NZLR

14/5

IN THE HIGH COURT OF NEW ZEALAND

AUCKLAND REGISTRY

A. 442/82

460

BETWEEN: KIPLING CHAMBERS LIMITED
a duly incorporated company
having its registered office at
Papakura, Auckland

Plaintiff

A N D: RAPHAEL PAUL DELLABARCA of
7 Symmonds Street, Onehunga

Defendant

Hearing: 27 March 1984

Counsel: Messrs Finnigan and Grace for Plaintiff
Messrs Hubble and Towle for Defendant

Judgment: 19.4.84

RESERVED JUDGMENT OF CALLEN, J.

In May 1981, the plaintiff company, of which Mr John Henry Beale is director, entered into a tenancy agreement in respect of an eight and a half acre property at Takanini situated in School Road. The tenancy provided a right to occupy the property for six months from 7 June 1981, with an option to purchase. The property was said to be in a run down condition. The house was in need of redecoration and the land had become very overgrown. While a farmlet in nature, it was in fact zoned 'industrial' under the Manukau City Council scheme and because of the zoning, the rates on the property were in excess of $6,000 per annum. The rates were so high that

effectively it was uneconomic to farm the property but it was not possible to develop it for industrial purposes because of practical constraints. The services which would have been necessary for such a development were not available and their availability was likely to be delayed.

Mr Beale had some discussions with a Mr Gallagher at the Manukau City Council. Although this is a matter of some dispute, it appears likely that he was informed the only way in which relief could be obtained in respect of the rates was for an application to be made under the provisions of the Valuation of Land Act 1951. These provisions allow a revaluation in certain circumstances which would have the effect of lowering the rates payable. In addition, the Council contemplated a differential rating scheme but there was no prospect of this coming into force before April 1983.

Mr Beale stated that as a result of preferences expressed by his wife, the decision was made that the property should be acquired under the option, but immediately sold, it being the intention of Mr and Mrs Beale to move to the Bay of Plenty district. Mr Beale did not at this stage consult a Land Agent; indeed he had some experience in land agency himself and an advertisement indicating the availability of the property for sale was placed in the New Zealand Herald for the morning of 26 October 1981. The wording of the advertisement is not without significance. It makes it clear that the property is zoned as 'industrial' and there is an indication that it would be considered as a possible investment because of its future industrial potential.

As a result of the advertisement, negotiations commenced between Mr Beale and a Mr Dellabarca, the defendant in these proceedings.

On 28 October 1981, the plaintiff company and the defendant signed an agreement for sale and purchase in respect of the land, the price being $160,000. The agreement provided for a payment of a deposit of $1,000 which was set out on a form available to the Real Estate Institute of New Zealand. Apart from the printed general conditions of sale, it was unconditional. The agreement was typed by the defendant's wife and neither party submitted it to their respective legal advisors before signature. If they had done so, these proceedings would probably have been unnecessary, and a great deal of time and money saved.

The plaintiff contends that the agreement for sale and purchase is a valid and binding document. The defendant contends that it was subject to a pre condition which was never complied with and accordingly it never attained any legal validity, nor was it binding on the parties. The plaintiff has always maintained the validity of the agreement. The defendant declined to complete in accordance with its terms. Eventually the plaintiff sold to another purchaser.

The plaintiff claims damages in respect of the transaction. The defendant denies the liability to meet these.

A considerable amount of evidence was called, and as Mr Hubble pointed out, on behalf of the defendant, there are some considerations which favour the plaintiff's view of the transaction and others which tend to favour that taken by

the defendant. The conclusion depends upon a consideration of all the surrounding circumstances.

The plaintiff says that the agreement is, on the face of it, valid and unconditional. It contains no reference to any pre condition and the terms of the agreement at least suggest that it is intended to be complete because on the front page the following words appear:

> "It is agreed that the vendor sells and the purchaser purchases the above-described property and the chattels included in the sale on the terms set out above on the general conditions attached and any special conditions hereinafter appearing."

