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N.Z.L. Reports

(3)

IN THE HIGH COURT OF NEW ZEALAND
PALMERSTON NORTH REGISTRY

A.37/83

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BETWEEN MARGARET ANN McLEOD and MARGARET ANN BAILEY both of Feilding, Married Women

Plaintiffs

AND RUSSELL GEORGE DAVIS of Palmerston North, Company Director

Defendant

Hearing: 15 May 1984

Counsel: J H Williams for Plaintiffs
M J Behrens for Defendant

Judgment: 11 JUN 1984

JUDGMENT OF EICHELBAUM J

The defendant, having made extensive alterations to commercial premises he owned in Featherston Street, Palmerston North proceeded to carry on a butchery business there under the name Cobbity Meats. In November 1980 he sold the business to Foodfare Ltd (FFL) whose principal was Mr Benton. In the sale of the business were included numerous items of equipment relating to the butcher's trade including display cases, various types of refrigeration equipment and many other similar items. They accounted for $84,814 out of the total purchase price of $103,814. The chattels in question were detailed in three annexures to the agreement for sale and purchase. Except for one item, described as "Sundry plant as agreed - $3000" all the equipment was separately itemised and priced. As

part of the transaction Mr Davis agreed to lease the premises to FFL for a period of four years with two rights of renewal each for a similar term. Rent reviews were at two yearly intervals.

Early in 1981 Mr Davis arranged to advertise the premises themselves as for sale. The advertisement attracted the attention of the husbands of the two plaintiffs, who were looking for an opportunity for a joint investment. They inspected the property in company with Mr Davis and Mr Roe, an estate agent, on 23 January 1981.

It was common ground between Mr Bailey, Mr McLeod and Mr Davis that on this occasion the first two asked a number of questions about items of equipment on the premises. This is not surprising since it must have been obvious that there were a number of expensive chattels. Further, in evidence there was a fair amount of agreement as to the items discussed. Mr Davis maintained that Mr McLeod and Mr Bailey were told that no chattels were to be included in the proposed sale, except for a single item, a meat rail. On his own showing this would not have been correct since although the vast majority of the chattels belonged to FFL, having been sold as part of the earlier transaction, there were several, such as a sink bench and a hot water cylinder, that Mr Davis believed he still owned. Mr Davis also agreed that he mentioned certain items included in the schedules to the FFL agreement, such as the brine room, and the cooling room, in the context that it would be difficult for any tenant to remove them. It was common ground too that there was discussion about where the "cut off point" lay in regard to certain refrigeration facilities. I find it hard to understand how such a discussion could have

arisen except in the context that on one side of that point there was equipment that would pass to the purchaser on a sale. I say now that I do not find the allegation of fraud against Mr Davis proved, but I have formed the view that in the course of presenting the value of the premises in the best light, and gilding the lily a little in the process, Mr Davis gave the impression that there were some chattels would pass with the deal. The effect this had on Messrs McLeod and Bailey was not so much to convince them that any particular chattels were in that category, but that some were, and to make it clear to them that they needed to find out the position more precisely. If as was maintained by the defendant he told Messrs McLeod and Bailey that no chattels were involved at all, except for one meat rail, I cannot understand that there would be, as was agreed, a series of discussions about individual items.

The view I have taken of this initial inspection is not supported by Mr Roe. I believe that he gave his evidence honestly, but in the intervening period understandably had forgotten some of the finer detail which, equally understandably, had remained in the memory of Messrs McLeod and Bailey. Mr McLeod, I may add, had some appreciation of factors relevant to the value of what was being offered, by reason of his occupation. He had already ascertained the floor area of the premises and believed that on the basis of current rentals the figure that was being obtained per square foot was high. He appreciated that if the initial rental was unduly high, the purchasers could have difficulty in obtaining the increase they would otherwise expect to achieve when the first review fell due. Since the McLeods and the Baileys were going into the venture simply as an investment the point was of importance. Mr McLeod believed

that the figure was explicable on the basis that chattels of a significant value were included in the transaction.

Mr Bailey and Mr McLeod decided to make an offer and instructed a Feilding solicitor, Mr D.A. Taylor, to act for them. One of the points Mr McLeod made to Mr Taylor was that the exact scope of the chattels involved had to be established : there had to be a satisfactory list of chattels. The need for a complete list was the first point made in the initial letter written by Mr Taylor to Mr Davis' solicitor, Mr T.J. Loughnan. A sad feature of the case is that both Mr Taylor and Mr Loughnan are dead. It necessarily renders certainty in findings of fact more difficult, although I have been assisted by having Mr Taylor's entire file, excepting only some items of a without prejudice nature, put before me by consent. No evidence was called as to what occurred at Mr Loughnan's end of the transaction, except such as Mr Davis was able to provide or as appeared from Mr Taylor's file.

