IN THE SUPREME COURT OF NEW ZEALAND
WELLINGTON DISTRICT
WELLINGTON REGISTRY

A.13/69

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BETWEEN : GEORGE ALAN NEVILLE FRASER of Masterton, Chiropractor, and CAROL IRENE FRASER of Masterton, Hairdresser.

Plaintiffs

AND : THOMAS JAMES COTTLE of Masterton, Builder.

First defendant

AND : WILLIAM VAN PRAAGH of Masterton, Land Agent.

Second defendant

Hearing : May 3, 4 and 5, 1971

Counsel : Dalgety and Hart for plaintiffs
McLeod and Rennie for first defendant
Jeffries for second defendant

Judgment: November 24, 1971

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RESERVED JUDGMENT OF WHITE J.

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This is a claim for $3,000 as damages arising out of the sale of a property in Masterton. The plaintiffs were the purchasers, the first defendant was the vendor and the second defendant was the land agent.

The claim was based on three alternative grounds. The first cause of action against the first defendant was that he was in breach of a term in the contract, or a contract collateral thereto, that a separate building on the property, referred to in the pleadings as "a flat building", would be able to be used "as a place for human habitation and to be used as a flat and be available for letting as a flat". It was alleged that as a result of the breach the plaintiffs suffered the damages claimed

through depreciation in the value of the property, expenditure on the flat and other consequential loss. The second ground, in the alternative, was that the plaintiffs relied on the truth of representations by the second defendant, who knew or ought to have known that the plaintiffs trusted him and placed reliance on him to exercise due care having regard to his "special skill and knowledge". It was alleged that the representations were incorrect and made negligently and consequently the plaintiffs suffered loss. Thirdly, and alternatively, it was alleged against the first defendant that the representations made by the second defendant already referred to, were based on fraudulent or negligent misrepresentations made by the first defendant to the second defendant to the effect that the flat building was a self contained flat intending that the second defendant would act upon it. The claim under each alternative head was $3,000.

The first defendant admitted that the second defendant was his agent for the sale of the property and that the contract was entered into. He denied any breach of contract and the allegations of fraudulent and negligent misrepresentation and said that if the second defendant was found to have fraudulently or negligently misled the plaintiffs the second defendant acted outside the scope of his authority as agent for the first defendant. The second defendant admitted that he acted as agent for the first defendant to sell the property at 119 High Street, Masterton, but denied the allegations of breach of contract and the allegations of misrepresentation and negligence and claimed alternatively that the first defendant was in breach of contract.

The plaintiffs have claimed damages, first, for the depreciated value of the property because the "self contained flat" is not in fact able to be used as a flat. Secondly, they have claimed damages for monies that have been expended on the flat because it was in fact thought to be a flat. Thirdly, they are

claiming other losses and expenses arising from the reduced value of the property because the flat was not a flat (including loss of use of money and the extra scale costs and stamp duty incurred because the transaction was for an excessive sum); and also compensation for the time and expense involved in negotiating with the Borough Council for a waiver of their requirements concerning the flat.

The case was therefore a three-cornered contest in which lengthy evidence was called extending over several days and elaborate arguments were submitted on the various issues as to liability and damages. The fact that in addition to breach of contract, fraudulent misrepresentation and negligence were alleged against both defendants, has meant that evidence of events extending over a period of years, and concerning which the recollection of witnesses was naturally hazy, had to be considered.

The facts are that both plaintiffs were working in Masterton in 1965 when they became engaged to be married. The firstnamed plaintiff is a chiropractor and at that time he leased rooms, his lease being due to expire in March 1966 subject to a right of renewal for a further term of five years. The property which has become the subject matter of these proceedings was of special interest to the plaintiffs and to the secondnamed plaintiff's parents, a Mr and Mrs Cooper. It consisted of a house large enough to be altered to provide for a chiropractor's rooms and there was a separate building on the property which had been converted into a flat. The plaintiffs saw photographs of this property in the second defendant's window display of properties. Mr and Mrs Cooper became very interested in the flat because they planned to move into Masterton to leave their farm house for their son who had arranged to marry in December 1965. It appears

that Mr and Mrs Cooper arranged to see the flat and the plaintiffs the house, and it was then left to Mr Cooper to negotiate with the land agent and owner. There is no doubt that the Coopers accepted what they were shown by the agent as a self contained flat and that it was discussed as such. The plaintiffs also had a long term view of the flat becoming a surgery if and when they had a family and needed more space in the house.

