IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

A.699/82

1284

BETWEEN BRIAN WILLIAM ROE of Auckland, Builder, AND JEANETTE JOY ROE of Auckland, married woman

Plaintiffs

A N D PETER ROSS of Auckland Retired Plumber, AND IRENE ROSS of Auckland, Married woman

Defendants

Hearing: 6-7 September 1984

Counsel: R N T Norris for plaintiffs
G J Thwaite for defendants

Oral Judgment: 7 September 1984

ORAL JUDGMENT OF HENRY J.

This action is based on an agreement for sale and purchase dated 25 January 1982 between the Plaintiffs as vendors and the Defendants as purchasers. The agreement relates to Unit A, or Flat 1, at 4A Harry Human Heights, Remuera, Auckland. The agreement contains the following provisions :

> Purchase price $124,000.00; deposit $3,000.00. The sum of $100.00 shall be paid as part deposit, the balance

> of $2900.00 to be paid within 14 days of the purchaser's receiving an unconditional sale of 10 Harry Human Heights, St. Johns. The balance of purchase price to be paid or satisfied as follows : in cash in one sum on vacant and legal possession being given and taken."

This date is stated as being on or before 30 April 1982. Prior to execution of this agreement the real estate agent involved, a Mr Primrose from Scholes Oakley, had presented to Mr Roe, one of the Plaintiffs, an earlier agreement which, according to Mr Roe, was conditional upon the sale of the Defendants' own property also situated, as is recorded in the agreement, at Harry Human Heights. This first agreement was rejected by Mr Roe because of it being conditional, and the agreement now in question came as a consequence of that rejection.

It transpired that the Defendants did not sell their property prior to 30 April 1982 and on 27 April 1982, through their solicitors, gave notice of termination of the contract and declined to complete. The property was subsequently sold by the Plaintiffs at a loss, thus giving rise to the present claim. The basic issue is whether that termination by the purchasers was lawful in the circumstances.

There are some six separate defences raised in the pleadings, all of which have been covered by Mr Thwaite in his comprehensive submissions.

The Court's first and primary task, as I see it, and one which will assist in determining most of those defences, is the true construction of the agreement in question. Its meaning, looking at the document as a whole, in my view is quite clear and I can see no call for the Court to have regard to any surrounding circumstances to assist in its construction. In the first place the agreement, as is common, having stipulated the purchase price requires the payment of a deposit. The amount of that deposit is, in turn, stipulated as being $3000.00 but payable as to $100.00 on execution of the agreement, and a further $2900.00 within 14 days of the purchasers entering into an unconditional sale of their own property. Next, it required settlement on or before 30 April 1982, with payment then in cash of the balance of the purchase price. The clear meaning, in my view, is that that balance would be either $121,000.00 if the further deposit had been paid, or $123,900.00 if that did not either become payable or for some reason or reasons was not in fact paid.

The primary obligation to settle and to pay the full purchase price was, as I see the agreement, unaffected by the provisions I have mentioned to the deposit. The requirement of a deposit is, as is well known, put in to provide something by way of a guarantee, or earnest as it is sometimes described, to ensure completion of performance by a purchaser.

This agreement is in common form and under its express terms Clause 2.1 requires payment of the deposit immediately upon execution "but unless otherwise expressly provided". Here there was a provision for the immediate payment of $100.00, but otherwise the balance remained to be paid only on fulfilment of the condition which I have earlier referred to. Clause 2.2 again is in common form and provides that the deposit, whatever it may be, shall be in part-payment of the purchase price.

The first main submission made on behalf of the defendants is that the agreement itself is void for uncertainty. In support of that, it is submitted that the deposit provision is uncertain. If the Defendants were to have entered into an agreement, unconditional, for the sale of their own property by 16 April 1982, they were under an obligation to pay the additional $2900.00. If a sale had not eventuated by that date then that obligation did not arise. As I have mentioned, the remaining obligation to complete settlement operates independently of what happens so far as the deposit is concerned, except insofar as it may assist in determining the balance which becomes payable at the later date. There is, therefore, in my view, nothing which could be said to make that provision in any way uncertain so as to leave the obligations of the Defendants undetermined and a matter of any sort of speculation.

One further point can be made in respect of this particular defence. Even if it could be said that that provision were in some way uncertain, it would only avoid the obligation to pay the additional $2900.00 and would not, in my opinion, in any way affect the validity of the agreement as a whole or the obligation on the part of the purchasers to complete on due date.

Mr Thwaite, in the course of his submissions, referred to a number of matters which he said were omitted, relating to any intended sale of the purchasers' own property. In my view none of those matters are required to be stipulated or to be known so as to give certainty to what I have mentioned is the true construction of the provision as to payment of the deposit.

