

IN THE COURT OF APPEAL OF NEW ZEALAND

C.A. 209/96

**NOT
RECOMMENDED****BETWEEN YUNG KIONG YONG and
NA NA NG****Appellants****AND ROBIN HENRY FRANK and
HELEN THERESA NICHOLSON****Respondents**

Coram: Richardson P
Keith J
Cartwright J

Hearing: 23 June 1997

Counsel: S C Barker & M J Timmings for Appellants
K Teh for Respondents

Judgment: 14 July 1997

JUDGMENT OF THE COURT DELIVERED BY CARTWRIGHT J

Introduction

The appellants were the developers of home units at Rossall Street, Christchurch. In September of 1994 the respondents agreed to purchase one unit from them. It was anticipated that building would be completed and possession given on 11 November 1994. The respondents entered into a contract to sell their own house property, but by the anticipated settlement date of the Rossall Street unit it became apparent that the builder would be unable to complete on time. At that stage it was thought that there would be only a short delay until 23 November 1994. In order to accommodate the respondents during the anticipated 12 day period, the appellants, through their New Zealand agent,

offered them another property at Sparks Road which they were to be entitled to occupy as licencees rent free.

Negotiations concerning the right to occupy the Sparks Road property were initially conducted orally between the respondents and the appellants' agent, and the respondents shifted into the property on 10 November. Later that day the appellants' solicitors wrote to the respondents' solicitors in the following terms:

re: Yong and Ng to Nicholson

We record our telephone conversation of yesterday that Mr and Mrs Nicholson are to move into the Sparks Rd property on the following terms.

1. That their accommodation in Sparks Rd is in consideration of any interest or other penalty payments arising out of the late settlement of the sale and purchase of Flat 1, 7 Rossall St, and that no other further claim for costs or damages will be made.
2. That the basis of their occupation is a licence to occupy.
3. That the licence is to determine on the date on which vacant possession of the Rossall Street flat is available.
4. That your clients are to arrange their own insurance for storage of their furniture and belongings whilst at the Sparks Road property.
5. Any damage to the Sparks Road property directly attributable to Mr and Mrs Nicholson whilst they are in residence there, shall be repaired at Mr and Mrs Nicholson's cost.

Although the respondents had not known of the term in paragraph 1 "that no other further claim for costs or damages will be made" and claimed not to have given instructions to their solicitors to agree to such a term, they did not challenge it for some time.

In fact the temporary accommodation at Sparks Road turned out to be for the very much more lengthy period of 21 months. The appellants were unable to settle the sale of the Rossall Street property because the builder did not complete it and filed in bankruptcy. During the ensuing period the respondents maintained steadfastly their desire to acquire the property and the appellants worked to have the building completed so settlement could be finalised. Eventually, when agreement could not be reached as to what was required to

complete, the appellants offered not to make any attempts to take back possession of the Sparks Road property provided the respondents entered into a “meaningful arbitration”.

A reference to arbitration was signed in May 1995. The first part of the arbitration was concerned with the dispute between the appellants as developers of the property and the builder. The arbitrator determined what was required of the builder to complete the property. The second part of the arbitration was to consider the dispute between the appellants and the respondents, but when the arbitration reconvened on 25 July 1995 the appellants, through their barrister, Mr O’Neill, advised that the arbitration would not proceed as they were cancelling the agreement for sale and purchase with the respondents. In addition, the appellants gave the respondents 14 days notice to vacate the Sparks Road property. The respondents then embarked on proceedings seeking specific performance and injunctive relief against being required to vacate the Sparks Road property.

By mid December 1995 the appellants had completed the building to the stage where a certificate of compliance and a certificate of title were available, and they invited the respondents to settle the purchase. The respondents, however, declined to settle the purchase of Rossall Street, claiming that certain items to a value of a few hundred dollars still required completion. They remained in possession of the Sparks Road property until the purchase of the Rossall Street unit was finally settled on 30 August 1996. Their period of occupation was rent free. They also had the right to use most of the chattels, the electricity charges were paid (until early 1996) and telephone rentals were met by the appellants.

The terms of the agreement for sale and purchase

Included in the standard terms of the agreement for sale and purchase of the Rossall Street property were certain provisions concerning possession and settlement. The relevant clauses state:

- 3.3 If from any cause whatever save the default of the vendor any portion of the purchase price is not paid upon the due date for payment the purchaser shall pay to the vendor interest at the interest rate for late settlement on the portion of the purchase price so unpaid from the due date for payment until payment; but nevertheless this stipulation is without prejudice to any

of the vendor's rights or remedies including any right to claim for additional expenses and damages. For the purposes of this subclause a payment made on a day other than a working day or after the termination of a working day shall be deemed to be made on the next following working day and interest shall be computed accordingly.

