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RST

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

A.70/84

**No Special
Consideration**

BETWEEN CORNELIUS ANTONIUS KIVITS
ELIZABETH HUBERTINA JOSEPHINE
KIVITS and MITCHELL GOYA KIVIT

1086

Plaintiffs

A N D JAMLS WILLIAMS and PHYLLIS
JACQUELINE WILLIAMS

Defendants

Hearing : 27th and 28th August 1984

Counsel : D.F. Dugdale and N. Browne for Plaintiffs
R.E. Bartlett for Defendants

Judgment : 10 September 1984

JUDGMENT OF BARKER, J.

In this Action, the plaintiffs now seek only rectification of an agreement for sale and purchase dated 25th May 1983. The plaintiffs agreed to sell to the defendant for \$18,125 a vacant section described in the document as "66 Florence Ave, Orewa, Lot 3, DP 63201".

It is claimed by the plaintiffs that the written agreement did not accurately record the terms of the bargain between the parties because "Lot 3, DP 63201" included an area of some 245m² ("the disputed land") which it is said formed part of an adjoining property owned by the first-named plaintiff and his sister, Lucia Antonia Maria Kivits on which is erected a block of eight flats.

In their amended statement of claim, the plaintiffs sought, as an alternative to rectification, orders under the Contractual

Mistakes Act 1977; another set of proceedings brought by Lucia Antonia Maria Kivits and the present plaintiff, Cornelius Antonius Kivits, as owners of the adjoining property, sought relief under Section 129 of the Property Law Act 1952, claiming that buildings on the disputed land encroached onto the section now owned by the defendants.

As will appear in some detail from the narrative, Cornelius and Lucia Kivits obtained from Greig, J., in a reserved judgment dated 23rd September 1983, an order that a caveat in respect of the disputed land not lapse until 28th February 1984; this caveat was alleged before Greig, J. to have been based on an oral agreement between Lucia and Cornelius Kivits as vendors and the present plaintiffs as purchasers to transfer the disputed lot for a nominal consideration. It was alleged that this oral agreement was later recorded in writing in May 1980. The present defendants were parties to and opposed the application over the caveat.

It is now stated by Lucia and Cornelius Kivits that there was never any such oral agreement; it follows that the order of Greig, J. was obtained through deception. The extension of the life of the caveat had the effect of precluding the present defendants from registering the transfer which they had received from the present plaintiffs upon settlement of the agreement for sale and purchase which had taken place in a normal manner without any mention of the disputed land.

The present plaintiffs changed solicitors sometime towards the end of 1983; on 27th February 1984, I declined an application by the present plaintiffs for an interim injunction to restrain the defendants from registering their memorandum of transfer.

On 17th May 1984, in the action brought for relief under Section 129 of the Property Law Act 1952, I issued an interim injunction against the defendants, restraining them from removing any structures, outbuildings and fixtures on the disputed land. I ordered the plaintiffs to file affidavits

in support of that application; that requirement was never fulfilled. No detailed evidence in support of the application was given orally; there was no surveyor's evidence such as one might have expected on such an application. It was not surprising, therefore, at the conclusion of the evidence, when Mr Dugdale elected to be non-suited in respect of this application. Indeed, the existence of such an application would hardly be consistent with the application for rectification.

The consequence of that election of non-suit was that the injunction made on 17th May 1984 had to be discharged; by agreement, the question of the costs undoubtedly due to the defendants was left to be resolved in the judgment on the present action.

At the conclusion of the evidence, Mr Dugdale abandoned any claim under the Contractual Mistakes Act 1977; the only matter requiring determination is the plaintiffs' claim for rectification.

The facts as presented to me were markedly different from those which had been given in affidavit form to Greig, J. in the caveat proceedings; if the evidence I heard from Lucia Kivits in particular is correct, a very serious situation is disclosed which may require the file to be referred to other quarters.

Miss Lucia Kivits gave evidence that, on 14th November 1977, having formed the intention to build a block of flats to house elderly people, she purchased Lot 9 of DP 63201. This section adjoins Lot 8. The section as originally subdivided was not large enough to meet the requirements of the Rodney County Council for bulk and location for the project of 8 flats. According to her, the Council was favourably disposed towards her plan to house senior citizens; the Council indicated that if the disputed land of 245m² were added to the existing Lot 9, the total area of the lot would then be regarded as adequate by the Council.

Miss Kivits instructed her solicitor to act for her and organise the necessary re-subdivision. Presumably the subdivider of the block and the then owner of Lot 3 would have had to agree to sell the disputed block. There was no evidence that it had been approached. The Council permitted her to proceed with building without awaiting the transfer of the disputed land into her name.

