IN THE HIGH COURT OF NEW ZEALAND
WHANGAREI REGISTRY

CIV-2008-488-000053

	BETWEEN	IGOR ALEXANDROVICH MIKITASOV Plaintiff
	AND	BERNARD JOHN COLLINS Defendant

Hearing: 16-17 November 2009

Appearances: S D Henderson and J Browne for Plaintiff
No appearance for Defendant

Judgment: 7 December 2009 at 3:20 pm

RESERVED JUDGMENT (4) OF COURTNEY J

This judgment was delivered by Justice Courtney
on 7 December 2009 at 3:20 pm
pursuant to R 11.5 of the High Court Rules

Registrar / Deputy Registrar
Date…….

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Introduction

[1] The plaintiff, Mr Mikitasov, moved with his family from Russia to New Zealand in 2006. In anticipation of the move, he came to New Zealand in 2004 to look for a property to buy. He was shown a house at 28 Binnie Street, Paihia, owned by the defendant, Mr Collins, and within a few days had agreed to buy it. He also agreed to purchase the adjacent vacant section from Mr Collins' company, Pacific View Properties Limited (PVP).

[2] Mr Mikitasov settled the purchase of 28 Binnie Street in early 2005 and tenanted it pending his move in 2006. When he moved into the house he discovered that it had weathertightness issues. Further, there were four parts of the house that did not comply with the Building Act 1991. Mr Mikitasov alleges breaches of warranties in the sale and purchase agreement and misrepresentation inducing contract. He claims the cost of rectifying the defects, together with damages for diminution in value and general damages.

[3] Mr Collins, did not appear at the trial. It was evident before trial that he is in serious financial difficulty. On the day of the trial advised the Court that he was in the UK and would not be participating and that he had declared himself bankrupt. His former counsel, Mr Mark, sought and was granted leave to withdraw. The matter proceeded by way of formal proof with sworn statements being provided and three witnesses (including Mr Mikitasov) giving evidence. After the hearing when Mr Collins' bankruptcy was confirmed Mr Mikitasov sought and obtained leave under s 76(2) Insolvency Act 1976[1] to continue the proceeding.

Breach of Clause 6.2

[4] The house at 28 Binnie Street was built in 1992-1993. In 1998 the original owners sold to a Mr and Mrs Hastie who, in turn, sold to Mr Collins in 2000. When Mr Collins bought the house it was situated on a half-acre of land. PVP purchased the neighbouring property at 26 Binnie Street which was on a similar sized piece of land. Mr Collins and PVP subdivided both lots so that they became Lot 1 (28 Binnie

[1] HC AK CIV-2008-488-000053 and CIV-2008-027-000210 26 November 2009 Courtney J

Street, the house that Mr Mikitasov purchased), Lot 2 (the vacant section that Mr Mikitasov purchased), Lot 3 (26 Binnie Street, on which Mr Collins built a house in 2005) and Lot 4 (a section which PVP still owns).

[5] Clause 6.2(5) of the sale and purchase agreement for 28 Binnie Street provided that:

> The vendor warrants and undertakes that at the giving and taking of possession…
>
> (5) 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:
>
> (a) The required permit or consent was obtained; and
>
> (b) The works were completed in compliance with that permit or consent; and
>
> (c) Where appropriate, a code compliance certificate was issued for those works; and
>
> (d) All obligations imposed under the Building Act 1991 and/or the Building Act 2004 (together "The Building Act") were fully discharged.

[6] In 2003 Mr Collins obtained a building consent for "additions and alterations" of 43m² and an estimated project value of $25,000. It appears that this related to an extension over the garage which was not part of the original design. There is no evidence of any building consent given for other work. However, Mr Mikitasov alleges that Mr Collins undertook other work to 28 Binnie Street in 2003 and 2004 for which no consent was obtained and which did not comply with the Building Act 1991.

[7] For the purposes of this proceeding Mr Collins disclosed, along with other discoverable documents, a DVD, apparently taken by the original owners, which showed the house being built. Mr Mikitasov produced still photographs taken from the DVD together with recent photographs of the relevant areas. The comparison between the two helpfully shows the nature of some of the work undertaken in 2003-04 when Mr Collins owned the property.

[8] The allegedly non-complying work was:

a) Weathertightness repairs;

b) A swimming pool;

c) Deck associated with the swimming pool; and

d) Basement unit.

