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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

A.1131/83

BETWEEN: KEVIN WAKELIN of Taupo, Motelier and PATRICIA JOAN WAKELIN of Taupo, his wife

Plaintiffs

A N D: R H and E A JACKSON LIMITED a duly incorporated company having its registered office at Hamilton and carrying on business as Takeaway Bar Owners

First Defendant

A N D: BARFOOT & THOMPSON LIMITED a duly incorporated company having its registered office at Auckland and carrying on business as Real Estate Agents

Second Defendant

A N D ROBERT HEDLEY JACKSON and EUNICE ALICE JACKSON both of Hamilton, Company Directors

Third Defendants

A N D: JAMES S LAMBERT of Auckland, Real Estate Agent

Fourth Defendant

Hearing: 4th, 5th and 6th July 1984

Judgment: 6 August 1984

Counsel: E P Leary for plaintiffs
M J Beattie for first and third defendants
R Harrison for second and fourth defendants

JUDGMENT OF HENRY J.

This is an action alleging misrepresentation in respect of the sale of a lunch-bar business known as "Crumbs" at 6 Angle Street, Te Papapa, Auckland. The business was owned and operated by the First Defendant which in 1983 listed it for sale through the Second Defendant, Barfoot and Thompson Limited. Mr Lambert, Fourth Defendant, an employee of that company's Town Hall Branch, was the agent who negotiated the contract of sale and purchase. The Third Defendants are shareholders and directors of the First Defendant.

The Plaintiffs inspected the business on 23 May 1983, subsequently decided to buy at a total price of $130,000.00, and an agreement was duly executed which provided for settlement on 2 July 1983. About a week or so after taking over, signs of a competing business close by - at 26b Angle Street - became apparent, and this new business became operative. The Plaintiffs found that the return from "Crumbs" was not as anticipated, and finally in March of this year it was re-sold, after some earlier abortive attempts, at a total price of $67,000.00.

The claim is based solely on misrepresentation, relief being sought under the Contractual Remedies Act 1979, or alternatively,

at common law for deceit. There are six separate misrepresentations pleaded. They are:

(a) That the lunch-bar business had takings of $7,000.00 per week.

(b) That the lunch-bar business would have takings of $10,000.00 per week by the installation of deep-frying equipment.

(c) That the net percentage profit was 29%.

(d) That, run under management for an investor, the business would return $70,000.00 net per annum.

(e) That the closest competition was a takeaway bar in Neilson Street, Te Papapa, more than or over half a mile away.

(f) That the Council would not grant permission for any further takeaway bars as the area was well serviced.

I will deal with each in turn :

(a) Takings of $7000.00 per week:

At the commencement of the hearing, this figure was amended to $6000.00, which is the figure contained in an express warranty in Clause 20 of the agreement for sale and purchase. The amendment recognizes that it is not possible to adduce oral evidence to contradict such an express provision. It was also clear from the oral evidence that the representation was as to a turnover of $6000.00 and not any greater figure. The evidence establishes that the turnover at the relevant time was in fact in conformity with that warranty or representation, in that the business was at the time achieving that figure by way of turnover.

There is therefore no falsity established, and accordingly there was no misrepresentation. This representation did not have, nor was it intended to have, any future connotation.

(b) An increase of takings to $10,000.00 per week by the installation of deep-frying equipment:

First, the evidence by both Mr Wakelin and his son was to the effect that the deep-fryer was said to be likely to increase turnover by a further $1000.00 to $2000.00, not up to $10,000.00 as pleaded. The reference to $10,000.00 was in respect of the full potential of the business at some unstated and indefinite future point of time. Further, both elements of what was said are statements of opinion and not statements of fact, and there was no evidence from which it could be suggested that those respective opinions were not held at the time of the sale.

It must follow that no representation in the sense required to found a cause of action as pleaded under this head has been established.

(c) The net percentage profit of 29%:

There was no challenge to the evidence given by Mr Wakelin and his son concerning this matter, and I accept that there was a representation to this effect. That, again, is a statement as to what the then net profit from the business amounted to by way of a percentage. There is simply no evidence to establish that as at the relevant

time that figure was incorrect. What the net profit was after the sale does not matter, and could only be relevant if the business operation and circumstances remained similar and if there were other evidence indicating that the earlier achievement had in fact been something less than 20%. As it stands, there is no evidence from which any inference to that effect could be drawn.