Negotiations took some little time because the first defendant was living in Wellington at the time, but ultimately negotiations were completed, the price being £6,500, and on 1 September 1966 an agreement for sale and purchase was completed. There was a mortgage for £4,000, the plaintiffs borrowed a further £1,500 on second mortgage and found the balance in cash. In fact, Mr Cooper made a gift to the plaintiffs at this stage of approximately £700. The tenants occupying the house left in February 1966, alterations were then carried out and on 28 May 1966 the plaintiffs were married and occupied the house. The Coopers were already occupying the flat.

The facts stated above are in the main not disputed. There are however important details of negotiations concerning which the plaintiffs and Mr and Mrs Cooper were not entirely clear in their recollections and they were careful and candid in stating only what they could remember clearly. These matters and the history of the flat will require more detailed consideration, but to complete the broad outline the apparently satisfactory arrangements were suddenly rudely shaken as a result of an application by Mr Cooper to the Masterton Borough Council to add a carport to the flat. The letter from the Borough Council dated 25 March 1966 reads as follows :

> "I have to inform you that the Council will not grant you permission to erect a car-port at the above address, as the maximum permitted area of accessory buildings has been exceeded as set out under Clause 1(8) of Ordinance V of the Code of Ordinances under the Masterton Borough Council undisclosed District Scheme.

> On the matter of the garage and workshop having been converted to a flat, the Council will not permit this to continue as a place of human habitation and must be vacated within 28 days. As a place of human habitation this structure fails to meet the required standard as covered by the Housing Improvement Act and Clause 804 and 828 of N.Z.S.S. 95 Par VIII. Further, the location of this structure on the site fails to comply with Clause 3 section 13(2) of Ordinance II of the Code of Ordinances under the Masterton Borough Council undisclosed district scheme. Apparently this building has gradually been converted to a flat over the years, starting with a temporary use granted for three months only, some eight years ago to house an employee while his dwelling was being erected. At no time has a permit been issued for making or converting this building into a flat. Anything that has been carried out by past or present owners has been unauthorised."

According to the plaintiffs and Mr and Mrs Cooper, and there is no evidence to the contrary, they were quite unaware of this situation. The correspondence shows that every effort was made to persuade the Borough Council to permit the flat to be used as such but to no avail. Ultimately the Borough Council gave notice that if the flat was not vacated proceedings would be taken. As a result the Coopers left the flat in 1968. From that date it was used by the plaintiffs as a storeroom. The plaintiffs moved to Auckland in August 1970 since when another chiropractor rented the house but he has now left and the property was placed on the market. The asking price was $16,500 which was the figure the agent advised and the separate building was advertised as suitable for a rumpus room, studio or workshop. In the negotiations before the contract was signed Mr Cooper dealt with the first defendant. The plaintiffs did not meet the first defendant until after the Borough Council had given notice, when he came to the property to collect some chattels belonging to his mother. When the matter was raised the evidence of the plaintiffs and the Coopers is that the first defendant expressed great surprise at the Council's attitude and said that he had a permit for the flat

and would produce it. He did in fact produce documents but an approved plan which the first defendant said he regarded as the permit he stated in evidence had been lost.

It is necessary to review in some detail the history of the building now known as the flat in order to determine the issues of fact on which the allegations in the case depend. The house was built in 1955, pursuant to a permit issued in January of that year. In March 1956 the first defendant himself applied for and obtained a permit to build what is described in the records of the Masterton Borough Council as a "Shed with W.C. and basin". It is to be noted that at the time the flat was built there were a number of deviations from the plan approved by the Council for the purposes of the building permit. Some time in 1958 it appears that the first defendant decided to convert the shed, as it then was, into a flat. About that time he reached an agreement with a Mr Harrington, who was a plumber then living in the first defendant's house, that on the return of the first defendant's mother to live in the house Mr Harrington would go and live in the flat (or, as it was at that time, the shed) until the building of Mr Harrington's own house was completed. In return, Mr Harrington was to install the plumbing for the flat. This plumbing and further construction work was done and as far as the plumbing was concerned, it was done pursuant to a permit issued by the Masterton Borough Council on 8 August 1958. The work authorised in the permit is described as "plumbing and drainage to flat". As mentioned above the first defendant claims that he had a permit for the building construction work. He stated that he submitted a detailed plan of the flat as it was to be, and that this plan was approved by the Council. It was his copy of the authorised plan which he stated has been lost, and although he says he has since inspected another copy of it at the Masterton Borough Council offices, the Council has not been able to find it. It should be added, that there was evidence of some purging of files and also some incidents of lost records.

