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IN THE HIGH COURT OF NEW ZEALAND A NO 1558/78

AUCKLAND REGISTRY

BETWEEN KENDALL WILSON SECURITIES LIMITED a duly incorporated company having its registered office at Auckland and carrying on business there as a nominee loan company

Plaintiff

AND COLIN THOMAS BARRACLOUGH of Auckland, Registered Valuer

First Defendant

AND BARRACLOUGH BROS. LIMITED a duly incorporated company having its registered office at Auckland and carrying on business as a real estate agent

Second Defendant

Judgment: 21 July 1983

Delivery date of correction: [illegible] OCT 1983

CORRECTION TO JUDGMENT OF JEFFRIES J OF 21/7/83

The last complete sentence on page 27 is obviously incorrect and should read:-

"I have reached the view the defendants cannot avail themselves of this argument."

[signature] J

A NO 1558/78

IN THE HIGH COURT OF NEW ZEALAND

AUCKLAND REGISTRY

BETWEEN	KENDALL WILSON SECURITIES LIMITED a duly incorporated company having its registered office at Auckland and carrying on business there as a nominee loan company Plaintiff
AND	COLIN THOMAS BARRACLOUGH of Auckland, Registered Valuer First Defendant
AND	BARRACLOUGH BROS. LIMITED a duly incorporated company having its registered office at Auckland and carrying on business as a real estate agent Second Defendant

Hearing: 31 July 1984

Counsel: R Joyce for Plaintiff
B H Clark for Defendants

Judgment: - 3 SEP 1984

FINAL JUDGMENT OF JEFFRIES J

The hearing of this case took place over three days in June 1983 and I delivered judgment on the liability question in July 1983. I held that the

plaintiff succeeded in its claim for negligence against the defendants, but I said that I was not satisfied that either in evidence, or argument, the issue of damages had been dealt with in such a way the question could be satisfactorily decided upon in that judgment. Agreement was not reached by counsel on the issue of damages and has been re-argued before me.

On page 11 of the previous judgment I set out the claim of the plaintiff and reproduce it here.

"The plaintiff claims the sum of $94,183.20 made up in the following way:-

1.	Principal sum under the mortgage	150,000.00
2.	Interest on $150,000.00 @ 15% for period 15/5/77 to 15/5/78	22,500.00
3.	Interest on $150,000.00 $ 15% for period 15/5/78 to 15/11/78 (2 quarters)	11,250.00
4.	Rates	5,124.60
5.	Valuation fee	166.00
6.	Barfoot & Thompson - auction expenses	1,132.60
7.	Solicitors' Charges	2,000.00
8.	Supreme Court Application fee Mortgagee sale	10.00
		$192,183.20
9.	Less transfer price	98,000.00
		$94,183.20"

Items 1 and 9 above are not in any dispute. The loss there is $52,000 and is conceded by the defendants as payable. Items 5, 6, 7 and 8 are now conceded and will be met. Items 2, 3 and 4 are in dispute, not as to the quantum claimed of those items but whether or not they are properly payable as damages by defendants to plaintiff. Mr Clark for the defendants disputes causation. The claim for interest is the period from 15 May 1977, being the date of default through to 15 November 1978 which, in effect, was to about the date of the final auction which yielded the $98,000. As stated the defendants acknowledge liability for the shortfall of $52,000 plus the items 5-8 amounting to $3,308.60, making a total of $55,308.60. On the other hand the plaintiff claims the full amount of $94,183.20.

One of the subjects in the law that has attracted an enormous volume of legal writing in textbooks, learned articles and judgments is that of damages. Throughout the common law world the courts have found it convenient to approach damages as a two stage measurement. The courts have readily enough been prepared to give general damages which are the ones that courts believe "generally" flow from the wrong perpetrated by the defendant. These damages are usually concerned with value measurement which is heavily biased towards protection of capital rather than other interests. The really challenging problems have been in the field of special damages and the proclivity of the courts to impose limitations on their recovery by the doctrines of certainty and remoteness. Many a valid claim has been denied on one or other of those grounds.

The problem in this particular case arises out of a tortious wrong and is concerned with remoteness. Whilst admiring the judgments of those courts which have undertaken recondite reviews of the authorities, many of them cited by both counsel in argument, most of which have been consulted, this court without difficulty avoids attempting to add such a contribution but adopts a somewhat different emphasis, on the basis of authority, which is the only course for courts of first instance.