In response to Mr Taylor's enquiry Mr Loughnan provided over the telephone a list, which appeared in Mr Taylor's handwriting on his file, of seven separate items as follows :

" 24' Sherer's Meat Case
Air condition in packing room
Brine room eqpt
Cool " "
Deep freeze Ice Air DF 731
" " Skope FM 29
Mini-DELI HOVERD MD 4 "

When the above list is compared with the valuation by General Foods which was one of the attachments to the Davis-FFL contract it will be seen that the two are in identical terms. In that valuation, these were the first seven chattels listed, to a total value of $30,554. The particular valuation included a further three items, totalling $6,600. In due course, with slight verbal differences the content of the handwritten list found its way into the schedule of the contract of sale of the property, a subject to which I will return in a moment.

In the space of a few days of the initial inspection the parties had reached agreement on price at $88,000. With Mr Loughnan's assistance Mr Roe prepared an agreement, which in due course Mr McLeod handed to Mr Taylor. On 2 February Mr Taylor wrote the letter already mentioned enquiring about the chattels and other aspects. On 12 February he wrote again, this time stating he enclosed the agreement signed by Mr McLeod as agent. The letter enquired about the "value of the chattels included in the agreement" for stamp duty purposes, so there can be no doubt that the chattels were then listed in the agreement. Mr McLeod was confident that when he signed the agreement, the list had been typed into it. However, two letters written by Mr Taylor a little later contained comments to the effect that the list was typed in after Mr McLeod had signed. I do not think the point is of any significance. There was no room for suggesting that the list was not part of the document when it left Mr Taylor's hands. I believe that the chattels were of importance to Mr McLeod and that he made sure he approved the list before agreeing that the offer could be released. Whether he approved the list that Mr Taylor had on his file, leaving it to Mr Taylor to have it typed in afterwards, or signed the agreement in its completed form,

makes no difference to the legal issues.

On 18 February Mr Loughnan returned the purchaser's copy of the agreement to Mr Taylor duly executed by Mr Davis. In doing so, he said "he would imagine" that the chattels were worth in the region of $20,000.

The contract itself stated, as part of a printed form, that it related to the land described thereunder, and "the chattels (if any) set out in the schedule". There followed, in typescript, a description of the land, followed by the words :

> " Inclusive of the items of plant set out in the Schedule hereto. "

- while at the end of the agreement, under the heading "Schedule of Chattels", there appeared the seven items already mentioned. Clause 12 provided :

> " . . . the vendor undertakes as at the date of settlement
> . . . .
> (6) that the chattels included in the sale are the unencumbered property of the Vendor. "

The agreement recorded that the premises were leased and stated that a copy of the lease was annexed.

At this stage I comment on the inclusion of the chattels, looking at the matter first from the purchasers' point of view, then from the vendor's. Mr McLeod said, rather cryptically, that the list was not quite what he had expected, although satisfactory. I think he may have meant that it included some items he had not expected to find, e.g. the meat display case, never mentioned at the inspection and obviously a valuable article. On the vendor's side, Mr Loughnan had acted for Mr Davis on the transaction with FFL, only a few months previously. I am just unable to believe that he and Mr Davis conspired to puff up the value of the property by including chattels already sold to FFL. Indeed, it was Mr Loughnan himself who first brought it to Mr Taylor's attention that the items in question should not have been included in the contract. He also told Mr Benton, who gave evidence for the plaintiffs, that chattels had been included in the agreement by mistake. Any such deception could not have hoped to survive early discovery.

The next possibility for consideration is that Mr Davis alone set out, in effect, to endeavour to sell the items in question twice. I am unable to accept that either. Although, as indicated, in certain respects I prefer the evidence of Messrs McLeod and Bailey in regard to the initial inspection, I accept that Mr Davis gave his evidence honestly, that he understood that he had sold the chattels to FFL, and that he would not have endeavoured to sell them a second time.