Because she did not have sufficient finance, Miss Kivits persuaded her brother, Cornelius Antonius Kivits, to come in with her as a partner in the flat venture. He agreed to do so; according to both of them, his role was purely that of a "sleeping partner" and he left all the arrangements for the purchase, building permits, planning permission etc. to his sister.

The building permit application was in the name of Miss Kivits only; it sought permission to build 8 units on Lot 9, DP 63201. A scheme plan was apparently prepared by a surveyor but never deposited; it would have added the disputed land to Lot 9 from Lot 8. Miss Kivits said she built a fence which conformed to the boundary of what she thought was her land (i.e. a fence on Lot 8 at what was its boundary with the 245m²).

The solicitor never took the necessary action to perfect the subdivision.

On 1st October 1980, the plaintiff, Cornelius Kivits, agreed to purchase Lot 3 on DP 63201. His sister, Miss Kivits, attended the mortgagee's auction sale at which the section was offered. The agreement refers to Cornelius Antonius Kivits or nominee as purchaser; eventually, title was taken by Mr Cornelius Kivits, his wife and his then 17 year old son.

According to an affidavit made by Lucia Kivits in the caveat proceedings, in November 1980, she and her brother orally agreed to purchase from her brother, her sister-in-law and nephew, the disputed land for a consideration of \$1. According to an affidavit made by the solicitor in the same

caveat proceedings, this oral agreement was subsequently recorded in writing although no date was given. He exhibited what purported to be this document. The affidavit of Miss Kivits in the caveat proceedings on this point stated:

"In or about November 1980 Cornelius Antonius Kivits, Elizabeth Hubertina Josephine Kivits and Mitchell Goya Kivits (hereinafter referred to as "the Kivits Family") purchased Lot 8, which adjoins Lot 9, from Unit Developments Limited. At the time of such purchase an oral agreement was reached between the said Kivits Family and the said Lucia Antonia Maria Kivits and Cornelius Antonius Kivits such that part Lot 8 containing 245 square metres would be transferred to the said Lucia Antonia Maria Kivits and Cornelius Antonius Kivits in accordance with the survey plan as deposited with the Land Transfer Office in accordance with the vendors obligations contained in the Agreement for Sale and Purchase dated the 14th day of November 1977 and referred to in paragraph 4 hereof. The said oral agreement was recorded in writing and a true copy of the oral agreement as recorded in writing is annexed hereto and marked with the letter "D"."

The affidavit of the solicitor on the same point in the same proceedings stated:

"3. In or about May 1980 the said caveator entered into an oral agreement for Sale and Purchase together with the said Cornelius Antonius Kivits for the purchase of part Lot 8 D.P. 63201, comprising 245m² more or less, such property being the subject of the Caveat number B185466.1.

4. The oral agreement referred to in paragraph 3 hereof was recorded in writing, a copy of which is annexed hereto and marked with the letter "A".

5. Pursuant to the said agreement referred to in paragraphs 3 and 4 hereof, a survey plan was prepared and fences erected on part Lot 8 defining the new boundary line for Lot 8 and Lot 9. A block of units was then built on Lot 9."

In a second affidavit in the same proceedings, the solicitor deposed:

"At the time the Kivits family purchased Lot 8 agreement was reached between the Kivits family and Lucia Antonia Maria Kivits and Cornelius Antonius Kivits as owners of Lot 9 that the Kivits family would transfer to the said Lucia Antonia Maria Kivits and Cornelius Antonius Kivits that part of Lot 8 containing 245m² in accordance with the Survey Plan and in accordance with the vendor's obligations contained in the Agreement for Sale and Purchase such obligations being referred to in paragraph 3 hereof. Such agreement was recorded in writing and referred to in my previous affidavit dated the 21st day of July 1983."

After receiving from me the appropriate warning as to self-incrimination, Miss Kivits gave evidence that the above statements were false. There was never any agreement, oral or written, by the present plaintiffs to sell the disputed land to her and Cornelius Kivits. Counsel for the plaintiffs submitted that this written agreement which was signed by all the parties, was a device created by the solicitor to extricate himself from a charge of professional negligence. Miss Kivits stated that the solicitor told her to sign the document. She admitted that she swore on the bible when she made her affidavit, that her affidavit was true; she went ahead and made it because the solicitor told her to do so.