- 3.4 (1) Subject to paragraph (2) of this subclause, if for any cause whatever save the default of the purchaser the vendor does not offer to give possession (and where the agreement calls for it, vacant possession) when the purchaser is entitled to possession the vendor shall pay to the purchaser a fair market rent for the property until possession is offered and the vendor shall also compensate the purchaser for any expenses incurred and damages suffered by the purchaser (including the purchaser's reasonable costs of temporary accommodation for persons and for chattels) resulting from the failure of the vendor to give possession on the date aforesaid to the extent that such expenses and damages are greater than the fair rental for the property.
- (2) As a condition of giving possession prior to settlement the vendor may require the purchaser to provide reasonable evidence of the purchaser's readiness, willingness and ability to perform the purchaser's obligations and, where the purchaser does not upon request by the vendor provide such evidence, the vendor shall not be required to pay or give credit for any amount under paragraph (1) of this subclause.
- (3) (a) Where the purchaser or any person claiming through the purchaser elects to go into possession of the property prior to settlement the purchaser shall pay to the vendor on settlement a fair rental for the property during the period of possession prior to settlement; provided that in respect of any period when the purchaser is obliged to pay interest under subclause 3.3 the purchaser shall not be required to pay both that interest and rental under this paragraph and the purchaser's obligation in respect of that period for payment of interest and rental shall be limited to payment of whichever amount of such interest or rental is the higher.
- (b) In respect of any period when delay in settlement is caused by the default of the vendor, rental payable under this paragraph (3) shall be reduced to the extent necessary to ensure that the purchaser, by paying rental, will not be financially disadvantaged by taking possession, by comparison with the position applicable if possession had not been taken prior to settlement.
- (4) The provisions of this subclause shall be without prejudice to any of the purchaser's rights or remedies including any right to claim for any additional expenses and damages suffered by the purchaser.

- (5) Where the parties are unable to agree upon any amount payable under paragraphs (1) or (3) of this subclause an interim amount shall on settlement be paid to a stakeholder by the party against whom it is claimed until the amount payable is determined. The interim amount shall be the lower of:
- (a) the amount claimed by the purchaser or the vendor, as the case may be, or
 - (b) an amount equivalent to interest at the interest rate for late settlement during the period to which the claim relates on such portion of the purchase price (including any deposit) as is payable under this agreement on or by the possession date.

Any interest earned on the interim amount net of resident withholding tax and any handling charges shall follow the destination of the interim amount. The amount determined to be payable shall not be limited by the amount of the interim amount. If the parties cannot agree on a stakeholder the interim amount shall be paid to a stakeholder nominated on the application of either party by the president or vice-president for the time being of the Law Society for the district where the property is situated.

The respondents based their claim for damages pursuant to clause 3.4(1) of the agreement.

The judgment in the High Court

The judgment in the proceedings for specific performance of the agreement for sale and purchase and seeking an injunction preventing the appellants from evicting the respondents from the Sparks Road property was delivered on 7 August 1996 and broke the impasse between the parties. In it Moran J found in favour of the respondents, granting them an order for specific performance of the agreement for sale and purchase of Rossall Street, fixing liquidated damages in their favour pursuant to clause 3.4(1) of the agreement for sale and purchase, and making other orders necessary to finalise all issues concerned with settlement of the transaction. Certain awards of special damages were made, including travel expenses and boarding fees for their cat. The learned Judge also directed the appellants to refund, with interest, the deposit the respondents had paid for the arbitration.

The respondents had also claimed damages for distress for breach of contract. Moran J held that damages were payable and, bearing in mind the need for moderation, fixed the sum of \$10,000 (see *Andrews v Parceline Express Ltd* [1994] 2 ERNZ 385, 397). Noting that clause 3.4(1) was intended to provide compensation to the purchaser “for any expenses incurred and damages suffered by the purchaser (including the purchaser’s reasonable costs of temporary accommodation for persons and for chattels) resulting from the failure of the vendor to give possession ... to the extent that such expenses and damages are greater than the fair rental for the property”, the Judge held that the respondents could not recover these sums in addition to the liquidated sum for rental.

The issues on appeal

The appellants’ appeal is limited to their claim for set off of the rent free accommodation against the liquidated damages. Given the fact that since the judgment was delivered the settlement of the purchase of the Rossall Street property has been finalised, the issues between the parties have narrowed significantly.