On or about 8 August Mr Harrington moved into the flat for a short period of weeks or months. About the time that Mr Harrington moved out of the flat it appears that a Mr Eddy, the Chief Borough Inspector, visited the flat and expressed his dissatisfaction with it being used as such. Mr Eddy had been away during the period the plumbing permit was issued and at the time it was claimed the building permit had been issued. The plumbing permit was signed by one of his subordinates. When the first defendant at about this time wished to use the flat as a temporary residence for an employee of his company, while the employee's house was being built, the company wrote to the Borough Council requesting a special dispensation for the employee to occupy it and this was granted on 3 September 1958. According to the first defendant the reason the company wrote to the Council requesting such a dispensation when a properly endorsed plan authorising the conversion of the shed to a flat had been issued was that he did not wish to "buy a fight with the Council" following the intervention of Mr Eddy. In fact the employee did not occupy the flat.

Reverting to Mr Harrington's occupation; after he left the flat it appears that two other persons at some time occupied it. One was a Mr Arcus, who was the secretary of the first defendant's company, and the other was Mrs Cottle, the first defendant's mother. No special dispensation was applied for in the case of either of these occupancies. As far as Mrs Cottle's occupancy was concerned, however, it appears that an informal conversation did take place between the first defendant and Mr Eddy concerning it. Both stated that it was agreed it would be in order for Mrs Cottle to occupy the flat without a special dispensation because she was a member of the family. Mr Eddy added, however, that this was only on the condition that Mrs Cottle had her meals in the house itself. In other words, the flat could be used as an extra bedroom by a member of the family. While the first defendant

denied that the taking of meals in the house was ever mentioned he did not dispute that Mr Eddy had indicated that the flat was looked upon by him as an additional bedroom.

For business reasons the first defendant was absent from Masterton for long periods commencing about 1962. When the house was let no reference was made to the flat in any of the leases, except by way of exclusion. In 1964, the first defendant decided to sell the property. He placed it, as a sole agency, in the hands of agents, first a Mr Norman Towne, and then a Mr Ross, but it was the second defendant who was instrumental in arranging the sale. The evidence is not clear as to his appointment as agent but I do not think that has any significance.

The second defendant produced a diary which he used as a running note book unrelated to the dates, containing the following entry :

> "T.J.Cottle, 119 High Street,
> 32 Pch £21 rates 10 years old
> 6500 Nor Union 3 bedroom self
> contained flat."

Mrs Van Praagh who worked in the business, stated that some time in 1965 she talked to the first defendant by telephone and that he told her that if she went to the flat his mother, who was living there, would show her through. She stated that no difficulties in respect of the flat were mentioned. Mrs Van Praagh went to the flat and was conducted through by Mrs Cottle, Mrs Van Praagh taking photographs of the building. The first defendant said he could not recall the telephone conversation with Mrs Van Praagh, but remembered his mother telling him that Mrs Van Praagh had been there and had taken photographs of the flat. Some photographs taken by Mrs Van Praagh were ultimately exhibited in a display window of the land agent's firm. It was these photographs, probably one of the house and one of the flat, which first attracted the attention of the plaintiffs to the property.

