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Bulletin (3) X

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

No. A 163/83

920

BETWEEN JONATHAN WILLIAM KNOX URLICH of Wellington, Company Director

Plaintiff

A N D HARCOURT & CO. LIMITED a duly incorporated company having its registered office at Wellington and carrying on business as a real estate agent

Defendant

Hearing: 27 and 28 June 1984

Counsel: R. Chapman for the plaintiff
G.S. MacAskill for the defendant

Judgment: 30/7/84

JUDGMENT AND REASONS FOR JUDGMENT OF SAVAGE J.

The plaintiff in this action, Jonathan William Knox Urlich, claims $15,656.60 damages from the defendant, Harcourt & Co. Ltd, for breach of a contract of agency. The plaintiff claimed that the defendant was his agent to offer for sale a certain residential property and that it acted beyond its authority, as a consequence of which he suffered the loss claimed.

A good deal of evidence was given and a considerable number of documents were produced as exhibits. It is not necessary

for me to canvass all this material in this judgment and I propose to summarise the evidence and my findings in relation to the relevant facts fairly shortly. The plaintiff owned a residential property at 17 Lower Watt Street, Wellington, and also a flat, being flat No. 1, 17 Oriental Terrace, Wellington. He decided to sell both properties. This was about mid 1982. He put the properties on the market but by the end of the year had sold neither. About November 1982 he put the properties in the hands of the defendant, dealing with a Mrs Gillian Jones of the company. He signed documents appointing the defendant his agent for the sale of both properties and agreed to pay commission to the defendant, if it sold the properties, in accordance with the scale of professional charges of the Real Estate Institute of New Zealand. The appointment in respect of Lower Watt Street was a 30 day sole agency and in respect of Oriental Terrace was 90 days; nothing, however, turns on the question of the length of the sole agency. The parties accepted that at the material time the relationship of principal and agent on the general terms of the appointment existed.

On 15 January 1983 a Miss Sally Seavill, another saleswoman with the defendant, saw the plaintiff. She had a prospective purchaser. She had a written offer from a Mr and Mrs Verry for the Lower Watt Street property at a figure of $140,000. The property had been listed by them on the plaintiff's instructions at the figure of $165,000. The plaintiff indicated this figure was quite unacceptable. Then followed

some negotiations in the shape of an increased offer of $150,000 by the Verrys and a counter offer of $160,000 by the plaintiff. At that stage the plaintiff had altered the written offer to $160,000 and signed the document as vendor which was returned to Miss Seavill to enable her to submit it to the Verrys. There were further negotiations over Lower Watt Street during which, on 21 January, the plaintiff received an offer in respect of the Oriental Terrace flat. This transaction was handled by Mrs Jones, the person at the defendant company with whom the plaintiff had first dealt. This offer was $120,000, which was also considerably less than the listed figure, and the plaintiff made clear to Mrs Jones that it too was unacceptable; there were also conditions relating to the arranging of finance and the sale of another house which added to the unacceptability of that offer.

On Tuesday, 25 January, there were some further developments. At that stage the plaintiff understood that the Verrys had decided that they were not prepared to pay $160,000 for Lower Watt Street but Mrs Jones had obtained an increased offer from the prospective purchaser of Oriental Terrace in the sum of $130,000 and had made it unconditional. The plaintiff was at this stage becoming concerned about his position. He was apparently committed to some other transaction and needed to sell one of the two properties in order to complete that transaction. He said he indicated to both Miss Seavill and Mrs Jones that he was prepared to accept a lower price on one property, but not both, in order to obtain a sale.

Miss Seavill made no mention of the point but Mrs Jones accepted that she understood that to be the plaintiff's attitude. The next day, Wednesday, 26 January, the plaintiff initialled an amendment to the document which had contained the initial offer from the Verrys to show a figure of $150,000. Miss Seavill took this to the Verrys. In my view, the position between the plaintiff and the Verrys at that stage was that he had rejected their offer of $140,000 and had made a counter-offer of $160,000, which in turn had been rejected by the Verrys. The plaintiff was now making a fresh offer to sell to the Verrys at $150,000. It may be noted in passing that at the same time he had made a counter-offer to the prospective purchaser of Oriental Terrace in the sum of $135,000, which was $5,000 above the offer he had received.