Weathertightness repairs

[9] Mr Mikitasov engaged a chartered building surveyor, Mr Bundy, to investigate the weathertightness problems. He undertook various tests on the house and identified:

- Raised moisture readings, decayed timber and damaged carpet in the lower ground floor sitting area

- Raised moisture readings and staining or damage to paint and plaster work around the main entrance

- Staining and swollen joinery, damaged or stained paint and plaster work and raised moisture readings around the glass block window

- Raised moisture readings and decay to the windowsill near a bathroom on the first floor

- Flaking paintwork and a crack in the ceiling above the sitting area and below the master bedroom and external balcony

- Efflorescence, stained paint and flaking paint on the external balconies.

[10] Mr Mikitasov later discovered that in 2003 Mr Collins had obtained a report from Total Design into repairs to water damage and building defects at 28 Binnie

Street. In its report 5 November 2003 Total Design identified numerous items of water damage. It summarised it findings as follows:

> The house has suffered substantial water damage to the first floor wall framing. The rot has spread into some of the roof framing. Internal wall linings, architraves, skirtings, scotias, window and door frames, wall insulation and carpets have been damaged. It can reasonably be assumed mould is present in the exterior and possibly interior wall cavities.
>
> The leaks are the result of inadequate parapet flashings, inadequate gutter to down pipe connections, lack of flashings to openings in the exterior walls, insufficient clearance between the bottom edge of the cladding and the deck surface, insufficient step from floor to deck level and absence of building paper under the cladding.

[11] Total Design recommended substantial repair work, which Mr Collins carried out. The report noted that the majority of the work would require building consent but it is apparent from the Council's records that no building consent was ever obtained for the work and no code compliance certificate ever issued.

[12] Mr Bundy has concluded that some of the current problems are the same as those identified in the Total Design report in 2003. However, and crucially, he concludes that the defects he has identified are the result of faulty cladding, roof membrane and parapet flashings installed during the 2004 renovations, i.e. the remedial work itself was faulty and, as a result, further weathertightness damage has occurred. I therefore conclude that Mr Collins was in breach of cl 6.2(5) in relation to the weathertightness repairs.

Swimming pool

[13] The house presently has a concrete swimming pool situated on a suspended concrete slab and set into a wooden deck. When Mr Mikitasov first inspected the property in 2004 it did not have a pool. He and Mr Collins agreed that Mr Collins would create a pool for the property and by the time Mr Mikitasov took possession of the property the pool was there.

[14] It is apparent from the evidence that the concrete shell that now forms the pool was built as part of the original house but decked over. The photographs taken from the DVD show the concrete shell being constructed then covered with concrete slabs and, finally, topped with decking timber. I am satisfied that Mr Collins

removed the decking, tiled the concrete shell, installed the necessary plumbing and installed a new deck around the pool.

[15] I accept Mr Bundy's evidence that the construction of a swimming pool requires a building consent. I find that the original owners built the shell with a view to it being able to be used as a pool. However, there is no evidence to suggest that an application was made for a building consent to construct a swimming pool, either on the original plans or subsequently. It is clear that no consent was ever obtained either by the original owners or by Mr Collins. Mr Collins' completion of the pool without any consent was therefore a breach of cl 6.2(5).

[16] There is evidence that the pool appears to be structurally sound and with a relatively small amount of work, mainly connected with fencing requirements, could be brought up to a standard where it would receive a certificate of acceptance.

[17] Mr Mikitasov has pleaded an alternative cause of action for breach of cl 14 of the sale and purchase contract, which required Mr Collins to complete the swimming pool in a workman-like manner. Because of my conclusions in relation to cl 6.2 I do not need to consider that alternative cause of action.

Deck

[18] Associated with the swimming pool is the deck that has been built around the pool. That this area is new can be seen from both the comparison of the DVD stills with current photographs. Further, in a valuation obtained for Mr Collins in 2000 from Moir Valuations the valuer referred to:

> …Extensive areas of decks and patios, these totalling more or less 100 square metres *in addition to a deck of 26 square metres which has sufficient foundation to provide an area for a future swimming pool.*
>
> (emphasis added)

[19] The deck area around the swimming pool is now approximately 54 square metres, more than twice that identified in the valuation report. Mr Bundy also notes that decking of the same size as currently exists appeared on a scheme plan prepared by surveyors in September 2002. In his opinion the extended deck was created

between 2000 and 2002 and I accept that. There is, however, no evidence of any building consent for the extension which would have been required because of the height of the deck from the ground. I find that Mr Collins was in breach of cl 6.2 in relation to the deck.

Screen wall

[20] The third aspect of non-compliance relates to a substantial wall that currently runs along the northern boundary and provides privacy for the house by screening it from the adjacent property. The original construction shown in both plans and on the DVD involved a relatively low concrete retaining wall running parallel to the boundary outside the kitchen and living areas. The valuation obtained by Mr Collins in 2000 refers to a recently built barbecue area and it appears that the central part of the screen wall was built prior to Mr Collins owning the property. Mr Bundy's examination of the whole wall has, however, shown that in about 2003 the wall was extended at both the eastern and western end and its height increased. This conclusion, which I accept, was based on a comparison of building method and materials and the manufacturer's date stamp on one part of the cladding used.

