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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

A 522/83

180

BETWEEN UNIVERSAL EQUITIES LIMITED

Plaintiff

A N D GRAEME MAXWELL CUNDY

Defendant

Hearing: 7 and 8 February 1984

Counsel: P T Finnigan for Plaintiff
J M Priestley for Defendant

Judgment: 6 March '84

JUDGMENT OF THORP J

In this action the plaintiff, Universal Equities Limited, asks the Court to order specific performance of an agreement it claims to have reached with the defendant, Mr Cundy, "between 22 April 1983 and 29 April 1983" to purchase his holiday home at Tairua on the Coromandel Peninsula.

Mr Cundy's answer to the claim was that the parties had never reached agreement, which seemed to me to be the case on the evidence put forward at the hearing. This showed that the parties had been at odds over the number of chattels to be included in the sale and that Mr Cundy had become disenchanted with the negotiations and instructed his solicitor to withdraw the property from sale.

Mr Priestley put forward by way of analogy the case of a man offering $15,000 for a car provided the floor mats and seat covers were included in the sale, and being told that he could have the car and seat covers, but not the floor mats, which the vendor was to use in another car. That seemed to me a just analogy, and

one which aptly illustrated how the principle that parties must achieve a meeting of minds before they are bound in contract applied to the present case.

However, Mr Finnigan's spirited resistance of such argument, the fact that counsel of the experience of Mr Finnigan and Mr Priestley advised that they could find no previous consideration of the significance of minor differences between vendor and purchaser as to the chattels included in a sale, and my belief that there was an earlier consideration of that question in this Court, made it seem desirable that the decision be reserved. The point is one of recurring significance in many legal offices, so that even if no new principle of law emerged the fact of a considered decision being on record might be of some value, if only as a cautionary tale.

The relevant history commences in early 1983 when Mr Cundy decided to try to sell his house and erected a sign advising it was for sale and listing contact telephone numbers. The property is a seaside holiday home. It had been his father's property. Although it had been transferred to him as part of the settlement of his father's estate, his mother continued to use it on occasions, and kept some of her belongings there.

Mr Cundy was rung by Mr Brewster, the governing director of the plaintiff company, on 8 April 1983. After quite brief negotiations Mr Brewster instructed his solicitor, Mr Smith, to make an offer of $45,000 for the property and all the chattels then in it, with the exception of a lawnmower, a dinghy and some tools. Mr Smith accordingly prepared two copies of an agreement for sale and purchase using the Auckland District Law Society's standard form of agreement. It provided for settlement on 29 April 1983. He signed both copies as authorised agent of the purchaser and on 22 April 1983 sent them to Mr Cundy's solicitor, Mr Ross.

Clearly if that offer had been accepted by Mr Cundy he would have been obliged to deliver up on settlement all the chattels situated on the property on 22 April, the date when the

offer was made. However, Mr Cundy felt obliged to protect his mother's interest in the contents of the house, and was himself unwilling to hand over a number of the chattels which had a sentimental value to him. He discussed these matters with Mr Ross, and as a result travelled down to Tairua with his mother on Sunday 24 April. They collected and removed the chattels they wished to keep and made a schedule of the items Mr Cundy was prepared to let go with the property. He took the schedule to Mr Ross the following day, 26 April.

The section of the agreement form relating to chattels, as it appeared in both copies of the agreement which Mr Smith sent to Mr Ross on 22 April, is set out below. The underlined portions represent additions to the form, the balance being the printed part of the form as supplied by the Law Society:

> " CHATTELS: The following chattels if now situated on the property, are included in the sale (strike out those not applicable): STOVE AERIAL FOR TELEVISION and television FIXED FLOOR COVERINGS BLINDS CURTAINS DRAPES LIGHT FITTINGS (Add other chattels included in the sale (if any)): Radio, Beds, Couches and all chattels presently situated on the property excluding lawn mower dinghy and vendor's tools. "

When Mr Ross had received the schedule prepared by the Cundys on 26 April, he advised Mr Cundy of the legal consequences of making a counter-offer. That having been done, acting on the instructions he then received, Mr Ross deleted the word "Radio" and added after the word "tools" the phrase "as per list attached". He then initialed those alterations on the original copy of the agreement, inserted in it the original copy of the schedule prepared by the Cundys, placed a photostat copy of the schedule in the duplicate agreement form, and obtained Mr Cundy's signature as vemdor on both copies of the agreement.