The award of liquidated damages of \$32,350 was fixed by reference to clause 3.4(1) of the agreement for sale and purchase. The Judge found that the respondents were entitled to recover a sum calculated to represent a fair market rental for the Rossall Street property for the period of the amended possession date, 23 November 1994, to the proposed date of settlement of the purchase, 30 August 1996. The calculation of the sum is not challenged. The appellants do, however, submit that the respondents waived their rights to seek damages, the period during which the fair market rent should be calculated ought to be reduced, or that they are entitled to a set off for the rent free accommodation provided.

Did the respondents waive their rights?

In the High Court and in this Court the appellants submitted that the respondents by the letter of 10 November 1994 acknowledging “that their accommodation in Sparks Rd is in consideration of any interest or other penalty payments arising out of the late settlement of the sale and purchase of Flat 1, 7 Rossall St, and that no other further claim

for costs or damages will be made” waived their rights pursuant to clause 3.4(1) to claim a fair market rent for the Rossall Street property for the period they were unable to take possession of it. In response the respondents argued that their solicitors who had written that letter were not their agents for the purposes of that negotiation, they had not authorised them to waive the right to claim damages and nor did their advisers have the apparent authority to do so.

In the High Court the Judge accepted that the respondents had not authorised the giving of the concession and accordingly were not bound by it. Moreover, by their actions, including the request to the respondents to embark on an arbitration, the appellants waived the benefit of the stipulation contained in paragraph 1 of the letter of 10 November 1994.

We find it unnecessary to rule on the issues of agency and waiver in relation to that letter. Clearly it was intended to fix terms for a very short period of time down to the expected date of settlement. The appellants did not themselves assert any rights under that letter for some months and the respondents ultimately relied on the terms stipulated in it to enforce their licence to occupy the property.

Should the period over which the rental for Rossall Street was calculated be reduced?

Although the appellants purported to cancel the agreement for sale and purchase under s 7 of the Contractual Remedies Act on 25 July 1995, within one month of that date negotiations to settle the purchase had resumed, and by 20 December 1995 the respondents were advised that the unit they wished to purchase at Rossall Street was “now completed in all respects”. Settlement which might, however, have taken place on 22 December 1995 was not completed due to the respondents’ objection to the presence of the appellants’ barrister at a final inspection. From that point it appears that the respondents were prepared to settle only on the condition that a sum be set aside to meet their potential claim for damages and costs. In the High Court the Judge found that the imposition by the respondents of this condition did not constitute an offer of vacant possession.

Although the giving and taking of possession could readily have been arranged at least seven months prior to the ultimate settlement date, it is inappropriate in all the circumstances to interfere with the Judge's finding that offers of vacant possession were not unconditional.

For these reasons we would not adjust the period over which rental pursuant to clause 3.4(1) of the agreement for sale and purchase was fixed.

The appellants' right to set off the Sparks Road accommodation

The issues in this appeal have narrowed to the critical one: are the appellants entitled to set off the value of the free accommodation provided to the respondents for the period 10 November 1994 until settlement on 30 August 1996.

Finding that the offer of rent free accommodation was intended to ensure that the respondents would not claim the cost of temporary accommodation, Moran J nonetheless held that the appellants were not entitled to set off the value of that accommodation against the liquidated sum calculated in accordance with clause 3.4(1). He said:

The liquidated sum is payable by virtue of the Defendants' failure to offer possession on due date. If, in fact, the Plaintiffs had incurred the cost of alternative accommodation they may well have been able to prove losses or damages that exceeded the liquidated sum. In that event they would have been entitled to recover the excess in addition to the liquidated sum.

Because the Defendants have provided the Plaintiffs with free alternative accommodation, such other losses or damages which the Plaintiffs are able to establish may not add up to more than the liquidated sum, in which case the Plaintiffs' entitlement will be limited to the liquidated sum.

It may well be that, with the benefit of hindsight, the Defendants wished that they had not provided the Plaintiffs with free accommodation at their Sparks Rd property. The Plaintiffs' costs arising from the delay in settlement would have been augmented by the cost of alternative accommodation, and the damages recoverable might thus have exceeded the liquidated sum. The Defendants would nevertheless have had a return on the capital invested in their Sparks Rd property.

Noting that in seeking specific performance the respondents were invoking the equitable jurisdiction of the Court, the learned Judge went on to consider whether equity ought not

to intervene and permit the appellants to set off the rental value of the Sparks Road property, finding:

In the final analysis I am not satisfied that such equitable intervention is justified. The parties have made their contract. They have agreed upon liquidated damages in the event of the Defendants' delay in offering settlement. The Court should not interfere in a contingency for which the parties have provided in their contract. In any event the Defendants' conduct in delaying settlement for so long and exacerbating that delay and its prejudicial effects upon the Plaintiffs by peremptorily abandoning the arbitration without justification all tell against the case for equitable relief from the rigours of their contract.

