IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

Set 2

M. No. 458/83

BETWEEN CRAIG FREDERICK PATERSON and LORRAINE FRANCES PATERSON

Appellants

AND TOM TZE CHU of Auckland

Respondent

Hearing: 11th July, 1984

Counsel: Treadwell for Appellants
Daroux for Respondent

Judgment: 13 July 1984

JUDGMENT OF SINCLAIR, J.

This is an appeal from a decision of the District Court at Auckland where judgment was originally entered for the Respondent in the sum of $3886.46 for damages for misrepresentation arising out of a contract entered into between the parties in respect of the sale of some premises situated at the Mall, Onehunga. The Appellants in June, 1982 were the owners of this particular property which consisted of shop premises downstairs and residential accommodation upstairs. The shop premises were occupied by Curtain Style N.Z. Ltd in which the Plaintiffs were the major shareholders. It is apparent from the evidence that the company had originally occupied the premises prior to the freehold being acquired by the Appellants and, as will be seen later, there was originally a lease from the former owner of the downstairs portion of the company.

In relation to the sale from the Appellants to the Respondent Dalgety N.Z. Ltd was authorised as the Appellant's

agent in respect of the sale and a Mr Lewis was the actual gentleman involved.

On the 23rd June, 1982 Dalgety N.Z. Ltd advertised the property for sale in the New Zealand Herald, describing it as a building with a promised annual return of $10,816 with an asking price of $89,000. The Respondent became interested and after a number of negotiations the Respondent offered a price of $80,000 with a provision that the Appellants' company would take a lease for a term of six years at an annual rental of $10,816.

On 19th July, 1982 a formal contract was entered into between the parties at that price. Clause 12 provided as follows:

> "This agreement is conditional upon the purchaser executing in favour of the vendor a formal lease in the terms contained in the memorandum of agreement to lease appended hereto contemporaneously with this agreement. "

The agreement for sale and purchase was between the Appellants and the Respondent, but the memorandum of agreement to lease was in fact stated to be between the Respondent and Curtain Styles N.Z. Ltd. Paragraphs 2 and 3 of that agreement have some significance in this case and they read as follows:

> "(2) The lease shall commence as from the 16th August 1982 and shall be for a period of six years and shall allow for rent reviews every two years.
>
> (3) The rental shall be $10,816 per annum payable in advance by automatic bank transfer payments of $901.33 per calendar month. "

On the 22nd June, 1982 the Rent Freeze Regulations 1982 (Serial No. 1982/139) were passed and came into force

on the 23rd June, 1982. Those Regulations provided that where any land or building was let on the 22nd June, 1982 the rent payable in respect of that land or building for the period commencing on the 23rd June, 1982 and ending on the 22nd June, 1983 was not to exceed the rent payable in respect thereof as on the 22nd June, 1982. In addition, by Regulation 5 it was provided that no rent in excess of the rent fixed by the Regulations in respect of any land or building was to be recoverable or lawfully payable and offences were created for breaches of the Regulations.

As at the 22nd June, 1982 there was in existence a lease between Curtain Styles N.Z. Ltd and the former owner, Mr Church, which provided for an annual rental of $6,240 and by reason of the Rent Freeze Regulations that was the maximum rental which could be charged in respect of the premises in question until the Regulations expired on the 22nd June, 1983.

The existence of the earlier lease was not disclosed at the time the contract for sale and purchase was entered into, but it was disclosed at some later date which is not established with any great degree of certainty, but was found by the District Court Judge to be between the 21st July 1982 and 20th August 1982. Notwithstanding the disclosure the Respondent elected to proceed with the purchase, but reserving to himself the right to sue for damages for any misrepresentation.

The District Court judgment shows that that Court accepted the Respondent's evidence that had he been aware as at the date the agreement was entered into that there was some imped-

would not have been interested in purchasing at the price which he paid. The Agent stated that he would not have been able to have obtained a sale of the property at $80,000 if the annual rental had been just over $6,000.

It is evident from the judgment in the District Court that nobody turned their mind to the company's occupancy of the premises and no question was asked up to the time the contract was signed as to the terms of the company's occupancy and it is evident that all parties proceeded on the basis that the rental of $10,816 would be paid and would be receivable.

As was found by the District Court, Mr Paterson's evidence established that he could not claim that he had told the Agent about the existing lease and there is one portion in his evidence which suggests that the matter did not come to Mr Paterson's mind until it was raised with him by his solicitor who informed him that instead of having to pay $10,816 he would but have to pay $6,214. Mr Paterson's comment in evidence was that he just thought he was lucky and did not realise that the disclosure of that factor would have any effect.