The falsity of this representation is therefore not proved.

(d) That run under management for an investor the business would return $70,000.00 net per annum:

This related to the running of the business under a Manager, and the yielding of a return of $70,000.00 per annum net. As to this representation, what was established in evidence was that the business was said to be of a type suitable for a management operation by an investor who himself would not be fully engaged in the business personally. But that is not what is pleaded. Further, there is no evidence which in any way establishes either that the business was not so suitable nor that the representation, as pleaded, was untrue in fact. There is simply no evidence as to the net profit on a management or other basis as at May 1983.

This allegation must also fail.

(e) That the closest competition was a takeaway bar more than half a mile away:

a n d

(f) <u>That the Council would not grant permission for any further takeaway bars as the area was well serviced</u>:

These relate to the question of competition, or lack of it. The competition now complained of comes from a lunch-bar known as the "Hasty Tasty", which is situated at 26b Angle Street, Te Papapa, some short distance from the premises the subject of the action. I find it proved that the agent, Mr Lambert, stated that the nearest competition was in Neilson Street, approximately one half mile away. This was stated on the way to inspect the premises on the only occasion on which Mr Wakelin attended them, and the assertion was repeated on the return journey. I also find that Mr Lambert said, in reply to a specific question by Mr Wakelin, and which related to nearby vacant land, that the local Council would not grant permission for additional lunch-bars because the area was already well serviced in that regard.

Both Mr Wakelin and his son gave evidence to this effect, and no cross-examination was directed to the latter. No evidence was called on behalf of any of the defendants. As at 23 May 1983 it was, of course, literally true that the nearest competitor was at Neilson Street. But that does not prevent such a statement as I have found was made from being a misrepresentation. In its context, the statement was misleading because in fact some opposition was then in the process of being set up and

possession of the new premises for the express purpose of use as a lunch-bar was due to be taken on 3 June - those facts I find being to the personal knowledge of Mr Lambert at the time. The evidence, which was unchallenged, disclosed that he, Mr Lambert, had been involved in the preparation of an agreement for sale and purchase of the lease of these premises and that the agreement itself referred to the requirement for the consent of the landlord for use of the premises as a lunch-bar.

It was urged, on behalf of Mr Lambert, that there was no evidence as to his knowledge as at 23 May 1983, but only the limited evidence as to what had transpired in respect of this particular agreement some three weeks earlier. The inference I take from the evidence - and in my view the only inference which can be taken from it, unchallenged as it stands - is that Mr Lambert as at early May was fully aware that there was an intention to set up a lunch-bar in these premises in the immediate future. There is absolutely nothing to indicate that his knowledge of that fact, and of that intention, in any way altered thereafter. It was proved in evidence that the transaction did in fact go through, and, on the face of the documents, through the agency of Barfoot and Thompson Limited as agents for the new purchaser.

I therefore find as a fact that as at 23 May 1983 Mr Lambert was fully aware of the pending use of these premises as a lunch-bar in the immediate future. It is in the light of that, which the representation as to

competition must be considered. In my view, the unequivocal statement as to the situation concerning opposition and the specific reference to Neilson Street, coupled with the advice that the local Council would not permit further lunch-bars, was at the time it was made both in substance and in effect untrue, and painted an erroneous picture to the Plaintiffs.

In my opinion this is a typical case where an answer given to a specific question, although theoretically true, constitutes a misrepresentation for the reason that it does not indicate the true position. The existence of competition nearby was known to Mr Lambert to be a matter of importance, and the enquiry directed to him required an answer disclosing the full position so far as it was known to him.

I am accordingly satisfied that the answer given was, in the circumstances, a misrepresentation as to the true position and I am also satisfied that it was made at a time when Mr Lambert was fully aware of the then position regarding the proposed new lunch-bar, and that he knew his answer was misleading and therefore false. I am further satisfied that on the evidence this misrepresentation was an inducement to Mr Wakelin and was a cause, at least in part, of the Plaintiffs' decision to purchase. The question whether Mr Wakelin should have taken more care himself by way of investigation or further enquiry is not, as the law presently stands, relevant.