[21] Two problems arise in relation to the screen wall. The first is that, according to Mr Bundy, the wall exceeds 3 metres in height at its eastern end and, as a result, a building consent was required for its construction. There is no evidence that such consent was obtained and I find that it was constructed without the necessary consent.

[22] The second difficulty the wall poses is that at its eastern most end it runs perpendicular to the house and, in doing so, crosses an easement registered over 26 and 28 Binnie Street (and other nearby properties) which provides access for properties in the neighbouring street down to an esplanade reserve. Whilst structural issues with the wall could be addressed, a certificate of acceptance will not be given because the wall blocks the easement. Had consent been sought at the time the wall was built, it would undoubtedly have been refused for this reason. Mr Collins was therefore in breach of cl 6.2 in relation to the screen wall.

Basement unit

[23] Beneath the house at ground level is a small guest suite with a living area, kitchen and bathroom. This area did not appear in the original house plans. In the Moir valuation report there is reference only to a "basement storage area" with no mention of an ensuite bathroom or bedroom. In comparison, the draft Total Design report 20 April 2003 which advised on weathertightness issues, referred to the lower floor containing "a guest bedroom with an ensuite bathroom built in a partial concrete block basement". This description, compared to the situation described in the Moir valuation report three years previously, suggests that the basement area had been completed during that time frame. Further, the hot water cylinder installed in the basement unit has a manufacturing date of October 2000.

[24] Mr Bundy has examined the room and compared it to the original plans. His evidence was that, in order to create the room, one of the foundation walls shown on the original plans appears to have been altered by creating a space for a window and sliding door. This work, together with the installation of plumbing for a bathroom and kitchen, required a building consent. I accept that evidence and find that the unit was substantially built by Mr Collins and that although a building consent was required, the work was completed without such consent. In relation to this area of the house there was a breach of cl 6.2.

[25] I am satisfied from the evidence that Mr Collins did, during the period he owned the house, undertake work that resulted in the completion of the basement unit, the extension of the screen wall, the completion of the swimming pool and the extension of the deck around the swimming pool. I am satisfied that all of this work required a building consent but that building consent was not obtained for any of it. I also find that Mr Collins undertook substantial repair work for the purposes of fixing water ingress to the house. That work also required a building consent and no such consent was obtained.

Damages

[26] The usual measure of damages for breach of a contractual warranty would be the amount required to place Mr Mikitasov in the position he would have been in had Mr Collins performed his obligations under the contract. This equates to the cost required to obtain certificates of acceptance for the work. Mr Mikitasov has already undertaken some of this work and, in respect of work yet to be completed, has adduced evidence as to the probable cost. In addition, Mr Mikitasov has incurred reasonably substantial costs in investigating the problems and obtaining professional advice as to the best course of remedying them.

[27] Mr Mikitasov adduced evidence on the cost of the work from Mr Bundy and Mr Joyce. I am satisfied that the provable losses are:

Investigative costs,reports and cost of liaison with the Far North District Council for the purposes of obtaining certificates of consent	$ 52,062.25
Costs associated with building and resource consents and the estimated costs of undertaking the required work.	$277,474.22
Total	$329,536.47

[28] In addition, Mr Mikitasov claims $200,000 for the residual diminution in value resulting from the stigma attached to the property even once the building work has been completed and certificates of acceptance issued. A valuer, Mr Garton, gave evidence regarding the residual diminution in value. He considered it likely that at least two of the certificates of acceptance that could be obtained in respect of the work would be qualified because, in respect of some aspects of the work, it would not be possible for the Council to be satisfied that all aspects of the structure complied with the building code. This would be the position, for example, regarding the adequacy of foundations already poured. Mr Garton also considered that regardless of what remedial work has been undertaken to rectify the weathertightness issues, a building known to have had leaks will suffer a residual stigma from that fact.

[29] Mr Garton said that it was difficult to quantify a diminution in value resulting from stigma but considered that it could be as high as 10 percent of the value of the property i.e. $200,000 (the estimated value being $2m).

[30] Whilst I can readily accept Mr Garton's evidence that weathertightness issues will result in an ongoing diminution in value, it is more difficult to accept that proposition in respect of the basement unit, the swimming pool and the deck. The work required to bring those structures up to standard seems relatively minor and, once completed, there is no reason that they should cause prospective purchasers any concern.