He then sent the original agreement to Mr Smith with a covering letter which read:

> " Further to your letter of 22nd April we enclose herewith agreement signed by our client. To avoid any confusion we are also attaching a list of chattels included the balance having been removed from the property last weekend by the vendor.

> In view of the shortage of time we have prepared a transfer and had it signed by our client and would be grateful if you would let us have notices of sale for posting. "

When he received those documents Mr Smith conferred with Mr Brewster, who as a result went down to Tairua to see what chattels were left at the property. He particularly noted that an old mantle radio, a Tilly lantern, and two tins of acrylic paint, which had been in the house when he inspected it, had been removed. The exterior of the house had been painted on two sides, and Mr Brewster wanted to use the paint to finish painting the house. Mr Cundy later informed me that he had removed it because it was paint of the same type of paint as he was using on another building.

On his return to Auckland Mr Brewster again conferred with Mr Smith. As a result Mr Smith wrote to Mr Ross on 2 May as follows:

> " We refer to recent telephone discussions between the writer and your Mr. Ross. We wish to record that your client has apparently removed a number of chattels from the property which, on our instructions, were intended to remain and specifically our client is concerned that a radio, two lanterns and tins of paint were removed. We find it remarkable that those chattels should have been removed but in an attempt to settle this matter, our client is insistent only that the paint be returned. We gather that the paint was mixed specifically for the property (which is only partly painted) and its value is therefore considerably in excess of the normal replacement value for such quantity of paint.
> We confirm our telephone advice that we have funds in hand to settle and we shall settle with you as soon as we have your confirmation that the paint has been returned. "

The nature of Mr Ross's response has already been stated. His letter informing the plaintiff that the property was withdrawn from sale read:

> " We refer to the agreement signed by your client which was amended and returned to you. We would also refer to your letter of 2nd May in which it is apparent that the counter offer of our client is not acceptable to you. We write to advise that our client hereby withdraws his offer to sell the property to you and accordingly the matter is now at an end. "

It was not contended by Mr Finnigan that a subsequent offer by Mr Brewster to forego delivery of the paint could have any legal significance. Both counsel agreed that the only questions which would need determination were:

1. Was the document signed by Mr Cundy and returned to Mr Smith on 27 April an acceptance of the plaintiff's offer of 22 April or a counter offer?

2. If it was a counter offer, was the letter sent by Mr Smith to Mr Ross on 2 May an acceptance of that counter offer?

As to the first question, Mr Priestly argued:

(a) That the alterations to the agreement form made prior to its signature by Mr Cundy and its return to the plaintiff were new terms, and their inclusion prevented any such meeting of minds as would be necessary to enable Cundy's subsequent signature amounting to an acceptance of the plaintiff's offer; and

(b) That the submission of the amended agreement and covering letter constituted a counter offer to sell on the amended terms.

He restricted his citation of authority to the section dealing with the principles of offer and acceptance in Cheshire and Fifoot's Law of Contract (5th NZ ed) at pp 28-9, and in particular the passage at page 29 which was adopted by T A Gresson J in Reporoa Stores Limited v Treloar [1958] NZLR 177 at 192; namely

> " Whatever the difficulties, and however elastic their rules, the judges must, either upon oral evidence or by the construction of documents, find some act from which they can infer the offeree's intention to accept, or they must refuse to admit the existence of an agreement. This intention, moreover, must be conclusive. It must not treat the negotiations between the parties as still open to the process of bargaining. The offeree must unreservedly assent to the exact terms proposed by the offeror. "

Mr Finnigan referred me to an earlier passage in the same judgment on page 188 citing a passage from Dart on Vendors and Purchasers (8th ed) p 228, to the effect "if the reply be either more or less than a simple acceptance, the variation, unless immaterial, must be acceded to by the original proposer." He said that while he did not seek the application of the de minimis

principle in the field of formation of contract, any difference between the terms of the offer and the terms of the acceptance must be "material". He referred to the value of the chattels over which the dispute arose, and described this as "trivial" compared with the total consideration. From that point, as I understood the argument, he contended that the lack of correspondence between offer and acceptance should be regarded as "immaterial".

