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IN THE HIGH COURT OF NEW ZEALAND A. 1222/83

AUCKLAND REGISTRY

Special Consideration

706

BETWEEN GRAEME ROSS PENDERGRAST and DALLAS OLIVE PENDERGRAST

PLAINTIFF

A N D PAUL PERCY CHAPMAN

DEFENDANT

Judgment: 13 June 1984

Hearing: 18 May 1984

Counsel: M.C. Black for Plaintiff
N.W. Ingram for Defendant

JUDGMENT OF CASEY J.

Mr and Mrs Pendergrast (who describe themselves singularly as "Plaintiff") issued a Bill Writ against Mr Chapman on 24th November 1983 in respect of a cheque for $40,000 given by him to their land agents on 3rd October 1983 (but post-dated to the 20th of that month) as part-payment of a deposit of $50,000 under an agreement signed the same day for his purchase of their house for $650,000. He paid $10,000, and asked the agent not to present the cheque before the 20th October because there would be no funds to meet it until then. This arrangement was evidently accepted by the vendors. On 19th October Mr Chapman's accountant informed the agents that the funds to meet the cheque were expected the following week and asked them not to lodge it with the bank meantime. The latter said they would take instructions from their principals, and on 20th October they presented the cheque which was dishonoured. Mr Chapman says that he instructed his bank to stop payment.

In accordance with Clause 2.1 of the agreement, the vendors' solicitors gave three days notice of intention to cancel for non-payment of the deposit and shortly after received a telephone call from the Defendant's solicitor, and a copy of the note he made is annexed to his affidavit. It is to the effect that a remittance of $40,000 for the balance of the

deposit would be paid within the next day or so. However, nothing happened and on 31st October they cancelled the agreement, reserving the vendors' rights to commence proceedings on the dishonoured cheque. Mr Chapman was evidently still making efforts to raise the balance of the deposit a few days later, but nothing came of this. At some stage after the cheque was dishonoured the agent endorsed it over to the order of the vendors' solicitors.

Mr Chapman moved to strike out the writ or for leave to defend. The first ground was not pursued and Mr Ingram accepted at the outset that the cheque reached the vendors' hands as a valid bill of exchange, notwithstanding the conditions on which it had been delivered to the agents and the subsequent discussions between the accountants and the solicitors. I felt some reservation about this concession but the matter was taken no further, especially as Mr Black had been told there would be no challenge to the cheque itself and the only argument would be over leave to defend.

On this point Mr Ingram emphasised that this was a case of cancellation of the contract by the vendors for failure to pay the deposit and the ordinary default provisions in the agreement for failure to settle had no application. It is clear on the authorities that a vendor in these circumstances is entitled to retain whatever he has received on account of the deposit, but he cannot sue for the balance. The principle was explained by Pennycuick J. in Lowe v. Hope (1970) Ch. 94 on the basis that, having put an end to the contract by rescission, the vendor is not entitled to insist on its performance in relation to the deposit, insofar as it might bear the character of part of the unpaid purchase price. And insofar as it bore the character of a pledge, there could be no outstanding obligations of the purchaser in respect of which the vendor was entitled to the protection of such a pledge. This reasoning was accepted by McMullin J. in Johnson v. Jones (1972) NZLR 313, who reached the same conclusion in dismissing a vendor's claim for the unpaid balance of a deposit.

Mr Ingram accepts that the position is different

where a deposit cheque has been dishonoured, and to succeed the Defendant would have to show a failure of consideration. He referred to a number of cases cited by text book writers to support the proposition that a vendor can sue in these circumstances, and sought to distinguish them. The first was New Zealand Loan & Mercantile Agency Co. Ltd. v. Foster & Anor (1912) 15 GLR 220, involving a claim on a promissory note of $150. The circumstances of that case were unusual and it appears that the decision turned on a clause in the agreement providing that in default the amount could be forfeited as liquidated damages. The Court was mainly concerned about whether this amounted to a penalty. Mr Ingram pointed out that the breach relied on was failure by the purchaser to settle, and it cannot be relied on as authority that when a vendor rescinds for failure to pay a deposit he can sue on a cheque or a promissory note.

The next case he mentioned was Low v. Fry (1935) 152 LT Rep. 585, where a vendor sued on a dishonoured cheque for 400 pounds paid under an oral agreement for the sale of a cottage at 800 pounds. The purchaser had changed his mind and stopped payment. He was held entitled to recover, but as Mr Ingram points out, the judgment proceeded on the basis that the vendor did not accept the repudiation and had not rescinded. The cheque appears to have been treated as part-payment of the purchase price rather than as a deposit in the strict sense. At p. 587 of his judgment du Parcq J. pointed out that there was no provision in the contract for forfeiture of the money paid, and said that if the plaintiff had elected to treat it as rescinded and accepted the defendant's repudiation, he would not be entitled to recover. Again I think Mr Ingram is correct when he says this case does not support the Plaintiff.

The next one was Davidson v. Murphy (1899) 17 NZLR 462 in which the headnote states that a cheque given by a purchaser in payment of a cash deposit for purchase of land must be paid, even though afterwards the purchaser discovers defects in the vendor's title. From the judgment it appears that the price of 1,000 pounds under the agreement was payable by cash of 200 pounds, and the balance by instalments of 100

pounds a year with interest. The claim concerned a dishonoured cheque for the initial 200 pounds. The purchaser had gone into possession and the judgment seems to treat it as non-payment of an instalment of purchase price by a buyer who repudiated without adequate grounds at the time. It could not be suggested there was a failure of consideration for the cheque, and again, this is not a case of a vendor rescinding and attempting to support the cheque by obligations which no longer existed under the contract.

Mr Ingram put the right to defend forward on two grounds. He submitted that the vendor elected to rescind, but now seeks to recover the very thing which was absent at the time he made that election and formed the basis for it. I agree that there is a logical inconsistency involved when a vendor cancels the contract on the ground that all he has is a worthless piece of paper, and then treats it as being worth $40,000. The other ground is a failure of consideration for the cheque once the contract was rescinded, because on the authorities the vendor had no enforceable right to recover the unpaid balance and the purchaser would obtain nothing in return for it.

I have a discretion to give leave to defend upon affidavits disclosing to my satisfaction a good defence, or facts making it encumbent upon the Plaintiff to prove consideration. All that need be established is a bona fide arguable defence and it is not my function to try the case at this stage. Mr Ingram has satisfied me that leave should be given and there is no suggestion of the application being a sham or a delaying tactic, as sometimes happens in these cases. Accordingly I see no need for security. Leave will be granted, the Statement of Defence to be filed at Auckland within fourteen days, and costs are reserved.

M.C. Casey J

Solicitors:

Rudd Garland Horrocks Stewart Johnston, Auckland, for Plaintiff
Mahony Samuel Becker & Co., Auckland, for Defendant