It is accepted by Mr Harrison that Mr Lambert was at all times acting within the scope of his authority as an employee of Barfoot and Thompson Limited, and that the company is vicariously liable for his actions in this regard.

Mr Lambert was also clearly acting as agent for the vendor First Defendant at all relevant times, and this was conceded by counsel. It is apparent that anything he did or said of relevance in these proceedings was done or said within his ostensible authority, and the vendor is therefore liable for any statement made on that basis.

As regards the possible liability of the Third Defendants, there was also evidence as to a similar sort of statement as to competition being made by Mrs Jackson. It was contended that it was made at a time when she was aware of the possibility of nearby competition, but I make no specific finding on this issue. The exact context and timing of her discussion with Mr Patmore is not clear, and the totality of the evidence does not, in my view, give rise to any actionable misrepresentation, either innocent or fraudulent, on her part. As regards Mr and Mrs Jackson personally, therefore, I find that there is nothing to implicate Mr Jackson in any way at all; and Mrs Jackson, to the extent she did say anything, did so only in her capacity as an officer of the company. On the evidence, no personal liability has been established against either one of them.

Mr Harrison submitted that there were two relevant consequences flowing from the Contractual Remedies Act 1979 and a decision by the Plaintiffs to invoke that Act. First, it is said that the Act is not available as against Barfoot and Thompson Limited or as against Mr Lambert, for the reason that they are not parties to the contract in question. Reliance is placed on s.6 (1) for this submission. It states :

> "s.6(1) If a party to a contract has been induced to enter into it by a misrepresentation, whether innocent or fraudulent, made to him by or on behalf of another party to that contract -
>
> (a) He shall be entitled to damages from that other party in the same manner and to the same extent as if the representation were a term of the contract that has been broken;
>
> (b) He shall not, in the case of a fraudulent misrepresentation, or of an innocent misrepresentation made negligently, be entitled to damages from that other party for deceit or negligence in respect of that misrepresentation."

I am in agreement with the submission. Subsection (1)(a) gives an entitlement to relief to a party to a contract only as against another contracting party. It does not purport to confer any rights against other persons. Support for this conclusion can be found in the judgment of

Mustill J. in Resolute Maritime Inc. & Anor v Nippon Kaiji Kyokai & Ors [1983] 2 All ER 1, where it was held that an agent for a party to a contract could not be held to be personally liable, under the Misrepresentation Act 1967, to the person entering into the contract with the principal. The position is even stronger in the New Zealand legislation because the subsection speaks specifically of an entitlement "from that other party", which can only be the party by whom or on behalf of whom the representation was made. By contrast, the United Kingdom legislation refers to "the person making the representation" in the equivalent provision.

Second, it was submitted that the Act operates to preclude the party to the contract from suing a non-contracting party, for example for deceit, if proceedings are instituted against a contracting party pursuant to the Act. I can see no justification for so construing s.6(1) (a), nor indeed any other provision in the Act. Section 6 (1) (b) is of no assistance in this regard, the right of action against the other contracting party being the only right which is taken away. The Resolute Maritime case was determined solely with reference to a claim under the Misrepresentation Act 1967, and left open the availability to the plaintiff of a claim for fraudulent or indeed negligent misrepresentation brought independently of the Act. Mr Harrison accepted that there is at common law a claim available in deceit to a

purchaser under a contract as against a third person who has been guilty of fraudulent misrepresentation. I can see nothing in the 1979 Act which in any way purports to take away that right, neither can I see that an election to sue a contracting party under the Act can have any effect on such a right. It is not uncommon, despite the difficulties which sometimes follow, for parties in the same action to be sued on different bases - such as one in contract and one in tort. Providing there has been proper joinder under Rule 61 of the Code of Civil Procedure then there is nothing, as I understand it, to stop the adoption of such a course.

Accordingly, the plaintiff is entitled to relief against the First, Second and Fourth Defendants for such damages as have been properly proved.

