ORIGINAL

IN THE HIGH COURT OF AUSTRALIA

MERCANTILE CONSTRUCTIONS PTY. LIMITED

V.

B. B. AND B. PTY. LIMITED

ORIGINAL

REASONS FOR JUDGMENT

Judgment delivered at SYDNEY

on FRIDAY, 18th SEPTEMBER 1964

A. C. Brooks, Government Printer, Melbourne
C.7639/60

MERCANTILE CONSTRUCTIONS PTY. LIMITED

v.

B. B. AND B. PTY. LIMITED

ORDER

Appeal dismissed with costs.

MERCANTILE CONSTRUCTIONS PTY. LIMITED

v.

B. B. AND B. PTY. LIMITED

JUDGMENT

BARWICK C.J.
KITTO J.
TAYLOR J.
MENZIES J.
WINDEYER J.

MERCANTILE CONSTRUCTIONS PTY. LIMITED

v.

B. B. AND B. PTY. LIMITED

By a contract in writing dated 23rd May 1960 the appellant agreed to buy from the respondent and the respondent agreed to sell to the appellant a parcel of land upon which was erected a building known as 15 Randle Street, Sydney, for the sum of £18,750. The contract contained a clause 23 reading: "The purchaser acknowledges having inspected survey certificate and report dated 11th December 1959, prepared by Gallagher & Odell and accepts the property with the discrepancies as shown therein." The report stated that the positions of "the brick walls of the building and the recent tilework along the frontage to Randle Street in relation to the building alignments of Randle Street and Randle Lane are shown in sketch hereon". The sketch showed that along the Randle Street frontage there was a face of tiles encroaching upon the street by depths varying from one-half to five-eighths of an inch.

The appellant having at a later date refused to proceed with the purchase, the respondent sued for specific performance. The appellant resisted the suit on a number of grounds, but a decree for specific performance was made and was upheld by the Full Court of the Supreme Court on appeal. The appellant now seeks to have the decision reversed, making several submissions in support of a single defence, namely that completion of the purchase would cause such hardship to the appellant that a court of equity in the exercise of its discretion should refuse to order specific performance. That that remedy is discretionary it is hardly necessary to say; but the principles upon which it will be refused in a case which is prima facie appropriate for it have been explored and

settled long since. The only such principle to which the appellant's submissions are relevant is that equity will not enforce a contract when the result would be to impose great hardship on one of the parties: Fry on Specific Performance, 6th ed., (1921) p. 199, para. 417. The degree of hardship likely to result is of course material, and a far higher degree is required where the result flows obviously from the terms of the contract - so that it must have been present to the minds of the parties at the time the contract was made - than where it arises from something collateral and so far concealed and latent that it might not have been present to their minds: op. cit. p. 203, para. 425.

In the present case the matter upon which the appellant chiefly relies in this court has to do with the effect of the tile work along the Randle Street frontage, which was mentioned in the surveyors' report as encroaching beyond the building alignment and of certain interior work, of a minor character, done in the building. The argument submitted here for the appellant recognizes that in the face of clause 23 of the contract the bare fact of the encroachment cannot be relied upon as a ground for resisting specific performance, even though the legal consequences follow that under s. 267 of the Local Government Act, 1919 (N.S.W.) the City Council may order that the encroachment be removed, and under s. 632 may either prosecute for non-compliance with the order or do the work itself and recover for the cost. The simple fact is that at the least the defendant deliberately chose to accept whatever risk there might be of the Council's taking action under these provisions in respect of the encroachment.

The appellant's contention, however, is that at the date of the contract the respondent knew and failed to disclose to the appellant certain additional facts

