IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

M. No. 234/83

N2LR

581

BETWEEN RICHARD HAMMOND KEATS

Appellant

A N D WILLIAM HENRY SMYTHE and KATHLEEN MARY SMYTHE

Respondents

Hearing: 4th April, 1984.

Counsel: P. R. Heath for Appellant.
Miss C. M. Grice for Respondents.

Judgment: 21 - 5 - 84

JUDGMENT OF TOMPKINS, J.

The Appellant appeals from a judgment delivered by Judge Cartwright in the District Court at Hamilton on the 13th May, 1983. The Appellant, as Plaintiff, had claimed from the Respondents, as Defendants, a deposit of $5,000 paid by the Appellant as purchaser to the Respondents as vendors in respect of an agreement for sale and purchase. The learned District Court Judge held that the Respondents were entitled to forfeit the deposit. The Appellant's claim therefore failed.

In August, 1980, the Appellant and the Respondents had reached an agreement on the terms upon which the Appellant would purchase the Respondents' property on the main road at Karapiro near Cambridge. At the request it seems of both parties, an agreement recording the purchase of the land was prepared by a Cambridge solicitor, Mr. Grandfield. For reasons that do not emerge from the evidence, the agreement was not evidenced by the usual form of agreement for sale and purchase. In its original form it read:-

" We, William Henry Smythe and Kathleen Mary Smythe both of Cambridge, retired, hereby agree to sell to Richard Hammond Keats of Cambridge, Nurseryman, all our property at Pukekura containing four acres two roods thirty seven decimal six perches (4 acres 2 roods 27.6 perches) being Lot 1 D.P.S. 1769 for the sum of $100,000.

With a deposit of five thousand dollars ($5,000) receipt of which is hereby acknowledged. The balance of the purchase price shall be payable in full upon the sale of the purchaser's property at Saville Road. "

There are two copies of that document. One copy (Exhibit 1) is undated and signed by both of the Respondents. The other copy (Exhibit B) is dated "11/8/80" and signed by the Appellant. There was added to Exhibit B in the Appellant's handwriting:-

" (to be fixed up by 31/12/80) "

At the time the agreement was negotiated the Appellant was the owner of a farm property at Saville Road, Cambridge. As Respondents had become aware in the course of the negotiations, it was the Appellant's intention to sell that property. The proceeds from the sale were to be used to complete the purchase from the Respondents.

The deposit referred to in the agreement of $5,000 was paid on the 11th August, 1980. The Appellant put his Saville Road property on the market, but by the end of December, 1980, it had not been sold. The Respondents told the Appellant that they wanted to purchase another property. Mr. Smythe's evidence is that it was as a result of this that an amendment was then made to the agreement. This was done in Mr. Grandfield's office. The amendment was in the form of a handwritten addition to Exhibit 1. The addition reads:-

" R. H. Keats is to pay $50,000 in cash by the 30th January and we will leave the balance of $45,000 free of interest until the 30th April.

(Signed) W. H. Smythe.
R. H. Keats. "

The Appellant made no payment on the 30th January, nor was any payment made on the 30th April. On the 30th June, 1981, the Respondents re-sold their property. The Appellant then sought repayment of the $5,000 deposit. The Respondents response to that request is set out in a letter written by Mr. Grandfield to Mr. Keats on the 3rd November, 1981:-

" I advise that Mr. Smythe has called to see me.

He states that a meeting was held on a Sunday in January 1981 at the house at Pukekura between the two of you and Raymond Smythe and at that meeting you told him to go ahead and buy Raymond Smythe's house at 289 Shakespeare Street and you promised to pay the interest on the $40,000 that had to be borrowed to finance the purchase of the house. Mr. W. H. Smythe also states that you assured him that you would definitely buy his property.

He advises that the interest incurred on the $40,000 amounted to $6400 and when this is paid he will refund the deposit of $5000. "

The Appellant's present solicitors replied denying that there had been an agreement in the terms set out in Mr. Grandfield's letter, asserting that the Respondents have no right to retain the deposit of $5,000 and requiring payment of this amount. Upon this request not being met these proceedings were issued.