Details of the negotiations between Mr Cooper and the first defendant then assume some importance in determining the latter's state of mind regarding the flat. It appears that Mr Cooper made an offer to Mr Van Praagh of £6,000, but when Mr Van Praagh rang the first defendant to convey this offer to him it was refused, the asking price for the property being £6,500. The first defendant stated about this time he himself had found a prospective buyer in Wellington, and he had taken this person (whose name he could not recall) and the purchaser's prospective wife to Masterton to look at the house. When, however, the first defendant met Mr and Mrs Cooper at the property and Mr Cooper increased his offer to £6,500, the first defendant accepted it. He said in evidence that although he discussed the problems concerning the flat with the prospective purchasers from Wellington he did not discuss these problems with the Coopers. He said, however, that he specifically asked the Coopers what they intended doing with the flat, without explaining why he asked and that if they had said that they wished to rent the flat he would have told them that it was not suitable for that. As they intended to live in it themselves from time to time, he thought there would be no problems. In evidence Mr Cooper said he could not remember the first defendant asking them what they were going to do with the flat.

In my opinion, fraudulent misrepresentation having been alleged, that should be dealt with first.

It was submitted that the first defendant sold the property as including a self contained flat knowing he was able to deliver only a detached building usable as an adjunct to the house. It was alleged that as a result of the first defendant's instructions to the second defendant representations were made by the latter to the plaintiffs and Mr and Mrs Cooper that the building was a flat, that it was available for letting and that it gave added

value to the property. It was claimed that the first defendant made statements to the second defendant with the intention that the second defendant would act upon them in advising prospective purchasers as to the nature of the flat building and the uses to which it could be put and the value it added to the property.

In my view the inference to be drawn from the evidence is that the first defendant's instructions to the second defendant to sell his property were in such terms that the second defendant would be likely to gain the impression that the flat was habitable and available for separate use and letting. There was no evidence that the first defendant described it as a flat to let but at the time the flat, which is situated some distance from the house, was occupied and the lay-out confirmed the instructions that it was a self contained flat.

There is no doubt that at the time the first defendant placed the property in the hands of agents, the general history of the building was known to him. He had been personally responsible for its conversion to a flat and he was well aware of the attitude of Mr Eddy regarding the use of the flat. In considering fraudulent misrepresentation I do not attach great significance to the detailed history of deviations from the original permit to build a shed but I consider that the first defendant's state of mind in light of the history and following his discussions with Mr Eddy was of considerable importance. The existence or otherwise of an endorsed plan was another important consideration affecting this question, and naturally Mr Dalgety argued that whatever the position really was the purchasers should have been warned. That the first defendant's instructions and statements were less than a full and frank disclosure of the position is quite clear. Looking at the evidence as a whole Mr Dalgety argued that the first defendant "did not act honestly in any of his dealings with the property" and that fraudulent misrepresentation had been established.

Mr McLeod contended that when the history of the property is examined and it is remembered that over a period of years the flat was used and publicly occupied as a flat, the first defendant was entitled to treat it as accepted as available for human habitation with some limitations on its user. It was pointed out that the question whether the flat could be let separately was never raised specifically during the negotiations and there was no evidence that the first defendant had stated that it could be. Citing Walters v Morgan (1861) 3 De G.F. & J. 718, 723, 45 E.R. 1056, 1059, Mr McLeod argued that a vendor must not mislead a purchaser but that "simple relicence does not amount to legal fraud". He also relied on Armstrong & Anor v Strain & Ors (1952) 1 K.B. 232. There an agent employed by a vendor made a representation which was false, and material, and induced the plaintiffs to purchase. The vendor had not authorised the land agent to make the representation and did not know it had been made although the vendor knew of facts which rendered it untrue. In that case it was held by Devlin J. (as he then was) that neither vendor nor agent was guilty of fraud. The decision was affirmed on appeal and Birkett LJ. (at p.246) adopted the statement of Devlin J. that "there is no way of combining an innocent principal and agent so as to produce dishonesty". Applying that reasoning Mr McLeod submitted that the inference which should be drawn was that the first defendant honestly believed that the flat could be used for human habitation, or that it had not been shown that he did not. Mr McLeod also referred to Graham et al v Legault et al (1951) 3 D.L.R. 423, in which the facts were similar to the facts in the present case. In Graham's case the vendor knew that the purchaser required a property with a rentable suite and sold a property knowing that the suite was let illegally. It was held that in those circumstances there was a duty to disclose but it was submitted the case was distinguishable

because there the vendor knew that the purchaser intended to rent the flat.

