IN THE SUPREME COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

No. A.392/76

543

BETWEEN RAYMOND DAVID EASTMOND previously of West Melton, Farmer but now of Auckland, Farmer

Plaintiff

[redacted]

A N D WILLIAM MURRAY ROBERTSON of Christchurch, Chartered Accountant and STEPHANIE ANNE ROBERTSON his wife

Defendants

Hearing: 24 October 1977

Counsel: A.P.C. Tipping for Plaintiff
G. Thompson for Defendants

Judgment: 16th November 1977

JUDGMENT OF SOMERS J.

This is a vendor's action for specific performance of a contract made 17 October 1975 wherein the plaintiff, Mr Raymond David Eastmond (to whom I will refer as the plaintiff) agreed to sell and the purchasers, Mr and Mrs W.M. Robertson (the purchasers) agreed to purchase some 8 hectares of land at West Melton for the sum of $27,000. Mrs Robertson was not an original party to the transaction but by some form of novation became a purchaser along with her husband.

The land in question lies between Bell's Road and Melton Grange Road at West Melton. Running along the Bell's Road frontage is a water race used generally both for watering stock and irrigation purposes. The statement of defence as amended at the trial alleged that during the negotiations preceding the contract Mr D.L. Laird, a land agent acting on behalf of the plaintiff, told the purchasers that water from the race would be available to them but

the right to take that water was in fact declined by the Paparua County Council which controls the race. The property was advertised for sale by Mr Laird, who is a salesman for Mercer Real Estate. That advertisement was not produced in evidence. It contained some reference to the presence of the water race together with other customary terms of commendation of the property. Mr Robertson, one of the purchasers having seen that advertisement, went with Mr Laird to view the property some time before 17 October 1975 which is the date of the contract. At that time, as he told Mr Laird, he owned another piece of land in West Melton which he found to be somewhat unsatisfactory by reason of lack of water. He walked with Mr Laird from Melton Grange Road down to the water race on the Bell's Road frontage. A discussion then took place about the water and it is on that discussion that the dispute centres.

Mr Laird had been extensively engaged in the sale of small lots such as the one in question in that area. He had negotiated the sale of some 50 or 60 such allotments, a few of which adjoined the race. He was familiar with the race, and was aware that in a number of cases purchasers of small areas of land abutting the race had been permitted by the Council to take water for irrigation. Mr Laird's general experience as a salesman of land in the area was known to Mr Robertson. I do not doubt that Mr Laird's past experience had brought to his mind the notion that there should be no difficulty about the grant of the right to draw water for irrigation.

Both Mr Laird and Mr Robertson gave evidence. Neither could recall the precise words used. The onus of proof rests upon the purchasers, the defence being an affirmative one.

There is no doubt that Mr Laird told Mr Robertson that the purchasers could not take the water without

the approval of the Council and that an application for that purpose was necessary. Mr Robertson understood that and, after first findingout from the Council what was required, by letter of 22 October 1975 he made such an application. Mr Robertson said he was told by Mr Laird "there would be no trouble getting" the right and that he understood from what he was told that the application was only a formality.

> "Mr Laird only said about the water that we should "apply formally to the Council but we understood "again that that was only a formality, obviously "the people who had the land at that time had the "water, we assumed that we were buying the land, "we would be the only person who would use it, so we "would get it, my impression was that it was simply "a formality."

Mr Laird said that he had had discussions about the use of water from the race with innumerable actual or potential purchasers and that he had a standard form of observation which he made to them all and which in particular he made to Mr Robertson. It was to the effect that water could not be taken without permission, that an application should be made to the Council and if the right was given the Council would require certain works to enable water to be drawn and would rate for the right. He said he told Mr Robertson he would, in his application, have to give a lot of detail of proposed use and of quantities of water required. He said he did not think he told Mr Robertson his view of the likely fate of the application but did mention other possibilities such as an approach to a neighbour to use part of his water and the drilling of a well.

The issue is whether Mr Laird represented to Mr Robertson that water would be available and if so whether that representation was false. It was not alleged that if made and false the representation was fraudulent. To succeed the defendants must show a representation which was false in substance and in fact. The nature of the

falsity relied upon illustrates clearly enough the nature of the representation which must be shown to have been made. That falsity is the refusal of the Council to consent to the taking of the water. Accordingly, the character of the representation which needs to be established must be such as to indicate that water would be available, that in short, the Council would give its consent.

I do not think that what was said by Mr Laird meant, or, more importantly, was capable of conveying to Mr Robertson any such notion. In the first place I find that Mr Laird did not say that an application was a formality or anything to that effect. Nor do I accept that he said there would be no trouble. I think that he may well have expressed his opinion or belief that a right to draw water would be granted - that the purchaser's application would probably be successful. But I think that whatever the precise words were they carried with them the possibility of the refusal by the Council to approve. And I think that is really what Mr Robertson understood. In cross-examination he said that he was aware that an application had to be made but was not aware that "we had little chance of getting it approved". Nor indeed was Mr Laird and it was not alleged that his belief or opinion was otherwise.

In so finding I do not overlook the circumstances in which the statement was made, the expressed desire of Mr Robertson to have a property with water upon it or available to it, and his enquiries as to the availability of water. But in the end I think the expression of Mr Laird was nothing more than a statement of belief honestly held. There is no doubt that statements of opinion or belief are actionable if not honestly held. That is not in issue here. And there is no doubt too that a statement of opinion by one who best knows the facts often involves a statement of some other material fact, namely, that he

knows facts which justify his opinion. Mr Thompson, rightly as I think, disclaimed any reliance upon that point which is referred to by Bowen, L.J. in Smith v Land and House Property Corporation (1884) 28 Ch.D.7 and it was not suggested that what was said was in any way a collateral warranty or a term of the contract or any type of promise either actionable in itself or constituting an estoppel.

In those circumstances, the action must succeed. There will be an order that the contract made bearing the date 17 October 1975 as varied by the addition of Mrs Robertson as purchaser be specifically performed and carried into execution. I willhear counsel on the question of any ancillary orders or costs if these cannot be agreed upon.

Solicitors:

Wynn Williams & Co., Christchurch, for Plaintiff
Ralph Thompson Shaw & Thompson, Christchurch, for Defendants