Just what the District Court thought of that evidence I do not know as there is no reference to it in the judgment, but it is evident that the District Court, in finding that the Respondent was entitled to succeed, proceeded on the basis that the Appellants had failed to disclose the existence of the lease from the former owner to the company and that in those circumstances the Respondent was entitled to succeed for the amount which he claimed as damages which

was the difference between the rent received under the Rent Freeze Regulations from the date he took possession to the 22nd June, 1983 and the amount he would have received had the lease been in full force and effect according to its original tenor. I quote from page 4 of the District Court judgment which is in the following terms:

> "By the time the Agreement was signed the Rent Freeze Regulations had been issued. It was not until a month later that the February lease was brought to the notice of the purchaser's solicitors.
>
> "Right up to that stage the plaintiff was led to believe that the lease intended was an enforceable one and the transaction would proceed as intended. I am of the view that it was incumbent on the defendants to bring to the notice of Mr Tom the existence of the lease, even if it were as late as 19 July. I therefore come to the conclusion that the plaintiff must succeed."

At the commencement of his submissions Mr Treadwell made it plain that he considered that the agreement for sale and purchase and the agreement in relation to the lease were independent of one another or at least ought to be so treated and ought not to be treated as a condition precedent in relation to the agreement for sale and purchase. That concession, while I think it was properly made, does not really alter the fundamental ground on which the Appellants base their appeal. It was Mr Treadwell's submission that non disclosure as such was not pleaded as the basis of the misrepresentation and he pointed out that in any event in this country non disclosure normally will not entitle a party to avoid a contract or to seek damages in relation to it. He cited Spooner & Anor v. Eustace (1963) N.Z.L.R. 913 in support of that general proposition which, of course, is subject to certain exceptions, but as a general proposition

I acknowledge the propriety of the submission.

The attack which was launched on this appeal was in relation to the pleadings themselves. Paragraph six of the statement of claim reads as follows:

> "That in terms of Clauses 2 and 3 of the said memorandum of agreement to lease annexed to the agreement for sale and purchase the Defendants represented to the Plaintiff that the lease should commence as from the 16th day of August 1982 at an annual rental of $10,816 per annum payable in advance by automatic bank transfer payments of $901.33 per calendar month.

That, submits Mr Treadwell, was the representation pleaded and that in fact the clauses referred to were not a representation at all, but were terms of the contract which had resulted in consequence of the negotiations. He submitted that the provisions relied upon by the Plaintiff and which I have set out earlier above were the consummation of all that had been said, done and represented and that they became the terms of the negotiated contract which were accepted by the parties.

In that submission I am satisfied that Mr Treadwell is perfectly correct. There has been a failure to distinguish between a representation on the one hand and a term of the contract on the other (see Halsbury 4th Dedition, Volume 31, Para. 1006). There was no pleading here to the effect that the pride of $80,000 could be justified on the basis that it would provide a return of $10,816. or any other pleading of a representation of a like or similar nature. Had that occurred then one does not know how the evidence would have been produced in the District Court or what form the cross examination of the various witnesses may have

taken. Equally so, if there had been a pleading that the non disclosure in the circumstances amounted to negligent misrepresentation then, of course, the evidence would have had to have been directed to that particular issue and the Court would have to have found whether that in fact had been established. The issue simply was not raised.

The only other reference to misrepresentation in the statement of claim is paragraph 11 which pleaded as follows:

> "That the Defendants by Clause 12 (that is of the agreement for sale and purchase) and the memorandum attached to the agreement for sale and purchase misrepresented to the Plaintiff the rental return which he would receive on the building where for the Plaintiff has suffered loss."

Once again, as was submitted on behalf of the Appellants, an attempt was made to convert what were terms of the actual contracts into representations. Of course it was not possible for the Respondent to sue for breach of contract as the Rent Freeze Regulations provided that he could not recover any rental in excess of that payable as on 22nd June, 1982. Therefore in my view the Appellants are entitled to succeed on the appeal as the issue of non disclosure, which forms the basis of the District Court judgment, was not in fact put in issue by the pleadings.

I repeat that on the pleadings as they stand there is in fact no representation pleaded which could form the basis of a claim for damages in the event of the Court finding that there had been any breach of that representation. Accordingly, in my view the Appellants are entitled to succeed in their appeal.