The second main submission is that the agreement was conditional upon the defendants selling their own property. It will be apparent from what I have already said as to the construction of the agreement that performance of it by the Defendants was not conditional in the manner pleaded. The condition related solely to the payment of the additional deposit of $2900.00 and to no other part of the obligations undertaken in the agreement.

The third main defence is that the deposit of $3000.00 in full was, as it was submitted, a condition precedent to settlement. Again, this is covered by the construction of the agreement which I have already dealt with, as a consequence of which it must follow that payment of the full amount of that deposit was not required by the terms of the agreement and therefore could not be a condition precedent to settlement of the whole transaction. But, in any event, on that aspect it seems to me that a failure to pay the $3000.00, if the obligation to pay it had arisen, would be a breach by the purchasers and would not in any way operate to negate their obligation to perform and complete the transaction. At best, in my view, it would give the vendors an entitlement to rescind.

The fourth and fifth grounds of defence are based on an alleged misrepresentation. The allegation, as I understood it, is that it was represented by Mr Primrose, the agent, that the agreement was a conditional agreement. It seems to me that there are several major difficulties in the way of this ground of defence. First, there is no direct evidence of such representation ever having been made by Mr Primrose. Second, I do not see the surrounding circumstances as they were given in evidence, establish anything of the nature of a representation by conduct to the effect pleaded. At best, it seems to me there was something possibly given by him in the nature of advice which may

perhaps have amounted to a representation as to his, Mr Primrose's, own personal belief as to the effect of the terms of the agreement but there is nothing in the evidence which could lead me to the inference that anything there was being done as evidencing a belief on the part of the vendors. There is, in addition, no evidence of Mr Primrose not in fact having held any such belief which, of couse, would mean that the representation, even if it had been made, was not a false one. Third, in respect of this matter, I am not satisfied that anything which was either stated by Mr Primrose or which could be attributed to him by conduct in this area, was or could have been in the course of his actual or ostensible authority as agent for the Plaintiffs. It is not, in the absence of express instructions, part of an agent's task as a vendor's agent to advise a prospective purchaser on the meaning of an agreement which he, the agent, has himself drawn up.

The sixth ground of defence is under the Contractual Mistakes Act 1977. There is, I think, a short answer to this which must follow from the construction of the agreement to which I have already referred. Section 6(1) (b) of the Act sets out one of the circumstances which must exist before relief can be given under the Act. It includes the need for "a benefit or obligation substantially disproportionate to the consideration" to have resulted from the transaction.

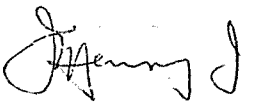
Here, the only obligations undertaken by the purchasers were to pay the $100.00 deposit, then to pay a further $2900.00 deposit, but only if their property were sold by 16 April 1982, and then finally to pay the balance of the total purchase price of $124,000.00 on or before 30 April 1982. The consideration for those obligations is the transfer to them of the title to the property in Unit A, and there is, as Mr Thwaite very properly conceded, in those circumstances nothing disproportionate. It is therefore unnecessary for me to look further into the ramifications of the Act on this particular transaction.

The Plaintiffs, in the result, are entitled to succeed on the claim as there has been an admitted repudiation which, as I have now held, I find to be wrongful. Whether, looking back on it, Mr Ross, one of the defendants, intended to buy on an unconditional basis or whether he merely thought that he could sell his own property within the stipulated time - and the latter is what I think may really represent the true position - does not really arise. Neither does any question of what legal or moral responsibility the land agent may have to the defendants. It may well be that the assurances given by Mr Primrose of his ability to sell the Defendants' property, and as to the undesirability of their obtaining legal advice on the agreement itself, gives the answer to what has happened. But I say nothing further on that.

The relief to which the Plaintiffs are entitled is their loss on re-sale, which has been proved at $8730.00. They are also entitled, pursuant to the terms of the contract to interest for late settlement from 30 April 1982 down to 1 July 1982 at the rate stipulated in the contract, that interest amounting to $3612.27, and also to the stamp duty totalling $189.00.

There is, further, a claim for commission payable to the agent at $3820.00. In evidence there was produced a letter from that Company, which indicated it would be making no claim to commission. As Mr Norris points out, that may have possible difficulties so far as it being binding on the Company as against the Plaintiffs. In the circumstances, I think it would be appropriate to reserve the question of the Plaintiff's entitlement to that part of the relief sought and leave will be reserved accordingly on that aspect.

The Plaintiffs are entitled to costs according to scale, together with disbursements and witnesses expenses to be fixed by the Registrar.



Solicitors:
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