The burden of proving fraud in such cases was referred to in Hornal v Neuberger Products Ltd (1957) 1 Q.B. 247, 258. There Lord Denning said, "The more serious the allegation the higher the degree of probability that is required; but it need not, in a civil case, reach the very high standard required by the criminal law". In the same case Hodson LJ. adopted an earlier statement of Lord Denning's in Bater v Bater (1951) P.35, 36, 37 where he said :

> "A civil court when considering a charge of fraud, will naturally require for itself a higher degree of probability than that which it would require when asking if negligence is established. It does not adopt so high a degree as a criminal court, even when it is considering a charge of a criminal nature; but still it does require a degree of probability which is commensurate with the occasion."

The high standard of proof in fraud cases was referred to most recently in the Court of Appeal in Kenny v Fenton (1971) N.Z.L.R. 1 at 10 and 31.

While the first defendant's failure to give his agents and prospective purchasers a full disclosure is open to censure it has to be proved that a fraudulent statement was made or that the statement was made recklessly, not caring whether it was true or false. In this case the first defendant had over a period of years converted the flat building into a self contained unit hoping, no doubt, that by effluxion of time it would be accepted. His mother had lived there for some years while the house was let independently and the Council had not given any formal notice concerning its use. Bearing in mind the onus of proof, in my opinion it has not been established that the first defendant, in giving instructions to the land agents for the sale of the property or in the course of negotiations, was guilty of "legal

fraud" or withheld information in order to mislead his land agents, nor do I think it has been established that his conduct in instructing the second defendant was reckless in the sense that he did not care whether what he said was true or false.

The second question is the claim based on breach of contract. It was submitted that it was a term of the contract, or a contract collateral thereto, that the flat building would be able to be used as a place for human habitation and be suitable for letting as a flat.

Mr Dalgety submitted that considering the contract as a whole it was clear that the vendor had agreed to sell a house and a flat, the land on which the house and flat are and certain chattels in the house and flat. Further, it was submitted that the flat building was represented as a self contained flat capable of being used as such by the Coopers as tenants. There was evidence that the flat was probably described by the second defendant in his advertisements as "an attractive self contained flat". In my view, that would have been in accord with the instructions given by the first defendant to the second defendant, and was what the land agents and any prospective purchasers saw when they visited the property. The first defendant treated the flat as a "detached self contained flat" which was the description it received in an application for mortgage finance in 1960. And in evidence he said, "... it would have been obvious that there was a self contained flat there". I agree that at all material times the Coopers intended to live in the flat as a self contained flat and must have been understood to have that intention. In my view there can be no doubt that the contract was entered into on the basis that the vendor was selling a self contained flat.

Mr Dalgety relied on Cornwall Properties v King (1966) N.Z.L.R. 239, and in particular the following passage from the judgment of Perry J. at p.245 :

> "He sold and undertook to deliver a business licensed to sell both types of food. He can deliver a business licensed to sell one type only. He cannot, therefore, deliver what he has sold and in my view, the purchaser is not bound to accept something different from what he has bought. The matter is not one of degree only. ... An illustration could be if a buyer bought what he was told was a licensed hotel, when in fact, it was an unlicensed guest house. The whole character of the business depends on what may be legally sold. The vendor has sold an eatinghouse. He can deliver only a refreshment room. He cannot therefore perform his fundamental obligation of delivering what he has sold."

In interpreting the agreement for sale and purchase, and applying the general principle stated by Lord Wilberforce in Suisse Atlantique Societe D'Armenta Maritime S.A. v N.V. Rotterdamsche Kolen Centrale (1967) 1 A.C. 361, 434, "the contractual intention is to be ascertained - not just grammaticall from words used - but by consideration of those words in relation to commercial purpose (or other purpose according to the type of contract)", I consider that what was described and sold as a flat did not have the essentials of a flat as commonly understood in such a transaction. If authority is required Sommervell LJ. said in Murgatroyd v Tresarden (1947) T.L.R. 62, "The natural meaning of the word 'Flat' is, I think, a separate self contained dwelling...". In considering the question whether the plaintiffs received what they contracted to buy it is important to remember that this is a question of fact, unaffected by the first defendant's wishful thinking as to the habitability of the flat. In my view a contract to sell a building in fact illegally converted and used as a flat does not result in the sale of a self contained flat but something fundamentally different. At most it was an additional self contained bedroom usable legally in conjunction with the house. The flat was only a part of the subject matter of the contract but in my view the misdescription was of a kind which altered the character of the bargain which contemplated the separate use of the flat as commonly understood.