The problem of remoteness has troubled both contract and tort. It may not be very fashionable to do so but I would like to pass a remark or two in favour of Hadley v Baxendale (1854) 9 Exch. 341; 156 E.R. 145 because I think it is of some influence in assessing tort damages as well. I do not think it is to be overlooked Alderson, B. was deciding how juries were to be directed (in the days well before universal education and literacy), who were expected to follow that direction in the only contract damages question a particular jury would ever decide. That seems to this court to imply strongly a decision was to be made primarily on the facts of the case and that is a point which should never be overlooked in the assessment of damages. One way of looking at Hadley v Baxendale is that most famous passage beginning "Now we think the proper rule in such a case as the present is this: ..." is a kind of code (the court itself in deciding the case was said to be influenced by the French Code Civil) and should be used as such. If we in New Zealand decided to codify the assessment of damages in a statute surely the most influential factor would be Hadley v Baxendale. It was for the United States with the Uniform

Commercial Code, which has been adopted by every state excepting Louisiana. Forseeability at the time the contract was made on the basis of the facts known to the parties at that time is a very good general rule. It is then the duty of the courts to apply that rule to the facts of each case and not to attempt to force the facts into some judicially stated formula. I don't pretend I am saying anything that has not been said before from greater authority, and far more eloquently. See Charterhouse Credit Co. Ltd v Tolly [1963] 2 Q.B. 683, Upjohn L.J. at p.712 and that extract from the speech of Lord du Parcq reproduced hereafter. Until there is a statutory code the courts must keep developing the rule in Hadley v Baxendale. It sets the mainsail and the courts do the trimming.

In a tort case the damages question has material differences from a consensual action. See The Heron II. Koufos v C. Czarnikow, Ltd [1967] 3 All E.R. 686. The scope of general damages may be wider than what might be expected would arise naturally and logically from the tortious conduct. For special damages the wrongdoer in a tort action is charged with all injuries which naturally flow therefrom and were forseeable at the time of the misconduct. See Shaddock (L) & Associates Pty Ltd and Another v Parramatta City Council (1981) 36 ALR 385, High Court of Australia and State of South Australia v Johnson (1982) 42 ALR 161, High Court of Australia. But it is hard to better the speech, on a contract case, of Lord du Parcq in Monarch Steamship Co. Ltd v Karlshamns Oljefabriker (A/B) [1949] A.C. 196 at 232 for he tells a lower court how to go about its task, which is of inestimable value:-

> "I do not doubt the wisdom of the judges who, in Hadley v Baxendale and the many later cases which interpreted or explained that classic decision,

> have laid down rules or principles for the guidance of those whose duty it is, as judges or jurymen, to assess damages. When those rules or principles are applied, however, it is essential to remember what my noble and learned friend Lord Wright, and Lord Haldane in the passage cited by him, have emphasized, that in the end what has to be decided is a question of fact, and therefore a question proper for a jury. Circumstances are so infinitely various that, however carefully general rules are framed, they must be construed with some liberality, and not too rigidly applied. It was necessary to lay down principles lest juries should be persuaded to do injustice by imposing an undue, or perhaps an inadequate, liability on a defendant. The court must be careful, however, to see that the principles laid down are never so narrowly interpreted as to prevent a jury, or judge of fact, from doing justice between the parties. So to use them would be to misuse them."

All cases are unique but some are more unique than others. This was a claim, in effect, by a firm of practising solicitors against another professional man alleging negligence in the preparation of a valuation report. My previously published judgment held that the defendant valuer was negligent for the reasons set out. A very important part of that judgment was the view the court took of the conduct of the plaintiff (through the solicitors) and held, rightly or wrongly, the contributory negligence reached 60%, again for reasons that are set out in the judgment. The case was of some complexity and the

court's task was not made easier by the obliquity with which the facts of the sub plot were placed before the court, if I might put it that way. I refer, of course, to the part played by the Star Development Syndicate. I said the transaction had to be pieced together. This was a case that had definite undercurrents which observably disturbed the surface of the case rather than breaking it.

For some of the aforesaid reasons after deciding liability I reached the conclusion, as stated in the judgment, that I was not satisfied either in evidence or argument the issue of damages had been dealt with in such a way the question could have been satisfactorily decided upon then. For a case with the unique features of this, especially where liability itself was so ardently contested, it was not surprising the damages question tended to take a secondary position at the hearing. Counsel requested the court to rehear the argument on damages which was done on 31 July 1984 in Auckland. Neither side sought to call further evidence. Generally the arguments advanced by opposing counsel were heavily weighted on the side of legal submissions founded mainly on selected passages from judgments which were used to support the respective cases. Plaintiff's counsel made almost no use of the facts at all, and defendants' counsel some, but not extensive. By implication the argument of each counsel was that the authorities would decide the issue of remoteness if only the court could recognise the truth. By specifically mentioning evidence as well as legal argument in the first judgment the court meant to convey it regarded that as at least of equal importance as the authorities. For example the factual issue of what

was the amount to advance on a proper valuation was not canvassed at all. See London and South of England Building Society v Stone [1983] 3 All E.R. 105.