At this stage it is necessary to turn to Mr Davis' account of the events that occurred when he discovered that the contract included these seven

chattels. He acknowledged that he must have been careless at the time he signed the contract itself as he saw the chattels listed but wrongly assumed that they were a list of chattels excluded in the sense that they had already been sold to FFL. I have hesitated over that explanation because if that was what the list represented then to Mr Davis' knowledge it was thoroughly incomplete; the contract with FFL included numerous other items as well. A more probable explanation seems that Mr Davis, relying on his solicitor, did little more than glance at the contract. He said however that when at the end of March he called at Mr Loughnan's office in order to sign the transfer he then noticed that it stated the consideration to be $68,000 only. There was a further document which he described as an official form, yellow in colour, in which there was specific reference to chattels included in the sale. One of the forms or documents stated that the chattels were his unencumbered property. Mr Loughnan not being present at the time, Mr Davis drew these discrepancies to the attention of a secretary. Together they then looked through the file and found the McLeod contract which confirmed of course that the deal had included the items in question. In passing I say that understandably Mr Davis was not precise as to what he saw in the respective documents. I think it is clear that the yellow form was the notice of sale which in fact referred to chattels of $20,000 and that he must have seen the reference to unencumbered property in the contract, the only document produced that contained any such term. However, these are minor matters. I accept that it was at this point that Mr Davis appreciated the mistake that had been made. He refused to sign the papers until Mr Loughnan returned. At that stage Mr Loughnan persuaded him to sign the transfer, saying that he would proceed to straighten matters out with the solicitor for the purchasers.

Putting aside as I do the allegation that there was fraud, the only remaining possibility is that Mr Loughnan made a mistake of considerable proportions. I state that conclusion with regret, conscious as I am that circumstances have left me without the opportunity of hearing Mr Loughnan's version of events. However the view I take is supported by Mr Loughnan's own actions at the time. I should first note that settlement took place by post, Mr Taylor forwarding his trust account cheque by letter dated 31 March. On 8 April Mr Loughnan acknowledged this by a letter with which he forwarded the necessary documents. At the same time he wrote :

> " We confirm the writer's telephone conversation with Mr Taylor on the 1st instant to the effect that, through an error on the writer's part, the incorrect portion of a schedule of plant and equipment was read over the phone and then incorporated into the agreement. The correct list should have been 'Brine Room : Cool Room : Packing Room' and which have a value of some $7000. We would therefore suggest that you amend your copy of the agreement for sale and purchase accordingly and we will do likewise. The transfer has also been initialled and should you wish to alter the consider-

ation this can therefore be done. The items presently listed were part of the stock and plant which were required by Foodfare Limited last year. The writer apologises for any inconvenience caused as a result of the mistake. "

I comment "required" is obviously in error for "acquired".

At this point the evidence of the two solicitors acting would have been particularly valuable as it is not easy to understand their actions at this time. On 13 April Mr Taylor, without referring to the 8 April letter, wrote to Mr Loughnan as follows :

" Our clients have been in touch with the tenant of Mr Davis' property recently purchased with particular reference to the chattels passing under the agreement and our clients had seek the tenant before they became aware that the list of chattels as given by you to us for inclusion in the agreement was not correct.

It seems essential that the chattel position be set out in detail as soon as possible so that both parties will know exactly where they stand in this regard.

You will appreciate that our clients proceeded to the point of settlement on the basis of these chattels having been included in the document before the same was signed by the purchasers and sent to you for execution by the vendor.

We trust that the matter will be capable of a speedy conclusion but in the meantime we must expressly reserve all our clients' rights and remedies in the matter having the regard to the chattels as listed in the agreement prior to completion and the true position in regard thereto now to be ascertained. "

I was informed that on Mr Taylor's file his copy of that letter preceded Mr Loughnan's letter of 8 April. It is possible therefore that as at 13 April it had not been received. The 13 April letter does not refer to the telephone conversation of 1 April either, but a passage in a subsequent letter of Mr Taylor's confirms it took place "on the day of settlement". Mr McLeod and Mr Bailey did not become aware that such a conversation had taken place. As the 13 April letter suggests (although the purport of the phrase "our clients had seek the tenant" is unclear and obviously there is some omission or error) they had discovered the mistake

in the course of a discussion with the tenant on or about 6 April. It is not easy to follow why, following the telephone conversation on 1 April, the solicitors did not hold the transaction at that point so that Mr Taylor could obtain further instructions from his clients. Clearly on Mr Davis' evidence Mr Loughnan discovered the true position, or at any rate that something was seriously amiss, before he was in a position to disburse the settlement cheque, since according to Mr Davis the mistake was drawn to Mr Loughnan's attention before the transfer had been signed. Another aspect requiring explanation is that having been made aware of his first error Mr Loughnan proceeded to make another. The three items brine room, cool room and packing room which he stated should have comprised the correct list in fact were the three remaining items which I mentioned earlier when dealing with the General Foods' valuation; and like the others had been sold to FFL. On that list they were shown as having a total value of $6600. In view of Mr Loughnan's knowledge of the previous transaction it is just as difficult to understand his second error as is the case with his first.