For these reasons I have come to the conclusion that the plaintiffs have established breach of contract.

Having arrived at this conclusion it is unnecessary to deal with the contentions that the first defendant was liable under Hedley Byrne & Co Ltd v Heller & Partners Ltd (1964) A.C. 465, or that there was a breach of a collateral contract or warranty such as arose in Coffey v Dickson (1960) N.Z.L.R. 1135.

The plaintiff's allegations against the second defendant were that representations were made that the flat building could be used as a flat, that it would be available for letting to third parties and that the presence of the flat building gave an added value to the purchase of the property. No allegation of dishonesty was made against the second defendant but it was alleged that the second defendant was negligent in making representations concerning the flat.

With the exception of statements concerning the letting or the rental value of the flat, there can be no doubt that the instructions which were given by the first defendant were simply adopted and passed on by the second defendant in providing information for purchasers. Apart from that the house and flat were inspected by the plaintiffs and the Coopers who made up their own minds. This is not a case where any direct question regarding the legality of the building was put to the land agent. The rental value of the flat appears to have arisen merely in conversation and the evidence does not establish that Mr Cooper was relying on the land agent for advice. There is no evidence that the Van Praaghs had any knowledge of the actual position regarding the flat, or that either gave reckless advice, or proferred information which might be said to emanate from an agent because of his interest in selling the property. There was no evidence of a specific inquiry which should have warned the agent and therefore in my opinion, Barrett & Anor v J.R. West Ltd

& Anor (1970) N.Z.L.R. 789, is distinguisable. In the circumstances of the present case, therefore, I do not consider that Hedley Byrne & Co Ltd v Heller & Partners Ltd (1964) A.C. 465 applies.

The claim for damages for breach of contract is made under three heads : depreciated value of the property, expending monies on the flat building, and other expenses.

It was submitted that the flat was an important factor in the sale price of $13,000, being a feature which enhanced the whole value of the property. This was much debated but as the measure of damages is the difference between what was paid for the property and its true market value at the moment of purchase, I must consider first the evidence of the valuers. Unfortunately there was considerable conflict between them and an assessment must be made after weighing all the evidence.

Mr Hill, who gave evidence for the plaintiff, capitalised the income earning potential of the flat at $4,000. He valued the flat building at $600, assuming it was to be valued as a "shed", and he considered that, taking depreciation into account, its value today was approximately the same. There was some divergence of view as to the income earning potential of the flat at the relevant dates and Mr Pyne, who gave evidence for the first defendant, considered that it was unsatisfactory to value the house by one method and the flat by another. Mr Dalgety submitted that the value of the flat should be considered initially on the basis suggested by Mr Hill, whose figures and opinion as to the attractiveness of the flat received support from other witnesses, and that the real value of the building should then be offset. In his submission the difference between the value of a self contained flat as it appeared to be and what in fact it was, should be assessed as $2,200. As will be seen in making that submission, Mr Dalgety has not adopted Mr Hill's evidence that the flat building should be regarded as a shed. That is understandable

in view of the evidence which, in my view, shows that at the date of sale in 1965, if all the facts had been frankly disclosed, the well-equipped flat building would certainly have had a value exceeding the value of a shed in the eyes of a willing purchaser.

For the first defendant, after making the criticisms of Mr Hill's evidence to which I have referred, Mr McLeod submitted that on Mr Pyne's valuation the plaintiffs did not pay more than the property was worth, assuming it had been sold with a full disclosure of the position as revealed when the Coopers made their application to build a car port.

In my view both sides have overstated the position and cross-examination has revealed weaknesses in the evidence of both valuers. While Mr Dalgety's submission takes the facts into consideration, I do not think the difference in value is as high as the figure he has proposed. In my view the rental value of the flat was an important factor but not the only factor in considering the value of the flat as a part of the property. I think it is likely that the price at which the property was placed on the market in 1965 was intended to interest a large family, or a family wishing to use the flat for a relative or relatives living there independently, or for professional rooms, while its rental value to outsiders would also be in the minds of the land agents. I think the evidence of the sale shows that it was sold at its market value at that time and that the flat would certainly have attracted tenants. Looked at broadly, I consider that the limitations on the use of the flat as to both habitability and rentability were bound to affect substantially the overall market value and I assess the loss claimed under this head at $1,750.