In the amended Statement of Claim the Appellant pleaded three causes of action. In the District Court he proceeded with the first cause of action only. The relevant pleading reads:-

" 3. THAT it was further provided in a written sales note executed by the parties evidencing the terms as set out in paragraph 2 hereof as follows:

'The balance of the purchase price shall be payable in full upon the sale of the purchaser's property at Savill Road. '

4. THAT by the words set out in paragraph 3 hereof, it was at all material times intended by the parties to imply:

(a) That the principal contract was conditional on the Plaintiff being able to sell his Savill Road property.

(b) That the principal contract was conditional on the Purchaser being able to obtain a fair and reasonable price for the sale of his Savill Road property.

(c) That in the event of the Plaintiff being unable to sell his Savill Road property for a fair and reasonable price as aforesaid, he was entitled on notifying the defendants to treat the principal contract as at an end.

(d) That upon receiving notice as aforesaid the Defendants were to refund the deposit of $5,000.00.

5. THAT alternatively, immediately prior to, or concurrently with, the execution by the parties of the written sales note evidencing the terms as set out in paragraphs 2 and 3 hereof, the parties entered into an oral collateral contract by which it was agreed as follows:

(a) That the principal contract was conditional on the Plaintiff being able to sell his Savill Road property.

(b) That the principal contract was conditional upon the Purchaser being able to obtain a fair and reasonable price for the sale of his Savill Road property.

(c) That in the event of the Plaintiff being unable to sell his Savill Road property for a fair and reasonable price as aforesaid, he was entitled, on forwarding written notice to the defendants, to treat the principal contract as at an end.

(d) That upon receiving a written notice as aforesaid the defendants were to refund the deposit of $5,000.00.

6. THAT the plaintiff was subsequently unable to obtain a fair and reasonable price for his property at Savill Road, Tamahere and pursuant to the implied terms of the principal contract, (or, alternatively, of the terms of the oral collateral contract referred to in paragraph 5 hereof) he orally, and subsequently by letter from his solicitors dated 24 November 1981 advised the Defendants that the contract was at an end and requested a return of the deposit forthwith.

7. THAT the Defendants have neglected or refused to refund the said deposit to the Plaintiff and are in breach of the principal contract, or alternatively of the collateral contract. "

The Appellant then claimed as damages for breach of contract $5,000, being the value of the deposit not returned by the Respondents.

The Respondents in their Statement of Defence admitted the agreement, the payment of the deposit, and that the deposit had not been repaid. They otherwise deny the Appellant's allegations. On a counterclaim for damages for the Appellant failing to complete the contract in accordance with its amended terms, the Respondents in the District Court elected to be non-suited.

It was submitted on behalf of the Appellant in the District Court and in this Court, that extrinsic evidence was admissible to show the surrounding circumstances in which the contract was signed and the genesis and aim of the transaction (Prenn v. Simmonds (1971) 3 All E.R. 237 H.L.).

It was further submitted that evidence of acts and conduct of the parties subsequent to the contract is admissible as an aid in the construction of the contract. This submission was made in reliance on the judgment of the Privy Council in Watchan v. Attorney-General of East Africa Protectorate (1919) A.C. 533, as adopted by our Court of Appeal in Thames Borough v. Thames Valley Electric Power Board (1957) N.Z.L.R. 523, and N.Z. Diving Equipment Ltd. v. Canterbury Pipelines Ltd. (1967) N.Z.L.R. 961. The decision in Watchan has been doubted by the House of Lords in Wickman Machine Tools Sales Ltd. v. L. Schuler A.G. (1974) A.C. 235; (1973) 2 All E.R. 39. However, as was observed by O'Regan, J. in Adaras Developments v. Marcona Corporation (1975) 1 N.Z.L.R. 324, Watchan's case is binding on our Courts and the Thames Borough and N.Z. Diving Equipment cases are binding on this Court.

The rule as expressed by our Court of Appeal in those

two cases is that it can be applied only where the words of the contract are ambiguous and where the acts which are relied on unequivocally support the construction which the Court is invited to adopt. As McCarthy, J. observed in the N.Z. Diving Equipment case at 980, this doubtless is a hard test to satisfy: indeed an examination of the cases shows that it is not often thought to be satisfied.

I accept that in the present case the words of the contract are ambiguous. The phrase

> " The balance of the purchase price shall be payable in full upon the sale of the purchaser's property at Savill Road "

can mean either that the purchase price is to be paid when that property is sold, i.e. it is fixing the time for payment, or that the contract itself is conditional upon the sale of the Savill Road property. Then it is necessary to consider whether that ambiguity contained in the initial agreement is affected, modified or even resolved by the addition to the agreement made in December, 1980, when the words concerning the payment of the two sums of money were added.