The approach to be taken in fixing equitable damages is relatively straight forward. The learned authors of Spry *The Principles of Equitable Remedies* (4 ed) 1990, 633-634, put it like this:

In the first place, where a plaintiff seeking equitable damages has also a right to legal damages it is commonly found, at least in the absence of special equitable considerations such as unfairness or some other such matter affecting the balance of justice between the parties, that the same measure of damages is applied in equity as at law.

This statement is supported by Pettit in *Equity and the Law of Trusts* (7 ed) 1993, 539, where the learned author says:

In most cases, however, damages may alternatively be awarded at common law and it has now been settled that the same compensatory principle applies both to damages in lieu under Lord Cairns' Act and damages at common law.

The appropriate approach to setting an award of damages should therefore be a sum which satisfies the loss or damage which has been suffered and which the Court considers just and equitable to be paid. The application of general equitable principles will commonly result in the measure of damages being the same at equity as at law, because the amount of compensation which would satisfy the loss or damage suffered, and which the Court considers just and equitable to be paid, is ordinarily found to be the same as the appropriate amount of legal damages.

Moreover, in Meagher, Gummow & Lehane in *Equity: Doctrines and Remedies* (3 ed) 1992 at 638 the learned authors state that no element of penalty is involved in

equitable compensation. Applying these principles, it appears that an appropriate award of damages would be that which the appellants can justly and equitably be expected to pay for their failure to comply with the agreement for sale and purchase and that which the respondents have lost as a consequence. Applying common law principles such as mitigation of damages, the provision by the appellants of a rent free property prima facie suggests that the respondents suffered no real loss.

When it became clear that the appellants would be unable to settle the sale of the Rossall Street property they promptly provided alternative accommodation which was acceptable to the respondents. In addition, the appellants for a significant period paid the electricity costs and met telephone charges. As well, they met the costs of transporting and storing the respondents' furniture and permitted them to use chattels in the Sparks Road property.

The respondents, as the result of the turn of events and the judgment in the High Court, have enjoyed a certain benefit. In addition to their entitlement to accommodation at no cost to themselves, the contract for sale and purchase of the Rossall Street property exceeded \$400,000. Apart from the payment of a deposit of \$40,000, the respondents were able to retain the balance purchase price for their own purposes for a period of some 21 months. By contrast, the appellants, by making the Sparks Road property available, were unable to deal with a substantial capital asset.

Is then it just and equitable to allow the respondents to retain the sum fixed in the High Court?

We consider that the basis for the claim for equitable damages is to found in the provisions of 3.4 of the agreement for sale and purchase. Clearly it does not contemplate the sort of double benefit the respondents have received. Where the vendor is unable to complete settlement and/or offer possession of the property to the purchaser then under that clause the vendor will be liable, pending the giving of possession, to meet the purchaser's reasonable costs of accommodation and the associated expenses and damages suffered. If then the respondents had been obliged to rent a property from an independent

third person, they would be entitled to claim reimbursement for reasonable rental and associated expenses and damages.

In *Hieber v Hieber* [1991] 1 NZLR 315 this Court held that where purchasers were in possession and receiving rentals from the property without having paid the purchase price, there was an implied equitable promise to pay interest on the unpaid portion of the purchase price in the absence of a contractual stipulation to the contrary. It was desirable to fix the interest reflecting a fair market return. While the facts in the present case are not analogous, the principles are similar: the rationale of the equitable rule having been explained by the Lord Chancellor in *Birch v Joy* (1852) 3 HLC 565, 590-591, thus:

From the time at which the purchaser was to take possession of the estate he would be deemed its owner, and he would be entitled as owner to the rents of the estate, and would have kept them without account. From the same period the seller would have been deemed owner of the purchase-money, and that purchase-money not being paid by the man who was receiving the rents, would have carried interest, and that interest would have belonged to the seller as part of his property. A court of equity, as a general rule, considers this to follow. The parties change characters; the property remains at law just where it was, the purchaser has the money in his pocket, and the seller still has the estate vested in him; but they exchange characters in a court of equity, the seller becomes the owner of the money, and the purchaser becomes the owner of the estate. That is the settled rule of a court of equity;

Applying then the same approach in the present instance, the effective outcome of the orders in the High Court is this: the respondents were entitled to have the rental of reasonable alternative premises paid for them by the appellants until the appellants as vendors were in a position to give possession and/or settle the sale of the Rossall Street property. In the High Court, although there was some conflict in the evidence concerning the actual value of the right to occupy the Sparks Road property, it did not exceed the rental value of the Rossall Street property. We see no need to resolve the rental value of the Sparks Road property with precision, considering it to be on a par with that fixed for the Rossall Street property.