Cornelius Kivits did not make an affidavit in the caveat proceedings. He too acknowledged that the agreement purporting to record an oral agreement was false; there was never truly any such agreement. Indeed, such an agreement would be completely contrary to the plaintiffs' present claim for rectification. He stated that the document had been signed in the presence of and on the advice of his own solicitor who was not the same solicitor who had acted for his sister; i.e. the solicitor who failed to have the plan deposited.

Mr Kivits' own solicitor gave evidence before me - and I am completely satisfied having seen and heard him - that he had nothing to do with the false agreement. Mr Kivits was quite wrong when he claimed that the agreement was signed in the presence of his own solicitor. I do not accept Mr Kivits as a witness of truth on that point. His whole evidence on

the subject of the false agreement was evasive and unsatisfactory.

The defendants, Mr and Mrs Williams, entered the scene in May 1983. Mr Williams was looking for a section on which to build home units. He went to Beltons Real Estate Agency and was shown Lot 8 by a saleswoman, Mrs Howard. He admitted quite frankly that what he saw was a section bounded inter alia by ditches and by the fence built by Miss Kivits which was built on Lot 8 on its boundary with the disputed land.

Mr Williams candidly admitted that, from his physical inspection, he thought that he was buying the land bounded by the fence. However, before signing the agreement, he went with the Real Estate agent to her office; they inspected a plan of the area which showed the dimensions of Lot 8 as registered in the Land Transfer Office; and disclosed the area of Lot 8 as 1776m². Mrs Howard, on the spot, enquired of the County Council as to the number of home units that Mr Williams could build on a 1776m² lot. She was told, correctly, four. When she relayed this to Mr Williams, he made an offer to purchase which turned out to be acceptable to the plaintiffs; Mrs Howard prepared the agreement and had it signed by the parties; the transaction proceeded to settlement without incident.

I heard evidence from the defendants' solicitor who acted on the conveyancing transaction; he had received the settlement statement from the plaintiffs' solicitors, and paid over the money to them; he received on settlement a signed transfer for Lot 8. There was never any mention of the defendants being entitled to less than 1776m². However, registration of the transfer was delayed because of the caveat which was based on a deception.

After I had refused an injunction to restrain the defendants from registering their transfer, Mr Williams registered his transfer; he engaged an architectural draftsman, Mr Campbell, to prepare plans to build four flats. Mr Campbell had been consulted by Mr Williams before he bought the section;

He had, on that occasion, looked at plans held in his office which showed that four flats could be built on the property with special planning consent from the Council. That consent has now been forthcoming; the defendants are poised to undertake their building operation. However, if the disputed land of 245m² has to come off the site, then the defendants will be allowed to build only three units.

Mr Kivits stated that he had spoken to Mr Williams after the transaction was settled, told him of the difficulty concerning the disputed strip, and offered to unscramble the transaction. Mr Williams is said to have refused this offer. I prefer the evidence of Mr Williams on this point that there was no such offer made. Even if there were, I consider Mr Williams was quite entitled to have taken such a stand at a point where he had paid over his money and had received a registrable transfer for the whole lot. The plaintiffs had the opportunity of advising their solicitors of their claim about the disputed land; they just did not do so. Before settlement would have been the appropriate time to have raised matters of that nature.

Mr Williams acknowledged in cross-examination that, when he bought the section, he thought he was buying the block of land bounded by the ditches and the wooden fence with an area of 1776m². He also acknowledged that it was after he had completed the purchase that he discovered that the section he had purchased included some land on the plaintiffs' side of the fence. He acknowledged in re-examination that he had relied upon the description of the boundaries and the statement of the area which the land agent had told him about from information in her office.

On those facts, Mr Dugdale submitted that the plaintiffs were entitled to the equitable remedy of rectification which is concerned with correcting instruments and not with bargains. He acknowledged that the plaintiffs are required to state precisely what the contract should have been. Counsel submitted that the contract should be rectified to show the description of the land being purchased as Lot 8, DP 63201 excluding an area of 245m² as delineated on a plan annexed to the statement of claim.

However, this delineation is not precise; there was no suggestion that the defendants ever knew of the precise area and position of the 245m² or its dimensions. Mr Bartlett pointed out that by virtue of Section 307 of the Local Government Act 1974, any contract between the parties for the sale of land other than a whole lot on a deposited plan, is conditional on the proper deposit of the plan in the Land Transfer Office. It seems a fundamental objection to rectification that the contract before rectification should be unconditional; yet after rectification should be conditional.

Mr Dugdale submitted that rectification should be ordered on terms that the plaintiffs compensate the defendants for the loss of the disputed land. This might have been a proper basis for an award under the Contractual Mistakes Act if sole reliance had been placed on that statute; as counsel first pointed out, rectification is concerned with correcting instruments and not bargains. The injection of the notion of compensation seems to be correcting the bargain.

