clauses 6.1 and 6.2 then effect must be given to that part which is calculated to carry into effect the real intention of the parties as gathered from the instrument as a whole. As stated by the learned authors of *Chitty on Contracts* 30^{ed,} vol 1, paragraph 12.078:

> **Inconsistent or repugnant clauses.** Where the different parts of an instrument are inconsistent, effect must be given to that part which is calculated to carry into effect the real intention of the parties as gathered from the instrument as a whole, and that part which would defeat it must be rejected.

[33] However, in interpreting the contract the Court is to have regard to the background knowledge available to the parties in the situation in which they were at the time of the contract. As stated by Lord Hoffman in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 at 912:

> (1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.
>
> (2) The background was famously referred to by Lord Wilberforce as the "matrix of fact," but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.
>
> (3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.
>
> (4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax: see *Mannai Investments Co. Ltd v Eagle Start Life Assurance Co. Ltd* [1997] A.C. 749.

[34] Consequently, even if on its face there are inconsistencies between the two clauses, such inconsistencies cannot be resolved without taking into account the matrix of fact available to the parties when they entered into the contract. That

matrix of fact included reference to a pre-purchase inspection report which the plaintiffs say was supplied to them by the second defendants In that report, there is reference to the dwelling having been the subject of some external cladding issues and the current owners completing remedial works. The report emphasised that the report writer was passing no comment on the building frame and associated components. Consequently, the plaintiffs did have a basis for their belief that the second defendants had undertaken work to the building and clearly were concerned to ensure that a code of compliance certificate would issue.

[35] Clause 6.1 as inserted by clause 14 of the agreement contains a warranty from the second defendants they have not received any notice or demand and have no notice of any requisition or outstanding requirement imposed by any local or government authority. The warranty to obtain a code of compliance certificate prior to settlement contained in clause 16 is not in anyway inconsistent with the warranty in clause 6.1.

[36] Under clause 6.2 as inserted by clause 14, the second defendants warrant that at settlement, where they have done any work on the property for which a building consent or permit is required, such permit or consent was obtained, the works were completed in compliance with the permit or consent, a code compliance certificate was issued, and all obligations under the Building Act 1991 and Building Act 2004 were fully discharged. Clause 16 requiring the second defendants to obtain a code of compliance certificate prior to settlement is evidence the parties were aware that there was no code of compliance certificate at the time they entered into the contract. However, the evidence could result in an interpretation which placed on the second defendants an obligation to obtain a code of compliance certificate prior to settlement.

[37] Even if, as the second defendants contend, by proceeding to settle in the knowledge that there was no code of compliance certificate, the plaintiffs cannot rely on the lack of a code of compliance certificate to justify their claims arising out of breach of warranty, negligence and breach of fiduciary duty, there is evidence to justify an interpretation of this agreement which includes a warranty on the part of the second defendants that the work they carried out on the property was done in

accordance with the Building Act 1991, the Building Act 2004, did require a code of compliance certificate and would qualify for a code of compliance certificate. If the evidence produced by the plaintiff is accepted, then prior to settlement the second defendants had been told by the first defendant's building inspectors that there was a possible problem with the monolithic cladding system which indicated the work had not been concluded in accordance with the building consent. If correct, this evidence would establish a breach by the defendants of the warranty contained in clause 6.2(5) as inserted by clause 14 in that the work they carried out did not comply with the permit and building consent.

[38] Taking into account those factors it cannot be said that when requiring a code of compliance certificate prior to settlement, the plaintiffs were not also relying upon the warranty contained in paragraph 6 that work the second defendants did to the property had been done pursuant to a permit and were completed in compliance with that permit.

[39] If as the plaintiffs contend, the first defendants were aware that the second defendant would not issue a code of compliance certificate and failed to advise the plaintiffs of this fact then the second defendants are in breach of their duty of care as pleaded and have breached their fiduciary duties.

[40] Consequently, the second defendants have not established that the causes of action pleaded by the plaintiffs are so clearly untenable as to have no possibility of success. The application to strike out the plaintiffs' claim against the second defendants is dismissed. As the plaintiffs have been successful they are entitled to their costs assessed on a 2B basis with disbursements as fixed by the registrar.

Associate Judge Robinson