Giving all the weight that is appropriate to the dislocation caused as the result of their inability to settle the purchase of the Rossall Street property, the result achieved in

the High Court does not appear to us to be equitable. The appellants have paid the sum fixed and provided rent free accommodation; the respondents have had the benefit of the rent free accommodation plus the advantage of retaining a substantial capital sum pending settlement. They have effectively received a double benefit.

The judgment in the High Court awarding the respondents the sum of \$32,350 as liquidated damages will therefore be set aside to that extent.

Cross appeal

A number of the orders for general and special damages made in the High Court have been challenged by the respondents on cross appeal.

General damages

In their cross appeal the respondents sought an award of general damages of \$10,000 for distress suffered by them due to the purported cancellation of the agreement and the attempt to evict them from the Sparks Road property. In the High Court Moran J had fixed general damages for distress resulting from late settlement but had not extended the further relief sought to include that suffered as the result of the cancellation of the agreement. We note that the second respondent claimed to have suffered health problems as the result of the purported cancellation of the agreement, and do not doubt that the whole experience was stressful for both respondents. The appellants' actions in purporting to cancel the agreement and evict the respondents from the Sparks Road property were high-handed, even if immediately thereafter as the result of proceedings brought by the respondents they resiled from this position and allowed them to remain in possession of the Sparks Road property until settlement of Rossall Street was finally achieved.

In the light of the fact that the damages awarded under clause 3.4 have been set aside, it is necessary to consider whether the award of \$10,000 general damages should be paid by the appellants or whether by reason of that clause it is absorbed by the provision of rent free accommodation. We consider that the appellants' actions in attempting to cancel the agreement for sale and purchase were distinct from any failure pursuant to clause 3.4 to give possession on the due date. We therefore consider it appropriate to give effect to

the trial Judge's findings but to vary the award of general damages of \$10,000 for distress suffered by the respondents due to the purported cancellation of the agreement. We invoke clause 3.4(4) of the agreement for sale and purchase in making this separate award of damages and allow the cross appeal to that extent. As a consequence we set aside the award of general damages for distress resulting from late settlement.

Cost of replanting the garden

The respondents, anticipating a settlement in 1994 or early 1995, gained permission to establish a garden at the Rossall Street property. Due to their inability to care for the garden, the plantings have been destroyed. On cross appeal they sought the sum of \$2,500 as the cost of replanting. This claim was disallowed in the High Court; the Judge finding that as the appellants were not obliged to permit the respondents access to the property prior to settlement, they voluntarily assumed the risk that the settlement would not occur on time. Moreover, any such loss was not within the contemplation of the parties at the time, given that settlement was delayed significantly longer than either of the parties had foreseen. As a consequence, he found that that head of damages was too remote for orders to be made.

We agree with the findings of the learned Judge in the High Court and would not allow the cross appeal.

Light fittings

The respondents sought \$5,000 for the provision of light fittings to substitute for the "bare bulb" fittings provided by the appellants, asserting that the appellants had represented to the respondents that proper light fittings would be provided as part of the agreement.

We do not find that the respondents have made out their case for this head of damages and the cross appeal will be disallowed.

Cost of materials for fixing balcony

We heard no submissions on this part of the cross appeal and there appears to be no evidential basis for it. This too is disallowed.

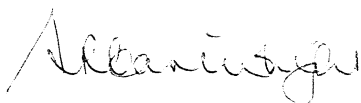
The result

The effect of this judgment is as follows:

1. The award of liquidated damages in the sum of \$32,350 in favour of the respondents is set aside.
2. The award of general damages in the sum of \$10,000 for distress suffered by the respondents arising from late settlement of the agreement for sale and purchase is set aside.
3. In its place an award of general damages of \$10,000 is made in favour of the respondents for distress suffered by them due to the attempt to cancel the agreement for sale and purchase and to evict them from the Sparks Road property.

Costs

Although the respondents have succeeded to a limited degree in their cross appeal, the appellants have borne the burden of their successful appeal against the award of liquidated damages and the costs against the respondents should reflect this. We fix costs of \$5,000, with disbursements to be fixed by the Registrar.

A handwritten signature in cursive script, appearing to read 'Alan Wright', is written in black ink.

Solicitors

Kinsman Barker, Christchurch, for Appellants

Thompson & Morgan, Christchurch, for Respondents