The evidence establishes that it was important to the vendor that the agreement should be unconditional. The defendant said in evidence:

> "He also made the point any offer he was going to get had to be totally unconditional."

The underlining is mine. The defendant further said that on a subsequent occasion, after there had been some alleged discussions as to price, Mr Beale said:

> "At that price he would only consider unconditional offer..."

Under those circumstances, in the face of an unconditional agreement and one where the evidence of the defendant confirms that it was important to the plaintiff that the agreement should be totally unconditional, there was a heavy onus on the defendant to establish his contention that contractual relationships between the parties were entirely dependant upon the satisfaction of an unexpressed pre condition.

The defendant, however, contends that there was such a pre condition and that it related to the rates levied on the

property. There is no doubt that the very high rates levied by the local authority would have been a significant consideration to persons concerned with the property. Before any question of sale to the defendant arose, Mr Beale had himself made enquiries from the local authority as to the possibility of alleviating the burden of rates.

The evidence of both Mr Beale and Mr Dellabarca indicates the question of rates was discussed on the occasion of their first meeting and the evidence establishes that Mr Beale informed Mr Dellabarca that the rates were in the vicinity of $6,000 at this meeting.

Mr Dellabarca confirms that such a statement was made. Both Mr Dellabarca and Mr Beale had experience in relation to land sales and the advertisement made a clear reference to the land being zoned 'industrial'. I should have been surprised if the question of rates had not been raised.

It is also significant that Mr Dellabarca states that he was informed at the first meeting that Mr Beale had been in touch with the Council and claims that Mr Beale indicated the Council had confirmed that if the property was being used as a farmlet, it could be zoned as rural and that some reference had been made to it being zoned rural in April 1983. Mr Beale is also said to have stated that he should have made some application earlier, that he had missed the last period when he could have made representations to the Council.

Mr Dellabarca had with him a manilla folder in which he made a reference to a "specified departure". These are not the only references in the evidence to town planning terms. Mr Dellabarca referred on a number of occasions to zoning.

Mrs Dellabarca stated she knew the property was zoned industrial but made a reference to a condition of buying it that it "be changed back to rural for rating purposes". She claimed to have been present during a telephone call when Mr Beale is said to have made a representation to the effect that the Council had approved a re-zoning back to rural. Mr Dellabarca also refers to a letter which he says Mr Beale claimed to have received from the local authority but does not refer to this letter in connection with the first meeting with Mr Beale. He does say that in a subsequent telephone conversation, Mr Beale advised him he had a letter of confirmation as to rating. The words used by Mr Dellabarca are as follows:

> He said "I have a letter of confirmation on that. As long as far is used as a rural property it will be rated as that and in April 1983 you can apply for a specified departure".

Mr Dellabarca's contention as to a pre condition depends on these matters.

It is first appropriate to deal with the contentions as to zoning. The amended Statement of Defence indicates that the contention of the defendant is based on an alleged representation by Mr Beale that the Manukau City Council "was prepared to charge rates on a rural and not industrial zoning". This does not in terms allege that the zoning had or would be changed and Mr Dellabarca"s own evidence referred to above is confirmation that what he was told was that he could apply for a specified departure.

In his closing submissions, Mr Hubble for the defendant suggested that the use of the term 'specified departure' was a loose use of terminology. I consider that the use of town planning terms during the evidence involved a loose use of terminology, and I conclude on the evidence that there was no representation that could have been construed as an indication that a zoning change had been made or sought.

Mr Dellabarca claims that Mr Beale stated that he had a letter available to the effect that the local authority had stated as long as the farm was used as a rural property, it would be rated as that. Mrs Dellabarca also refers to reference being made to a letter, and Mrs Christians, an employee of Mr Dellabarca, said both Mr Dellabarca and Mr Beale make reference to a letter.