The Court is being invited by the Appellant to adopt the construction that the contract was conditional upon the sale of the Savill Road property. It is therefore necessary to consider whether the acts relied on unequivocally support that construction.

When the agreement was concluded in August, 1980, the Respondents, as I have already observed, had become aware in the course of the negotiations leading up to the agreement, that it was the Appellant's intention to sell his Savill Road property and that the proceeds from that sale were to be used to complete the purchase from the Respondents. The Appellant said that the Respondents were happy to wait until the sale had been achieved before the purchase

of the Respondents' property was completed. Mr. Smythe confirmed that he and his wife were, at that stage, that is in August, in no particular hurry to have a settlement. That the parties then had in mind a settlement by the 30th December emerges from the addition of that date to Exhibit B.

By the end of December the Respondents had decided that they wanted to purchase another property. They then made a further approach to the Appellant concerning the payment of the purchase price. It was as a result of that that the words I have set out were added to Exhibit 1 and signed by Mr. Smythe on behalf of himself and his wife and by the Appellant.

No payment having been made on either of the dates specified, the Respondents resold their property on the 30th June, 1981. The evidence does not disclose the date upon which the Respondents put their property back on the market or the duration of the negotiations that led up to the resale. There is no evidence of any particular communication either orally or in writing between the Appellant and the Respondents between the 30th April and the 30th June. It is apparent that the Respondents considered that those dates having gone by they were now free to resell their property.

I do not find that these facts provide unequivocal support for the interpretation urged by the Appellant. On the contrary, I consider that when the contract was varied in December by the addition to it relating to the dates for payment, it was then the intention of all the parties that the uncertainty surrounding the dates of payment of the balance purchase price resulting from the uncertain words used in the original agreement should be resolved. They then agreed on the dates when the balance of the purchase price should be paid. They did so with words that are clear and unequivocal. There is nothing in the words used to suggest that the obligation to pay on the specified

dates was to be in any way conditional.

Indeed the variation itself indicates the contrary. If the obligation to make the payments was intended to remain conditional upon the Appellant selling his own property, then there was no reason to provide the two sums to be paid on two different dates. In that event the whole of the balance of the purchase price could be paid when the sale of the Appellant's property had been completed. Further, the evidence shows that when the variation to the contract was made all the parties knew that the Respondents were wanting to purchase another property. They agreed to the variation so that the Respondents would have the amount required to do so. Hence, far from suggesting that the payments were still to be conditional, these facts would indicate an intention by the parties that the liability to make the payments was to be unconditional.

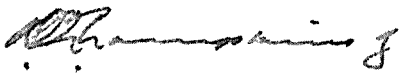
It follows from this that I do not consider that the Appellant has established that the terms set out in paragraph 4 of the Amended Statement of Claim should be implied into the contract. Nor do I find evidence that would establish an oral collateral contract on the terms set out in paragraph 5 of the Amended Statement of Claim. The Appellant in his evidence said that Mr. Smythe did at one stage (when is not stated) ask if the Appellant wanted the deposit back, but he said he did not want it back because he then thought the Savill Road property would sell readily. Other than this reference I find nothing in the evidence of any agreement between the parties that if the Savill Road property were not sold for a fair and reasonable price then the deposit would be refunded.

In these circumstances the Respondents have not been shown to be in breach of either the principal contract or the collateral contract as alleged by the Appellant. It follows,

therefore, that the Appellant's claim as formulated fails. The appeal is therefore dismissed.

I have determined this appeal on the cause of action as pleaded by the Appellant. Thus it has not been necessary for this Court to decide whether the variation of the contract made in December providing for dates for payment made time of the essence. Nor was it necessary to decide if time were not of the essence what was the legal consequence of the Respondents re-selling the property without first giving the Appellant notice making time of the essence and requiring settlement within a reasonable time (see Schmidt v. Holland (1982) 2 N.Z.L.R. 406). On the case as pleaded, and as argued in the District Court and in this Court, those issues did not arise.

The Respondents are entitled to costs on the appeal which are fixed at $300.



Solicitors:

Stace, Hammond, Grace & Partners, Hamilton, for Appellant.

Garrard & Osmond, Cambridge, for Respondents.