As I have said the claim for damages in this case has been extended first, to include a sum to recoup the expense of improvements to the flat - $100. Secondly, Mr Dalgety argued that a significant loss was the plaintiff's loss of use of the money

paid over and above the market value, assuming a finding in the plaintiff's favour. This claim under the head of other expense, is complicated by a submission that the plaintiffs are entitled to recover for the time and expense incurred in endeavouring to persuade the local body to waive its requirements for their legal costs in doing so, and finally a reduction in costs and stamp duty if the plaintiff's claim that the purchase price exceeded the market value. At first sight these matters appear to be items of special damage. They are in fact imprecise and matters under this head could not be calculated until the main head of damage has been decided. While various calculations were made, Mr Dalgety's final submission was that considered with a claim for $2,200 for loss of bargain these other matters could be assessed broadly but fairly to bring the total to $3,000 as claimed.

No authority for these heads of consequential loss was cited apart from general statements in Mayne & McGregor on Damages, 12 Ed. paras 282 and 283, which do not seem to me to apply directly to this case. The general principles in applying the rule in Hadley v Baxendale (1854) 9 Ex.341 were restated in Victoria Laundry v Newman (1949) 2 K.B. 528 (C.A.). It is clear that a complete indemnity "for all loss de facto" is not the rule but that a plaintiff "is only entitled to recover such part of the loss actually resulting as was at the time of the contract reasonably forseeable as liable to result from the breach". And the third paragraph of the judgment of the Court of Appeal delivered by Asquith L.J. reads :

> "(3) What was at the time reasonably so forseeable depends on the knowledge then possessed by the parties, or, at all events by the party who later commits the breach."

And in paragraph (5) it is pointed out that actual knowledge of consequences is not required but "it suffices that, if he

(the contract breaker) had considered the question, he would as a reasonable man have concluded that the loss in question was liable to result". Later in the judgment the word "liable" is considered and explained as "serious possibility" or a "real danger" or colloquially as "on the cards". It is helpful also to note the view of Buckley J. in Diamond v Campbell Jones (1961) 1 Ch. 22, that the Court of Appeal in the Victoria Laundry case was not referring to possible circumstances "but to reasonable probability of a possible loss arising from a given state of knowledge of actual relevant circumstances".

In Beard v Porter (1948) 1 K.B. 321, where a vendor agreed to sell a house with vacant possession, and the tenant failed to keep a promise to vacate, the extra expense incurred by the purchaser in renting premises temporarily was allowed together with the costs and stamp duty incurred on the purchase of another house in addition to the difference in value. In the course of his judgment Evershed L.J. at p.325, noted that "the purchaser has presumably paid in respect of his purchase a larger amount of ad valorem duty than he would have been called on to pay ..." but no claim is made in respect of any such overpayment.

In the present case at the time the contract was entered into the plaintiffs were a young couple purchasing a home for use as a home and a chiropractor's rooms and a flat to be used by the parents of the wife. In those circumstances I think it was reasonably forseeable, first, that the Coopers might leave the flat before the plaintiffs wished to use it for a surgery or "rumpus room", in which event it might well have been let, and secondly, that at a future date the plaintiffs would wish to sell the property in which event the value of a rental flat would be an important factor. These are the matters which are covered by the measure of damage already applied in comparing the contract price with the market value of the property at the

time of the contract. That being my view I do not think this is a case where the claims under the secondary heads can be dealt with precisely. Taking into account, however, the additional expense likely to be directly attributable to the breach at the time of the contract I consider the amount of damages should be increased on the basis referred to in Beard v Porter (supra). I reject the claim for improvements to the flat which was occupied for some years and the equipment added could be removed. Bearing in mind that remoteness must be considered in light of factors ascertained at the time of making the contract I fix the amount under this head at $300.

There will be judgment for the plaintiff against the first defendant for $2,050. I shall reserve the question of costs and shall hear counsel, or a memorandum may be filed, if that is necessary.

SOLICITORS FOR THE PLAINTIFFS :

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SOLICITORS FOR THE FIRST DEFENDANT :

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