Clearly enough, there was no letter, but the significance of the letter, apart from issues of credibility, is not its existence as such, but its evidentiary support for a representation as to rates. The nature of such a representation is referred to in the evidence in very vague terms. The whole issue stems from the telephone conversation alleged by Mr Dellabarca to have occurred and the statement alleged to have been made by Mr Beale that "As long as the farm is used as a rural property it would be rated as that and in April 1983 you can apply for a specified departure". This needs to be considered in context.

Mr Beale gave evidence that he had discussed the question of rating with an Officer of the City of Manukau some time

before the negotiations. This is, to some extent, confirmed by a letter written on behalf of the City Treasurer and dated 23 December 1981, which confirms that Mr Beale had had a telephone conversation with a Mr Wily, the senior Rates Clerk in October. The position adopted by the City Council was clearly that it had no power to make any reduction in rates, but that an application could be made to the Valuer General under the provisions of the Valuation of Land Act for a revaluation for rating purposes. In fact, in March 1982, at the request of Mr Beale's solicitors, a revaluation was made and special values assessed under Section 25 of the Valuation of Land Act which effectively reduced the rates payable in respect of the land by nearly 50%. The power to make such special valuations is based on the use to which the land is put so that it is clear that the reduction occurred because the land was used for rural purposes, not industrial as zoned. Mr Beale claims that this is what he told Mr Dellabarca. Mr Dellabarca's own evidence, to some extent, confirms this.

Further reference to some change occurring in April 1983 is also in conformity with the Council's subsequent advice that a differential rating system was being considered to be brought into effect on that date. Mr Dellabarca says that Mr Beale made such a reference during their first conversation. This would confirm Mr Beale's evidence, and also confirm that he had some discussion with the Council to this effect before the negotiations commenced. Nowhere was any figure mentioned as to the amount of reduction of rates. There is no claim that ther was any representation as to the amount which would ultimately

be achieved. The claim is that there was a representation that if the land was used for rural purposes, rating based on the use could be achieved.

I have no doubt that there were discussions between Mr Beale and Mr Dellabarca regarding rating. On the evidence of Mr Dellabarca, this referred to some future change, not one which had already taken place. It is not alleged there was any representation as to amount and I hold that it went no further than an indication that a change in rating related to use could be achieved if the appropriate procedures were followed. Such a representation was in terms correct and was ultimately achieved when the revaluation was carried out.

I cannot find, then, that there was a misrepresentation, nor that there was a pre condition, that a change in the basis of rating had already occurred.

That leaves only the question of the letter as such. Mr Dellabarca says that the contract was conditional on the production of the letter relating to rating. His evidence that there was reference to a letter is confirmed by Mrs Dellabarca and Mrs Christian. Mr Beale denies that there was every any reference to a letter.

As I have already indicated, the onus on Mr Dellabarca, in the face of an unconditional agreement made in a situation where there was an expressed emphasis on that agreement being unconditional, is heavy. Where the significance is not in the existence of the letter itself but its contents and where, as I have already found, a general representation for which the letter could be no more than evidence has been met, I could not

conclude that evidence of a failure to produce such a letter was sufficient to contravert the express written document.

There is, however, other evidence which leads to the same conclusion.

Mr Dellabarca opened independant negotiations with the solicitors acting for the mortgagees from whom Mr Beale had obtained an option. He says that those negotiations were facetious and amounted to no more than an enquiry as to title. The evidence of the solicitor concerned, however, is clear that figures for purchase were at least discussed and there is evidence that Mr Dellabarca believed he had obtained an option subsequent to that of the plaintiff. The significance of these negotiations is that there is no indication whatever that Mr Dellabarca raised any condition relating to rates, or indeed mentioned them, or referred to any understanding that the City Council had agreed to some rating change. If a rating change had assumed the importance which Mr Dellabarca now says it had, then it is inconceivable that he should not have made at least some enquiry from the solicitor for the mortgagees or imposed some kind of condition. He did not do so.