The further mistake Mr Loughnan made on 1 April is of some significance in throwing light on the nature of the research that he may have carried out into the earlier transaction, that is to say the sale to FFL. Mindful as I am that I have not heard Mr Loughnan's version, on the evidence before me I am afraid that the conclusion is irresistible that the explanation for the erroneous list of chattels initially given to Mr Taylor must lie in carelessness on Mr Loughnan's part. It is obvious from the details that he gave that he must have referred to at least one document relevant to the earlier transaction between Davis and FFL and the only conclusion can be that he did not look at the contract as a whole or if he did,

that he misread the reference to the particular schedule. I must add that a degree of personal blame also attaches to Mr Davis. Either he signed the contract without reading it at all, or if he indeed noticed the reference to the chattels at that time he should have stopped to check the position because on any view the list, whether regarded as recording the chattels included or those excluded, was incorrect.

I have spent a little time endeavouring to analyse where the transaction went wrong, not because the presence of negligence is directly relevant to any of the alternative bases of claim, but to explain why, in my opinion, fraud has not been established.

On the basis of the findings of fact already made, I can now deal relatively briefly with the causes of action. On the first, breach of a term, the defendant contracted to sell inter alia the chattels listed, which he undertook were his unencumbered property. He did not own them, and did not and was not in a position to transfer them to the plaintiffs. Under this cause of action, the plaintiffs are entitled to recover the appropriate measure of damages.

The second cause of action pleaded fraud and as already stated, I find this has not been made out. The third, in terms, refers to negligent misrepresentation. It cannot however be regarded as founded on tort, since in view of s 6 of the Contractual Remedies Act 1979 the plea of negligent misrepresentation inducing a party to enter into a contract is no longer open. I treat it therefore as an allegation of innocent misrepresentation under s 6. The misrepresentations relied upon were first, the supply of the list given to Mr Taylor by telephone and secondly, its confirmation by the signing of the

contract. The latter, in my opinion, is not available because by the time that representation, if it be so regarded, reached the plaintiffs they were committed to the contract so it was not causative of their loss. The initial supply of the list, on the other hand, was causative because in my view the plaintiffs would not have made their offer without a satisfactory list of chattels. Testing this, if Mr Loughnan's response to Mr Taylor's enquiry had been that no chattels were included in the deal, or only one or two of no great value, I am sure that the purchasers would not have proceeded on the basis they had in mind. Accordingly the plaintiffs are entitled to succeed on this basis also.

In view of my conclusions on the first and third causes of action, I do not need to deal with the further alternative, based on the Contractual Mistakes Act.

Turning to damages, and dealing first with damages for breach of contract, the principle is that the plaintiff is entitled to be put in the same position as if the contract had been performed, see McGregor on Damages, 14th Edn para 573. The only evidence directly in point is that of Mr Giles who, on the basis of an inspection of the chattels in question on the occasion of the FFL transaction, arrived at a figure of $30,544. Mr Giles took the view that the depreciation the items had sustained between the date of his inspection and the McLeod contract was balanced by an acceleration in prices during the same period. He conceded that his valuation included an element of "installed value" but on further examination this comment applied mainly to other items on the same list. So far as the seven with which this case is concerned, the evidence showed that each was readily removeable.

Mr Giles made his original valuation for the defendant, and his figures were accepted for purposes of the transaction between Mr Davis and FFL. There is no basis on which I should reject his opinion. Accordingly, on the first cause of action I fix damages at $30,544.

Had the third cause of action been in tort, for negligence or deceit, a different measure of damages would have applied, that is the difference between the price paid and the fair value of the property transferred at the time of purchase; see Canavan v Wright 1957 NZLR 790 per F B Adams J at p 802, Scott Group Ltd v McFarlane 1978 1 NZLR 553 per Cooke J at p 585, Capital Motors Ltd v Beecham 1975 1 NZLR 576, 581 and McGregor (above) paras 1480 and 1485. The plaintiffs called evidence in support of that approach from a valuer, Mr Goldfinch, but in view of the terms of s 6(1) of the Contractual Remedies Act this basis does not appear appropriate. The correct measure, as I see it, is as if a term of the contract had been broken, that is, the same measure as under the first cause of action.

Accordingly, on the first and third causes of action there will be judgment for the plaintiffs for $30,554 together with interest at 11% as from the date of issue of the writ. The plaintiffs are entitled to costs according to scale, with witnesses expenses and disbursements to be fixed by the Registrar. I allow $300 for the second day. Leave is reserved to apply in respect of any certificates or other matters

of costs not dealt with.

Solicitors :

Taylor McIntosh & Key (Feilding) for Plaintiffs
Behrens & Atkins (Palmerston North) for Defendant