Later that same day, 26 January, the plaintiff was advised that the Verrys had not made up their minds on the $150,000 offer and wished to inspect the property again, which they did. The next day, Thursday, 27 January, he spoke to Mrs Jones. She told him that Miss Seavill had advised her that the Verrys were no longer interested in proceeding with the purchase of the house. He said he informed her that he was pleased to hear that as he and his wife had discussed the matter the previous evening and were going to withdraw the offer. Mrs Jones accepted that he had so advised her but said that he had said they were thinking of withdrawing the offer, not that he was withdrawing it. The plaintiff, however, said that he had also asked Mrs Jones to get the document back from

Miss Seavill so that he could destroy it and that she had said she would organise it. The plaintiff said he then went on to say that he would now accept the offer of $130,000 in respect of the Oriental Terrace property. Mrs Jones, in her evidence, accepted the plaintiff's version of this part of the conversation and, indeed, went further and said the plaintiff had said to her that in view of the fact that the Verrys were not proceeding he would accept the Oriental Terrace offer.

I am satisfied that whatever the precise words used were, the position was that the plaintiff was withdrawing his offer to sell the Lower Watt Street property for $150,000 and that Mrs Jones knew this. The Verrys had said to the defendant company that they were not interested in proceeding further with the purchase; the defendant had so advised the plaintiff; the plaintiff had then told the defendant, in effect, that he was withdrawing his offer and, by asking for the document evidencing the offer to be recovered and returned to him, told the defendant, in fact, that the offer was withdrawn.

Subsequent events in the office of the defendant are a little uncertain. I was left with the impression that there was some misunderstanding between Miss Seavill and Mrs Jones. At all events Miss Seavill was led to believe that the Verrys had changed their minds and wished to buy at $150,000. She went to see them and the document was then initialled by the Verrys at the figure of $150,000. As I have noted earlier, it had already been so initialled by the plaintiff and so on the face of it there was a completed contract at the figure of

$150,000. The Verrys apparently, and understandably enough, thought they had a binding contract. The defendant's residential sales manager, a Mr Craig, in telephone conversations with the plaintiff had made his view clear also that he considered there was a binding contract. He remained of that view, though he accepted, when giving evidence, that Mrs Jones had not told him that the plaintiff had asked for the return of the contract document, nor that she had said to the plaintiff that the deal in effect was at an end. The plaintiff did not accept Mr Craig's view and said he would take legal advice, which he did. The advice was to the effect that no binding contract between himself and the Verrys had been entered into. The plaintiff had, however, told both Mrs Jones and Mr Craig that he was prepared to complete the Oriental Terrace transaction and he in fact signed the contract document a little later. He also entered into another contract to sell the Lower Watt Street property. What happened was that on the afternoon of the day on which he had asked Mrs Jones to get the contract, or, more properly, the offer, document back he was approached by a saleswoman from another firm of land agents with another prospective purchaser. That prospective purchaser, a Mr and Mrs Shirer, made an offer for the property at a price of $162,000, which the plaintiff accepted.

Mr and Mrs Verry, however, were not prepared to accept that they did not have a binding contract. Following an exchange of correspondence between the respective solicitors they issued a writ against the plaintiff claiming specific performance; they

also lodged a caveat against the title. The plaintiff then found himself in a difficult position in relation to Lower Watt Street. He could not complete the sale to the Shirers without having the caveat removed from the title and the Verrys would not remove the caveat unless their action was in some way resolved. At this stage the Shirers offered to release the plaintiff from the contract to sell Lower Watt Street to them. He did not wish to do that as it would have meant he would have had to forgo the higher price at which the Shirers were to buy, and he was committed to the sale of Oriental Terrace. His solicitors negotiated a settlement of the Verry action in terms of which the plaintiff was obliged to pay the Verrys the sum of $7,395 by way of damages, costs and interest. The caveat was removed and the sale to the Shirers was completed, though actual settlement was somewhat delayed.