There was a telephone conversation between Mr Beale and Mr Dellabarca which took place towards the end of November; Mr Beale says on 26 November. Mr Dellabarca does not refer to the date but certainly from his evidence it occurred before 4 December. Mr Beale says that he was informed by Mr Dellabarca that Mr Dellabarca could have some difficulty in settling because his sale of the Epsom Motor Inn had collapsed

and he said he would assist on selling on the property and requested Mr Beale to agree to it being sold in the name of Kipling Chambers. Mr Beale refused to do this and it seems clear that there was a heated discussion on the telephone. Mr Beale says that rates were not mentioned. Mr Dellabarca said that the question of rates assumed paramount importance. Mr Dellabarca denied that he had said anything to Mr Beale about any problem with the sale of the Epsom Motor Inn. He stated in evidence that although a proposed sale of the Epsom Motor Inn did fall through, that did not occur until "nearer the end of December than the beginning". However, Mr Dellabarca's solicitor, Mr Wilson, stated that the contract concerned was conditional until 20 November and Mr Wilson's note which were produced, contained a note dated 27 November 1981 in the following terms:

> "I rang Ray Dellabarca about the purchase of the property at Takanini School Road. He said he would not be signing the contract and probably would advise the vendors that as the sale of the Motel has fallen through, he would not be proceeding with the purchase. He will leave the matter until Monday, 30 November and then discuss it further. He considers that Arthur Young who acts for Mercantile Development, the present registered proprietor, may wish to make some sort of deal so that they go ahead with the purchase".

This appears to me to be an extremely significant note. There is no mention in it of the contract failing to proceed because of a pre condition as to rates not having been met. There is a clear indication that it is still Mr Dellabarca's intention to proceed with purchase, probably by a direct deal with the mortgagee vendors, even although by that time he claims to have been aware of the rate position. Mr Dellabarca stated in evidence that he had telephoned the Manukau City Council and ha been informed that the property could not be re-zoned.

Following this enquiry, he had the angry telephone call of which Mr Beale speaks and which Mr Dellabarca confirms was angry because Mr Dellabarca states he taxed Mr Beale with having misled him over the rating question. Mr Beale says that telephone conversation took place on 3 December 1981 after he had settled the purchase of the property which was due to take place on 2 December 1981. This date was not seriously contested.

The evidence,therefore, establishes that at the time Mr Dellabarca spoke to Mr Beale, he was aware that the sale of the Motel had fallen through and he must have mentioned this to Mr Beale because there was otherwise no way Mr Beale could have been aware of it.

On 8 December, Mr Wilson, Mr Dellabarca's solicitor, wrote to Mr Dellabarca. The terms of the letter have considerable significance.

> "re: KIPLING CHAMBERS LIMITED
>
> I rang Mr G. Schneideman of Schneideman Short & Co., solicitors in connection with the settlement of the property at Takanini. I advised him that the contract on the sale of your motel was not proceeding and accordingly you were looking to quit the property at Takanini.
>
> He advised that Mr Beale would be placing the property on the market and presumably looking to you for any shortfall. A letter subsequently arrived, a copy of which is enclosed for your information.
>
> Please keep me posted as to the progress of quitting the Takanini property."

There is no reference in this letter to any pre condition based on rates, but there is a reference to the sale of the Motel not proceeding.

On 6 November 1981 Mr Schneideman, the solicitor acting for the plaintiff, wrote to Mr Delabarca's solicitors enclosing a settlement statement and asking for information in connection with any application that may have been necessary in respect of the Land Settlement Promotion Act. This letter was not replied to.

On 26 November, Mr Schneideman wrote again, requesting a transfer and notices of sale. This letter was not replied to either.

On 4 December, Mr Schneideman wrote again to Mr Delabarca solicitors. The letter is in the following terms:

> "Your client has apparently contacted ours today and advised that he cannot complete his unconditional purchase on the due date, namely the 18th day of December 1981.
>
> We now give notice that we are ready to settle on the settlement date and failing completion by your client on the 18th day of December 1981, our client will exercise the appropriate remedies."

This letter was not replied to.

On 8 December, he wrote again, requesting that the deposit be handed over. This was not replied to.