[31] In relation to the screen wall I have a different concern. It seems likely that the work required to bring the wall up to the required standard may be relatively minor and the previous non-compliance is unlikely to result in a loss of value. However, even if brought up to the required standard, the screen wall will not receive a certificate of acceptance because it will continue to block the easement. Usually this would result in an ongoing diminution in value. But plans produced in evidence show that prior to the screen wall being extended by Mr Collins the existing concrete block wall already ran across the easement. Therefore any loss in value caused through interference with the easement cannot be attributed solely to Mr Collins' building work. It is true that the concrete wall was lower and, theoretically, presented less of a barrier to those wishing to exercise their rights to use the accessway. The reality, however, is that the original wall surrounded a tiled courtyard area with a built-in barbecue. It is highly unlikely that those wishing to use the accessway would feel comfortable navigating the concrete wall and making their way through the barbecue area of the house. I find that the easement was already blocked before Mr Collins owned the property and he simply added to the problem.

[32] I note that if the wall were removed altogether that would also affect the value of the property because it would deprive the occupants of privacy on that boundary. Again, however, the wall, at least partially, pre-dated Mr Collins' ownership of the property.

[33] For these reasons I cannot find that the diminution of value resulting from the existence of the wall is attributable solely to Mr Collins' conduct. Nor is there sufficient evidence which would enable me to quantify the extent to which any diminution of value for that reason is attributable to his conduct. I therefore conclude that the diminution in value caused by Mr Collins' conduct is limited to the leaky building issues, which Mr Garton assesses at $150,000.

[34] Mr Mikitasov also seeks general damages. He has given evidence about the stress and upset that he and his family have suffered as a result of the defects to the house and the work required to rectify them. In recent times this Court has recognised through an award of general damages the distress and anxiety suffered by occupants of leaky homes, with awards of $20,000-25,000.[2] Mr Mikitasov seeks $25,000, which I consider to be a reasonable award.

Pre-contractual misrepresentation

[35] Mr Mikitasov gave evidence that when he first visited the house he asked Mr Collins whether he had had any problems with the house to which Mr Collins replied "none". Mr Mikitasov said in evidence that he did not want to buy the house if it had a lot of problems connected to it and I accept that evidence.

[36] In fact, as is apparent from my earlier discussion, Mr Collins had experienced serious weathertightness problems with the house himself and in 2003 had obtained the report from Total Design Limited identifying a number of weathertightness issues and recommending appropriate remedial work. In early 2004 Mr Collins undertook substantial work to the property to rectify these defects. As I have concluded, he did not obtain the required building consent for that work.

[37] Further, in April 2004 Mr Collins commenced proceedings against the previous owners from whom he had bought the property and the Far North District Council. In August 2004 he reached a settlement agreement with the previous owners under which he received a sum of money. In April 2005 (well after the

[2] *Body Corporate No. 188529 v North Shore City Council* HC Auckland CIV-2004-404-003230 30 September 2008 Heath J; *Body Corporate No. 189855 v North Shore City Council* HC Auckland CIV-2005-404-005561 25 July 2008 Venning J

agreement for sale and purchase with Mr Mikitasov, Mr Collins reached a settlement with the Far North District Council, again receiving a sum of money.

[38] I am satisfied that, had Mr Collins answered Mr Mikitasov's question honestly, he would have disclosed the previous problems he had experienced with the house, the Total Design report on the weathertightness issues, the proceedings he had issued against the previous owners and the Far North District Council, the settlement agreement he had reached with the previous owners and the negotiations that were still on foot with the Far North District Council. I therefore find that Mr Collins did make a misrepresentation which induced Mr Mikitasov to enter into the contract. The issue of damages is to be treated in the same way as the claim for breach of warranty.

Result

[39] There will be judgment for the plaintiff as follows:

a) Special damages of $329,536.47, being costs incurred and required to remedy the breaches of contract;

b) Special damages of $150,000, being diminution in value as a result of the breaches of contract;

c) $25,000 general damages.

[40] I award interest at 8.4% on the awards of special damages from the date of judgment.

Costs

[41] The plaintiff seeks costs on a 2B basis together with disbursement in respect of both this proceeding and the proceeding relating to Lot 2. These cases were heard together and most of the evidence and legal submissions were directed towards the present proceedings, though there were discrete areas that related to the Lot 2 case.

However, I accept Mr Browne's submission that it would be appropriate to make a single award of costs to cover both cases. I therefore make an award of costs in this proceeding but not in the Lot 2 proceeding.

[42] Costs on a 2B basis are appropriate. The matter was originally set down for five days but in the end only two days of hearing time was required. I therefore make an award of costs on the basis of five days preparation and two days hearing time at the 2B rate. Disbursements are to be fixed by the Registrar.

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P Courtney J