I turn now to the question of damages. The first head of damages claimed is for the difference between the purchase price of the business and its then true value. Mr Harrison and Mr Beattie both accepted that this was the proper measure to be applied, subject to what was described as a "gloss" to which I shall refer a little later. For the Plaintiffs, it is claimed that this is ascertained by taking the March 1984 sale-price of $67,000.00. I have given careful consideration to Mr Leary's submissions in that regard but I do not think, on the evidence, that that represents the true value as at May

or July 1983. The 1984 transaction was in the nature of a forced sale, with no vendor finance provided, and with the Plaintiffs wanting to get out - really at all costs. The business, for reasons which are not explained, had become quite unprofitable, a development which may have been due to any number of factors or combination of factors quite unrelated to the nearby competition or the reduced turnover. Then there is the evidence of Mr Fleming who was called on behalf of the Plaintiffs, an experienced agent in the sale and purchase of these businesses, who spoke of a "rule-of-thumb valuation" which was reached by applying a factor of 20 to the weekly turnover of the business. This is consistent with the purchase price in the original agreement, and it is also consistent with the asking-price when the Plaintiffs first tried to resell.

The evidence disclosed that the actual turnover achieved by the Plaintiffs was of the order of $5000.00 per week. The inference I draw is that the reduction from the earlier figure of $6000.00 per week was substantially due to the advent of the competing business, even allowing for the change in proprietorship and the absence of evidence as to the operation of the "Hasty Tasty" business. The immediate impact of close competition must have been severe and, in my opinion, must have affected the value of the "Crumbs" business markedly. Taking all the circumstances into account, including the price which the Plaintiffs were prepared to

pay for a $6000.00 per week business, I find that the evidence establishes a value of the business at the time of sale of between $100,000.00 and $110,000.00, which I fix as the intermediate figure of $105,000.00.

The "gloss" I earlier mentioned, as contended for by Mr Harrison, related to the fact that the Plaintiffs had paid a price exceeding that reached by applying the formula or so-called "rule of thumb". Disregarding stock, the purchase price was $126,000.00, which Mr Harrison submits should be reduced to $120,000.00 for the purpose of assessing damages so as to reflect the turnover at $6000.00 per week. I do not think that is the correct approach. The normal measure of damages is the value transferred, less the value received. Induced by the misrepresentation, the Plaintiffs paid $126,000.00 for an asset which had a value of $105,000.00. The loss is the difference between those two figures.

The Plaintiffs are therefore entitled to an award of $21,000.00 under this head.

The second head of claim was for losses incurred to 30 March 1983 of $9424.00. According to the evidence, the business ran at that loss for the period it was operated by the Plaintiffs. I am not satisfied that these losses have been proved as flowing from the

representation. Nothing was put forward to explain why, even on a reduced turnover, an appropriate profit should not have been obtained and in my opinion the evidence does not establish this head of claim.

The third head of claim was for accommodation expenses incurred by Mr Wakelin in coming to Auckland for management and re-sale purposes when the financial problems became apparent. I do not consider that this expense is a legitimate head of damage, either in tort or in breach of contract. It was not a foreseeable type or kind of loss flowing from the one misrepresentation which I have found was made.

There was a remaining claim for loss of profits of $64,800.00, which I understood Mr Leary to abandon during the course of argument. In any event, I do not consider that there was adequate proof of that loss, even if it were a recoverable head of damage. It had no basis other than the application of a formula not supported by the evidence, and was subject to the same deficiencies as the claim for $9424.00, in particular the absence of explanation as to why there was a trading loss situation at all.

Accordingly, the Plaintiffs are entitled to judgment against the First Defendant, the Second Defendants and the Fourth Defendant in the sum of $21,000.00.

They are also entitled to interest on that amount at the rate of eleven per cent (11%) per annum, calculated from the date of issue of the writ, namely 7th November 1983, and to costs according to scale, two extra days being certified for, together with disbursements and witnesses' expenses to be fixed by the Registrar.

I record that the Defendants did not require the making of any orders as between themselves.

Henry J.

Solicitors:

E P Leary Esq, Auckland, for Plaintiffs

Wilson Henry Martin & Co., Auckland, for First and Third Defendants

McElroy Duncan Milne & Meek, Auckland, for Second and Fourth Defendants.