concerning the encroachment and the interior work, and that it would be a serious hardship to the appellant to have to complete the purchase because those additional facts were such as to make the Council more likely than it would otherwise have been to make an order for removal of the encroaching tiling, and for the removal or reformation of the interior work and to make it possible for the Council to order, and likely that it would order, the execution of a great deal of other work to remedy deficiencies in the building according to current requirements of the Local Government Act and Ordinances, deficiencies which had been specified by the Council when refusing a certificate under s. 317A of the Local Government Act. The facts suggested are that the tiling (and it is necessary to add certain cement rendering covering the wall above the point to which the tiling extended, which was about ten feet above the ground) had been erected and the interior work had been done only within the twelve months preceding the date of the contract and that the approval of the Council had not been obtained beforehand. It is contended that the addition of the tiling and cement rendering to the external wall and the interior work each constituted an alteration of the building within the meaning of s. 311 of the Local Government Act. It was then said that such alterations provided a second ground upon which the Council might order removal of the tiling and cement rendering and, in default, carry out the work itself and recover the cost: see s. 317B(1A) and (4). Further, because that work and the interior work had been done without the consent of the Council, the appellant claimed that the Council was enabled, according to the construction of s. 576(4)(e) of the Local Government Act for which the appellant contended, to require the rectification of all the suggested deficiencies in the building.

Thus, it was said, through the failure of the respondent to make a disclosure which in fairness it should have made, namely the recency of the work and the lack of local government approval, the appellant, if it had to complete the purchase, would run a much more serious risk than it had had any reason to take into account at the time of the contract.

The appellant acted in connection with the purchase by two directors, a father and son named Londish, who were both experienced in matters of building construction. They inspected the building thoroughly in April 1959, before the tiling and cement rendering and the interior work were done. They made another inspection on 27th April 1960, after the tiling and cement rendering and the interior work had been done. They saw it and knew it was recent. On the day of the later inspection the company was sent a form of contract containing clause 23, and thereby had the attention of its officers pointedly directed to the two facts that the tiling was recent and that it encroached on the road. Nearly a month's opportunity for deliberation followed before the contract was executed.

Thus the appellant in reality accepted all the risks entailed in the recent addition of the tiling and cement render.

The appellant ultimately conceded that its exposure to the risk of having to demolish the interior work said to constitute an alteration within the meaning of the Local Government Act would not constitute hardship within the doctrines of equity in relation to the remedy of specific performance. Indeed, there was no evidence of the estimated cost of doing that work, nor, for that matter, of removing the tiling and cement render. It is its exposure to the risk of being required to remedy all the deficiencies that the building has if current standards and requirements of the Local Government Act and regulations

are applied to it which the appellant claims as the relevant hardship.

No defence of hardship was expressly pleaded by the appellant. True it is that in a general recital of facts the appellant alleged that the interior work was done without consent of the Council and that the encroaching tiling and cement rendering were done in breach of the Local Government Act. There was also a general defence that the respondent had no equity: but the statement of defence was not apt to raise the defence of hardship, and particularly hardship made out as the appellant would now seek to make it out here. Hardship as a defence must be specifically pleaded and the hardship particularised: see Rule 122 of the Consolidated Equity Rules of 1902.

None of the essential steps in the assertion of hardship which the appellant now makes were examined at the hearing of the suit except the question whether any of the work done by the plaintiff on and in the building constituted an alteration within the meaning of the Local Government Act, and that question, as far as appears, was not examined in relation to a defence of hardship.

Although there was evidence of an estimate of the cost of putting the building into a situation where it could be used either for residential purposes or for commercial offices, there was no evidence as to the cost which compliance with any lawful requirement of the local government authority would entail and there was no evidence of the likelihood at the date of the hearing of the suit that the council would take action even with respect to the suggested alterations, let alone with respect to the suggested deficiencies, assuming it had the power to do so.

Indeed, on the appeal to the Full Court, from whose judgment this appeal is brought, the present submission of the appellant was not made nor was any examination made of any of the steps essential to the submission beyond the

question whether or not there had been an alteration of the building within the meaning of the Local Government Act.

The position therefore is that this court is asked to deal with a matter of defence which was not raised on the pleadings, without all the basic facts relevant to it having been investigated at the trial and without all the matters of law, in particular the construction of the relevant statute on which the defence essentially depends, having been dealt with at any earlier stage of the proceedings. So to say is to demonstrate that this appeal could not succeed.

This is sufficient to dispose of the matter but in taking this course we are not to be taken as necessarily agreeing with the view of the learned judges below that none of the work in question constituted an alteration within the meaning of the Local Government Act so as to require the consent of the Council. Nor are we to be taken as expressing any view as to the extent of a council's power under s. 576(4)(e).

We think that the decree for specific performance was rightly made. The appeal will be dismissed with costs.