On 21 December 1981, the plaintiff's solicitors wrote to the defendant's solicitors, enclosing a settlement notice. This finally drew a response. This is in the following terms:

> "Prior to the contract being entered into between the abovenamed parties, Mr H. Beale a director of your client company advised our client that the Manukau City Council had agreed to a change in the rating for the property being purchased in Takanini. This was a gross misrepresentation of the true position.
>
> Our client is now considering his legal remedy and we shall take the matter up with you in the New Year."

It will be noted that this is the first reference to the rating situation.

Mr Dellabarca claimed in evidence that he had not informed Mr Beale that he could not proceed because of the

collapse of the Motel sale. In view of the evidence, I cannot accept this. He further gave evidence, and this was confirmed by his solicitor, that he was not financially embarrassed by the collapse of the Motel deal and could have proceeded on a bridging finance basis. In support of this contention, he called evidence from a finance company with which he had had dealings over the years. This evidence supported that the company would have been prepared to look favourably at any proposition put up by Mr Dellabarca but no such proposition was ever put up and the evidence was to the effect that there could have been no certainty that the application would have resulted in the necessary finance being made available.

Mr Wilson, Mr Dellabarca's solicitor, stated that his firm was in a position to make available substantial Trust funds and would have been prepared to do so by way of bridging finance but again he was not asked to make this finance available and had to concede that since the funds concerned were Trust funds, it would have been possible only to advance to the extent that a valuation justified.

I accept that Mr Dellabarca could probably have financed the purchase if he had wished to do so, but in the circumstance this is not sufficient to contravert the other evidence which clearly leads to the conclusion that Mr Beale was informed by Mr Dellabarca that he was not proceeding because the Motel sale had fallen through. This is quite inconsistent with his contention as to a pre-condition.

There is a further matter of significance. On 4 December 1981 Mr Dellabarca instructed a land agency known as Beltons to endeavour to sell the Takanini property. Mr Dellabarca says that he did this because he had had a further meeting with Mr Beale, that Mr Beale had, at this meeting, stated that he was in a desperate position, that he was committed to move and that his and his wife's health were so bad that he could not effectively face up to the situation which would occur if the sale did not proceed. Mr Dellabarca says that in order to assist Mr Beale, he agreed to endeavour to on-sell the property effectively on behalf of Mr Beale. He further says that this was desirable because Mr Beale was out of the district and not available to deal with agents.

In fact, the agent at Beltons Real Estate was a Mr Brian Wilson Grant, who gave evidence. He stated that Mr Dellabarca informed him that he, Mr Dellabarca, had a property in Takanini Road which he wished to sell. He completed the form which his firm normally required and it is particularly significant that this is made out as showing Mr Delabara as the vendor, giving Mr Dellabarca's address, and what is more significant, showing Mr Dellabarca's solicitors. While it seems unlikely that Mr Dellabarca would have taken this action on behalf of Mr Beale, bearing in mind the angry conversation to which both have testified, I cannot accept that if Mr Dellabarca were acting entirely on behalf of Mr Beale that he would not only have not informed the agent that he was acting on behalf of Mr Beale, but should have shown

his own solicitors as the solicitors concerned. It is also significant that the price for which the property was to be offered was $178,000.

Evidence was also given by another agent who had dealt directly with Mr Dellabarca and who was not aware of Mr Beale's involvement.

Mr Hubble pointed out that while there were consideration which favoured the interpretation placed on the situation by Mr Beale, there were other considerations which favoured the interpretation put forward by Mr Dellabarca and that there were more of these and that they were more convincing. I agree that there are some factors which do point towards the interpretatio placed on the matter by Mr Dellabarca. It is true, for example, that Mr Dellabarca's concern with rates was borne out by his solicitor and his actions are, to some extent, explicable in the light of his claim that he never regarded the agreement as binding at all.