The law in relation to these facts is, in my view, clear. The defendant was in breach of its contractual duty as agent of the plaintiff in that it acted beyond its authority. See generally Bowstead on Agency (14th Edn) p 110 Article 37. The authority it had to offer the property for sale at $150,000 was terminated by the plaintiff in the discussion he had with Mrs Jones on the morning of Thursday, 27 January 1983. I am satisfied that the termination of the authority to sell at that figure which the plaintiff had given the day previous to Miss Seavill was clear and was understood to be a termination of authority to sell at that figure by Mrs Jones. Unfortunately, owing to a misunderstanding of the position in

the office of the defendant, Miss Seavill offered the property on behalf of the plaintiff to the Verrys. In the event I do not think it matters whether a binding contract between the Verrys and the plaintiff was created or not; the fact that the defendant went beyond its authority in offering the property to the Verrys at $150,000 and tendered a written offer at that figure is sufficient. The result of its action was that the Verrys were placed in a position where they could, and did, contend that they had a binding contract which enabled them to register a caveat upon the title, and that resulted in the plaintiff suffering loss. That, in my view, gives the plaintiff a good action for damages. See Halsbury's Laws of England (4th Edn) Volume 1, p 468, para 784.

I turn then to the question of damages. There were seven heads under which damages were claimed. There was no dispute about the quantum of the first three heads. The first related to the damages, costs and interest paid on the settlement of the Verry claim. Mr MacAskill argued that the plaintiff was not entitled to these and that what he should have done was to have refused to settle the action and either defended it or taken out some proceedings such as an originating summons to determine the validity of the contract. I think any such course would have been unreasonable, if not unreal, in the circumstances. If Mr MacAskill was correct in his submission that there was no binding contract between the Verrys and the plaintiff, then the plaintiff would not have had to complete the sale to the Verrys, but by the time the matter was resolved

the contract with the Shirers would undoubtedly have been ended and the plaintiff would have lost that. In view of the time it had already taken to find a buyer, he would be justified in not wanting that to occur, quite apart from the matter of losing a purchaser at a price of $12,000 more than the Verry offer. On the other hand, if Mr MacAskill was wrong and there proved to be a binding contract, then the plaintiff would have to complete the sale to the Verrys and have lost $12,000, being the difference between the two prices, though he might then have had a cause of action against the defendant. In either case he would have incurred the costs of the litigation. In my view, the plaintiff is entitled to recover under this head the amount claimed of $7,395.00, which is by no means excessive. The second head was the commission of $4,225.00 paid to the defendant in respect of the Verry transaction and the plaintiff is clearly entitled to recover that, as Mr MacAskill accepted. The third head was the amount of the plaintiff's legal expenses in relation to the Verry action for specific performance, which amounted to $1,585.50, and he is clearly entitled to recover that sum in view of my finding on the first head.

The remaining four heads of damage arose out of the delay in settling the Shirer transaction. They relate to additional rates, interest on mortgage, interest and bank charges on overdraft accommodation and a loss of income from the delayed investment of the proceeds of the sale. The actual figures involved are not really in dispute but two points are raised. The first is that Mr MacAskill argued that the loss of income

from the delayed investment of the proceeds of sale was too remote a loss to be recoverable. I do not accept that. The amount concerned is quite considerable and it would have been plain to the defendant that the plaintiff would have been likely to put those proceeds at least on interest-bearing deposit as soon after he received them as he could if they were not to be immediately applied to some other income-producing or expenditure-diminishing purpose. The second point is the length of the delay in settling the Shirer transaction. I am satisfied that the whole of this cannot be laid at the door of the defendant, as part of it was certainly attributable to matters of convenience to the plaintiff and the Shirers. In my view, the amounts claimed must be reduced. I gathered that the figures in the statement of claim were calculated on the basis of a 40 day delay; I allow amounts calculated on a 14 day delay. The parties can no doubt calculate the proper sum without further reference to the Court, but if difficulties arise the matter can be dealt with in memoranda.

There will accordingly be judgment for the plaintiff. The plaintiff is also entitled to costs, disbursements and witnesses' expenses according to scale.

Solicitors for plaintiff: Roache, Cain & Chapman (Wellington)

Solicitors for defendant: Scott, Morrison, Dunphy & Co. (Wellington)