The plaintiff company on the basis of a valuation made an advance of $150,000 to Mercantile. The plaintiff's case is that but for the valuation it would never have made the advance. This is the "but for" rule which establishes the link between injury and damages. See Baxter v F.W. Gapp & Co. Ltd [1938] 4 All E.R. 457 at 465. It is the causal relationship. Now the defendants do not contest that causal link for they agree to meet some of the damages claimed, but in particular the $52,000 which is the difference between the principal sum and the price the security was sold for. I will return to this aspect.

I think it is of importance in this case that the losses occurred for two reasons, not one. The first reason is that the borrower failed to meet its obligation under the contract. If it had been an asset rich company it could simply have been sued on the contract and the judgment executed. There would then have been no loss. The defendants have suffered through the weakness of the borrower but have been relieved somewhat by the finding on contributory negligence. The second reason for loss is that the security was weak as well as the borrower. If some of the ifs of the valuation report had been different the land itself might have been strong enough as security to compensate for the weakness of the borrower's covenant to repay. It was not to be. The defendants were very much responsible for this second aspect of the loss. The security was right in their province.

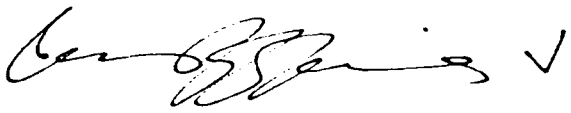
The argument of neither counsel was grounded in a difference between general damages and special damages. The split between general damages and special damages is a device courts have traditionally used to assist in the analysis of damage. There is confusion in the cases on the terms "general" and "special" so much so that McGregor on Damages 14th edn p.16 is most unsympathetic to their use. Halsbury's Laws of England 4th edn. Vol 12 para 1113 seems to see value in them. In the statement of claim all the items were specifically pleaded and there was no sum claimed for general damages. On that basis the whole claim must be understood as special damages and that appeared to be accepted by defendants. Defendants' counsel did not specifically agree to pay the $52,000 because it was general damages. It was simply agreed to be paid together with four other items. The items of interest and rates were regarded as special damages and the argument on both sides was on the remoteness issue. Why do the defendants concede the $52,000? Could it be said this particular loss is of the kind that the law would imply or presume was not excluded by the remoteness rule and is such as would be generally suffered by a plaintiff who acts upon a negligently prepared valuation? That is the general damages definition. Such payment is the subject of an agreement in this case, but I think that fact is of some importance in deciding whether the interest and rates are to be met. If defendants, as apparently is the case, agreed to meet the $52,000 as special damages there does not seem to be any reason in policy or logic why interest and rates should be excluded. If the land had been rezoned in a way particularly attractive to the market it might have

fetched say $225,000 at the auction and there would have been no injury because the plaintiff would have recovered its full losses including interest. The defendants have not argued the loss was solely the first reason namely the weakness of the borrower. They concede, I think rightly, it was the concatenation of the two reasons, and agree to meet the loss calculated by the difference between the principal sum advanced and the auction price. With that I see no justifiction for drawing the line there and refusing to meet the interest losses and rates. The damage naturally flows from the wrong and was forseeable.

Finally is the answer, or result, different if the $52,000 is characterised as general damages? I do not think so. The $52,000 is arrived at by a loss of value measurement which is the usual way of calculating general damages where tangible property such as land is involved. Earlier I referred to the "but for" rule and as evidenced by the decision on liability the court decided that the plaintiff would not have advanced the funds if it had not been for the valuation report. That report was faulty and it was the responsibility of the defendants. Interest was lost and the security was not good enough to recoup the lender. The lender is just as entitled to recover the interest and rates as the capital loss. This seems consistent with the object of damages which is to make the plaintiff whole, not to make it rich at the defendants' expense. Loss of interest is proximate and directly related to the injury.

It was never part of either case that there was some intermediate position over interest and rates : they were to be allowed or disallowed <u>simpliciter</u>.

Judgment is for the plaintiff in the sum of $94,183.20, but subject to the finding of 60% on contributory negligence which yields an amount of $37,673. There will be interest from 18 Novemberr 1978 (issue of proceedings) to date of this judgment at 11%. The plaintiff is entitled to costs on the final amount on which judgment is entered at scale, and I certify for three extra days. I certify for second counsel for three days.



Solicitors for Plaintiff: Kendall Sturm & Strong

Solicitors for First and Second Defendants: Earl Kent & Co.

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FINAL JUDGMENT OF JEFFRIES J

Reserved decision delivered by me this 3rd day of September 1984 at 10 a.m.

G.A. MORTIMER
Deputy Registrar

Copy Received (with corrections)
3.9.84
Mr Jaffe - Plaintiff S/N

Mr Clark - Defendants S/N