I record, however, that during the course of argument

on behalf of the Respondent reference was made to the text book "The Contractual Remedies Act 1979" by Dawson and McLauchlan. This was in support of the Respondent's argument that the case fell for consideration under S.6 of that statute. At page 13 counsel referred to there being three main requirements for liability to be established under that particular section of the statute and I quote from the work:

> "First, the aggrieved party must establish there was a 'misrepresentation'. Secondly, the misrepresentation must have been made to him 'by or on behalf of another party' to the contract. Thirdly, the misrepresentation must have 'induced' entry into the contract."

That statement is precisely what I have been trying to set out above, namely that a representation is normally and usually made during the period of negotiation and if it is a material representation it is one which induces one party or the other to enter into the contract. The resulting contract is one which the parties agree to and it contains the actual agreed terms of that contract.

I repeat, in the instant case the Respondent has attempted to rely on a term of a contract as being the equivalent of the representation and in the absence of any specific words in the contract that situation just cannot arise.

Whether in the instant case non disclosure would form the basis of an action would have to depend upon the evidence which was tendered and the eventual finding of the Court hearing the matter, but in this regard I refer to Spencer Bower & Turner on Actionable Misrepresentation, Third Edition, page 35:

"The representor may discover that what he believed true when making the statement was in fact at that time untrue; or circumstances may supervene which render a statement, true when made, untrue when acted upon. The former class of case..... ...But in the latter class the subsequent events convert a true representation into something which, whether to be regarded as fraudulent or not, is at all events a misrepresentation in fact, unless the representor supplants it by such timely modifications as will render it in accord with the new facts."

Reference may also be made to such cases as Davies v. London & Provincial Marine Insurance Co. (1878)8 Ch.D 469. Of some importance is that which Fry, J. said at pages 474 and 475:

"Where parties are contracting with one another, each may, unless there be a duty to disclose, observe silence even in regard to facts which he believes would be operative upon the mind of the other, and it rests upon those who say that there was a duty to disclose, to shew that the duty existed. .....Again, in ordinary contracts the duty may arise from circumstances which occur during the negotiation. Thus, for instance, if one of the negotiating parties has made a statement which is false in fact, but which he believes to be true and which is material to the contract, and during the course of the negotiation he discovers the falsity of that statement, he is under an obligation to correct his erroneous statement; although if he had said nothing he very likely might have been entitled to hold his tongue throughout. So, again, if a statement has been made which is true at the time, but which during the course of the negotiations becomes untrue, then the person who knows that it has become untrue is under an obligation to disclose to the other the change of circumstances."

To the same effect is the decision of the Court of Appeal in With v. O'Flanagan (1936)1 Ch. 575. In that case the earlier decision of Fry, J. in Davies case was approved as is a statement of Turner, L.J. from Traill v. Baring 4 De G. J. & S. 318. From page 329 of that decision the following appears:

> "I take it to be quite clear, that if a person makes a representation by which he induces another to take a particular course, and the circumstances are afterwards altered to the knowledge of the party making the representation, but not to the knowledge of the party to whom the representation is made, and are so altered that the alteration of the circumstances may affect the course of conduct which may be pursued by the party to whom the representation is made, it is the imperative duty of the party who has made the representation to communicate to the party to whom the representation has been made the alteration of those circumstances; and that this Court will not hold the party to whom the representation has been made bound unless such a communication has been made."

In the With decision Lord Wright referred to the duty which rests upon the party who has made the representation not to leave the other party under an error when the representation has become falsified by a change of circumstances. However, consideration of cases such as the above was not required in the Court below as the pleadings did not bring them into issue.

One short word on the damages claimed may be appropriate. Those were claimed, as already set out, on the basis of the difference in rental paid and the rental which would have been payable but for the Price Freeze Regulations. In other words, under the guise of damages the Respondent was seeking to have recovered the lost rental. I would have thought that the more appropriate course would have been to have alleged some diminution in value of the premises and to have sued for the difference between that value and the sale price.

Accordingly, as earlier stated, the appeal is allowed. The judgment entered for the Respondent is set aside and the matter is referred back to the District Court for judgment to be entered for the Appellants, that is the Defendants in

the Court below, with the appropriate order as to costs. In this Court the Appellants are allowed costs of $200 and their disbursements.

R.A. Wild J.

SOLICITORS:

Daniel Overton & Goulding, Onehunga for Appellants
Rennie Cox Garlick & Sparling, Auckland for Respondent

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Reserved decision delivered by me this 13th day of July 1984 at 2.45pm.

G.A. MORTIMER
Deputy Registrar

JUDGMENT OF SINCLAIR, J.

Copy Received.

Mr Treadwell - Appellants S/N
13.7.84

Mr Daroux - Resp S/N