The criteria for rectification are well-known; see Dundee Farm Limited v. Bambury Holdings Limited, (1978) 1 N.Z.L.R. 647; Joscelyne v. Nissen, (1970) 2 Q.B. 86, 95; and Merbank Corporation Limited (in liquidation) v. Cramp, (1980) 1 N.Z.L.R. 721. There has to be a common intention at the time the agreement was signed in regard to a particular provision. If, in regard to a particular point, the parties were in agreement up to the moment when they executed their formal instrument and the formal instrument does not conform with the common agreement, then the Court has jurisdiction to rectify. The cases emphasise the heavy onus on an applicant for rectification.

In the present case, the agreement demonstrates the intention of the parties was to sell Lot 8; before the purchasers signed, the agent of the vendors showed them a map with dimensions of Lot 3 and told them the correct area. In my view, there was therefore, in the minds of the purchasers and the vendors' agent, a consensus as to what was to be sold. The plaintiffs had no contact with the defendants. They did not inform their agent that they did not wish to sell the whole of Lot 8 but

wished to exempt the 245m². The agent spoke to them before the sale but nothing was said by them.

In those circumstances, I fail to see that a case for rectification has been made out. However, if I am wrong, since rectification is an equitable remedy, there are grounds for exercising the discretion against the plaintiffs.

Whilst there is no proof that the plaintiff Cornelius Kivits was a party to the deception of the Court practised by his sister and her former solicitor, he did go along with the charade of the phony agreement, the purpose of which must have been to deceive the Court. Not only that, he in my view untruthfully stated that this agreement had been signed on the advice of and in the office of his solicitor.

Furthermore, the defendants have been delayed unnecessarily and unjustly. Proceedings for rectification should have been commenced promptly by the plaintiffs, when the mistake was realised in June 1983 after settlement of the sale; i.e. the time when Mr Williams was allegedly telephoned by the plaintiff. It is no excuse, so far as the defendants are concerned, to say that at that stage, the plaintiffs had not received proper advice and were still labouring under the deluded advice of their former solicitor. Not only that, they appear to have acted without reasonable despatch when the files came to their new solicitors.

According to the solicitor who gave evidence before me, he received the files late in 1983. Even allowing for time for his firm to have considered them, I am of the view that proceedings should have been issued by the end of January 1984. They were in fact issued on 8th February but not served until 23rd February 1984. I commented adversely on this fact in my judgment of 27th February 1984; I have never received an explanation for the delay in serving the injunction proceedings although one would imagine the defendants' solicitors would have accepted service. Moreover, the Court was never informed at the February or indeed the May hearing that Greig, J. had been grossly deceived at the caveat hearing in September 1983.

In my view, the plaintiffs do not come to Court with clean hands; they cannot expect the exercise of equity in their favour.

The action is therefore dismissed.

I award costs to the defendants in respect of all proceedings in the sum of \$2,500 together with disbursements and witnesses' expenses as fixed by the Registrar. In fixing this figure, I note that there have been 5 hearing days and considerable preparation plus an action on which the plaintiffs have elected a non-suit.

I reserve to the defendants liberty to apply in respect both of the present action and in respect of A.420/84 for damages caused by the grant of the interim injunction. The plaintiffs will have an independent remedy under the Land Transfer Act 1952 in respect of what was clearly a wrongful caveat and one which must have delayed them in their building plans severely.

I also direct that the notes of evidence, copies of the exhibits in this case, a copy of this judgment and copies of all affidavits in the caveat and injunction proceedings be referred to the Auckland District Law Society for consideration of what steps should be taken by it against the former solicitor for Miss Kivits.

It may well be that the Society, having investigated the matter, will wish to refer the file to the Police; in which case, I am happy to authorise that course in respect of the Court documents. The situation disclosed is highly disturbing. If Miss Kivits is to be believed, a solicitor of this Court has aided and abetted her in making a false affidavit and has himself made one in order to extricate himself from a negligence claim. I have not named him because I have not heard him. Mr Bartlett at one stage proposed to call him as a witness but that did not eventuate. However, the allegations made are sufficiently serious to justify my taking the course of referring the file to the Law Society. I have refrained from expressing my view of Miss Kivits' credibility on this point.

It was not necessary to do so for the purposes of this action.

R. J. Barker, J.

SOLICITORS:

Kensington, Haynes & White, Auckland, for Plaintiffs.

Sheffield, Young & Ellis, Auckland, for Defendants.