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NZLR

IN THE COURT OF APPEAL OF NEW ZEALAND

CA 119/88

BETWEEN: BEACON CHARTERING AND SHIPPING LIMITED

Appellant

AND: CERAMCO CORPORATION LIMITED

First Respondent

AND: CERAMCO PROPERTIES LIMITED

Second Respondent

AND: BAYLEYS REAL ESTATE LIMITED

Third Party

CA 132/88

BETWEEN: WESTCHESTER HOLDINGS LIMITED

Appellant

AND: CERAMCO PROPERTIES LIMITED

Respondent

AND: BAYLEYS REAL ESTATE LIMITED

Third Party

Coram: Richardson J (presiding)  
McMullin J  
Casey J

Hearing: 17 August 1988

Counsel: M S Cole for Beacon Chartering and Shipping  
B H Clark and E J Werry for Ceramco  
Miss L Malcolm for Bayleys Real Estate  
S Stokes for Westchester Holdings

Judgment: 17 August 1988

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JUDGMENT OF THE COURT DELIVERED BY CASEY J

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**NOT  
RECOMMENDED**

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These are appeals from the refusal of Master Towle on 1 July 1988 to enter summary judgment on two applications heard together arising out of disputes over the sale of land at New Lynn owned by Ceramco Properties Limited. In each the appellants sought judgment for the return of the deposits paid for the purchase of sections from Ceramco's subdivision. The facts in each are virtually identical save for one matter in Beacon's case mentioned later. We have also dealt with them together in this Court.

Ceramco put the sale of the sections into the hands of Bayleys Real Estate Ltd (now the third parties) and through that agent it received offers in November 1986 from Beacon to buy two sections and from Westchester to buy two and they paid deposits of \$66,000.00 and \$60,000.00 respectively. Settlement was not to take place until the completion of the subdivision currently being undertaken by Ceramco.

The offers were accepted by the latter but the appellants allege that material alterations were made before it executed them, and that they were not aware of these until they obtained copies of the completed contracts in December 1987 and January 1988 after they had been requested to settle. They promptly repudiated any liability and brought the summary judgment proceedings. The vendor has commenced actions for specific performance against them.

The alleged alterations include a change of name of the vendor company, the substitution of the latter's solicitors for the land agents for payment of the deposit and, in Westchester's case, the exclusion of a clause rendering the agreement subject to its directors' consent. Counsel accepted that none of these alterations could be of any significance. However, there was one which could be material. It was claimed that a provision for interest in the offers reading, "Interest rate for late settlement % per annum" had been altered by the vendor by the insertion of the figures "23" in the blank space.

Mr Antunovich, the latter's General Manager deposed that when the offers were received he resolved that the amendments noted above were necessary and that they were returned to the agent for this purpose. They came back to the company with the alterations made. The documents were duly executed and then sent to its solicitor. He in turn deposed that he had no knowledge of any of these matters now raised until the point was taken after settlement was due.

On receipt of the applications for judgment Ceramco filed statements of defence and joined Bayleys Real Estate Ltd as third party. The latter appeared by counsel who intimated it would abide by the Court's decision and she was granted leave to withdraw. No matter relevant to the summary judgment proceedings arises as a result of its involvement as third party.

The appellants' case both here and before the Master is simply that their original offers were never accepted and that the alterations transferred the documents into counter-offers, which were rejected as soon as they became known.

The Master, after summarising the facts and Ceramco's submissions, expressed concern over the possibility that there had been some further dealings between Bayleys Real Estate and the appellants following the return of the agreements by Mr Antunovich for the amendments which he considered necessary. One might assume that this could be the case in the ordinary course of business. However, as he noted, there was no evidence from that agent, and Mr Clarke made no submissions to us about the implications which might be drawn from its absence. Both counsel for the appellants stressed that Ceramco had produced nothing to indicate there had been any direct contact between Bayleys Real Estate and the purchasers over these alterations, and that their respective directors deposed they were not aware of them for over a year.

It is obvious that the Master had reservations over this aspect and thought that evidence might be forthcoming from Bayleys Real Estate which could throw some light on the claims. His doubts were reinforced in Beacon's case by the differences between the way that company had executed its initial offer, and its execution of the completed contract

with the alterations. This could suggest some further dealings with it after the offer had been made. Mr Cole put forward another explanation which may be equally probable.

The Master also referred to a number of other matters relating to the conduct of the parties, apparently prompted by Mr Clarke's submission (repeated in this Court) that their conduct evidenced an intention to be bound by the terms of the original offers submitted to Ceramco. However, he made no finding on this proposition and we express no opinion upon it.

During the course of the argument in this Court it became apparent that little or no consideration had been given to the vendor's action in completing a blank for stipulation of the interest rate in a provision which demonstrated a clear intention that interest would be charged on late payment. Certainly it is not apparent from the Master's judgment that any attention had been given to this point at the hearing of the applications; nor did it seem to have been considered by the appellants' counsel. Nor was it raised by the respondent's in his written submissions to us. But we think it is something which may well call for further consideration, and possibly evidence of what constitutes a reasonable rate of interest in the circumstances.

We repeat that the Master clearly had his reservations about entering judgment because of the possibility of further evidence being available from Bayleys Real Estate.

We respect his assessment and judgment on this aspect but must also acknowledge the force of the submissions made on it by the appellants' counsel. However, on taking into account the interest point to which we have just referred, we cannot now be satisfied that Ceramco has no arguable defence, and we think that these claims should proceed to a trial. The Master made orders for their consolidation with the proceedings for specific performance and laid down a timetable to ensure an early hearing.

We accordingly dismiss the appeals. There will be costs of \$750.00 to the respondent in respect of each appeal, together with travelling and accommodation expenses for one counsel and any necessary disbursements.

*M. Casey*

Solicitors

Simpson Grierson Butler White, Auckland for Beacon  
Earl Kent Alexander Bennet, Auckland for Ceramco  
Tompkins Wake, Hamilton for Third Party  
Rudd Watts & Stone, Auckland for Westchester