I do not consider, however, that any of the factors referred to outweigh those which I have discussed above and which I regard as decisive. Mr Dellabarca signed an agreement which is unconditional in form and in circumstances where he accepts it was important to the vendor that it should be unconditional. He does not seem to have taken any formal steps in respect of his contention that the agreement was conditional until late in December. He did inform the vendor that he was not proceeding because the sale of his Motel had fallen through and this is confirmed by his solicitor's notes. He placed the property on the market in circumstances which

point strongly to his having done it on his own initiative and for his own benefit and he did so in the face of formal advice by the plaintiff's solicitors that he was being held liable for any loss occasioned by the alleged default.

I find that the agreement concerned is valid and binding and that the defendant is in breach of his obligations under it

The plaintiff seeks damages in respect of that breach and has set out his claim for damages under seven separate heads. He claims interest under the provisions of the Judicature Act on such sum as he may be found to be entitled to.
The property was eventually resold at the same price. The damages, therefore, do not include any sum for reduced sale price.

The first head of claim is in respect of Real Estate commission on re-sale of the property, Mr Beale having eventually sold it in order to mitigate his damages. The commission concerned amounts to $4,375 and is claimed by Beltons Real Estate Limited, the firm which effectively negotiated the sale. The agent for that firm who gave evidence stated that the firm claimed payment of commission, although it has not yet been paid, and denied that there was any arrangement whereby Mr Beale, who had had some connection with real estate agency, was entitled to some reduced rate of commission. He did, however, state that in view of the fact that no signed authority had been obtained from Mr Beale, it had to be regarded as doubtful whether the agency could enforce its claim against the plaintiff because of the provisions of the Real Estate Agents Act. There is authority to the effect an unenforceable claim can be the subject of a

damages claim where non-payment would result in some degree of embarrassment to the person who could otherwise claim some technical defence. See McGregor on Damages, 14th Edition para 239, and the cases there cited.

Some emphasis was placed on the fact that Mr Beale had been involved in Real Estate agency. Under these circumstances, I have no doubt that he should honour his obligations and under the circumstances I find that this amount is properly claimable against the defendant.

The second head of claim is an apportionment of rates amounting in total to $2,386.41. I find that this sum is recoverable.

The third head of claim is for advertisement costs on re-sale. That amount is $200 and is claimable.

The fourth head is the sum of $360 for the cleaning of the property with a mechanical slasher. The evidence establish that this was necessary in order to make the property more attractive on sale and I find it is properly recoverable from the defendant.

The fifth head of claim is scale legal costs on re-sale. These amount to $438 and are recoverable.

The sixth head is a claim for travelling expenses, accommodation and sundry expenses amounting to $2,679. Mr Beale claims that in order to keep the property saleable, it was necessary for him to travel considerable distances almost every weekend in order to work on the property and keep it reasonably attractive for sale. The expenses concerned are

motel expenses, mileage expenses and sundries related to these visits. Mr Hubble suggested that the figure was grossly exaggerated. I do not believe that it was reasonable to travel every weekend to the property and in the circumstance it would have been, I believe, considerably cheaper to have paid somebody local to carry out any necessary work. I believe that the actual number of visits Mr Beale should have made should have been very substantially less. Arriving at a figure is difficult because I have not been informed what it might have cost to provide local labour to keep an eye on the property and to keep it in reasonable order. I think the sum o $500 would be reasonable and I consider this sum properly recoverable against the defendant.

The last item claimed is interest from the date of default under the agreement to the date of sale. This has been calculated at 16% and amounts to $12,273. The agreement provides that the interest rate on default is to be 16%. This clearly is the agreement of the parties and in my view it is properly recoverable against the defendant. I find accordingly

There is strong authority to the effect that where a plaintiff recovers against a defendant he is entitled to interes on the amounts in respect of which he has been out of pocket, unless there are quite exceptional circumstances. However, the plaintiff has claimed, and in my view is entitled to recover, interest under the agreement. To award interest as well under the provisions of the Judicature Act would be doubling up and I consider it would be quite inappropriate for

any additional order for payment of interest to be made.

There will therefore be judgment for the plaintiff in the sum of $20,532.41. The plaintiff is entitled to costs as per scale, with disbursements to be fixed by the Registrar.