He also referred to the passage in 42 Halsbury's Laws of England (4th ed) para 261, which considers the effect of misdescriptions in contracts of sale and says that -

> " Where, however, the error in description or the defect is trivial and innocently made, the purchaser may be forced to take the property with compensation. "

At the time of the argument I indicated to counsel that I believed there had been an earlier consideration of a similar case in this Court. Since the hearing I have located the decision, which is an unreported oral decision of Hardie Boys J in Howard v Mullions (Gisborne A2147 judgment 3 March 1959) and from it a reference to the decision of Finlay J in Saunderson v Purchase [1958] NZLR 588.

While neither decision purported to do more than apply basic principles, they provide an interesting comparison which has relevance to several of the arguments put forward in this case.

Saunderson v Purchase, as Finlay J noted at page 591, was principally concerned with the question whether there was a sufficient memorandum in writing to satisfy the requirements of the Contracts Enforcement Act. On that point the learned Judge concluded that the vendor had impliedly authorised the agents to settle the amount of the deposit and give a receipt therefor, that their receipt could be read in conjunction with the form of agreement for sale and purchase signed by the purchaser, and that the two documents together formed a sufficient memorandum. However the report also notes that the vendor contended there had never been agreement between the parties, and that one of three areas in which he claimed agreement had not been achieved was the chattels passing

with the sale. Finlay J held that the vendor had orally instructed his agents as to the chattels to be included in the sale and at page 594 said:

> " The chattels included in the sale do not include any the agents were not initially authorized verbally to include except electric light shades and globes. These latter are items of negligible value and can be disregarded in any event. That being so, it cannot sensibly be said there was an absence of agreement as to the chattels. "

In the result he granted specific performance.

In Howard v Mullions the vendor's solicitor submitted to the purchaser a form of agreement for sale and purchase of a holiday house which did not include any provision for the sale and purchase of chattels. Before the purchaser signed that agreement he added to the description of the land contained in the schedule to the agreement the words "including curtains and light fittings".

On receipt of the agreement in that form the vendor, who in the meantime had received a higher offer, took advice from his solicitor. As a result he accepted the later offer and refused to complete the agreement with Howard.

Hardie Boys J held for the vendor/defendant both on the action for specific performance and his counterclaim for removal of the purchaser's caveat. The Court file contains a six page memorandum of reasons for those judgments. The final clauses of that document state the writer's conclusions both as to the claim and counterclaim and as to the amounts which should be allowed for costs on the action and on an interlocutory application. Those details conform precisely with the judgments entered, but no signed copy has been found. In the absence of other evidence as to its delivery as a judgment, the memorandum cannot therefore be awarded the status of a judgment of the Court, but from its wording and contents I am satisfied that it is the work of Hardie Boys J and that it was written after he had heard final argument. As such it is of considerable interest.

It discloses that Saunderson v Purchase was cited to him as authority for the proposition that "the addition of a clause regarding Chattels of negligible value is of no moment". His Honour declined to accept it as such, stating that he saw the case as one which contemplated that chattels should pass with the property and that Finlay J had concluded the divergence between the instructions given to the vendor's agents and their description of the chattels did not alter the situation. "But", he continued "be that as it may, for the Plaintiff here to insert for the first time a provision for chattels to pass on the sale (be they of slight or great value is of no moment,) for Plaintiff to insert that provision at all is the clearest indication that no bargain had been concluded."

I would respectfully agree with the author of the memorandum that Saunderson v Purchase is properly classified as a "misdescription" case, and as such within the principle noted at 42 Halsbury in the passage to which Mr Finnigan referred.

In the case of innocent misdescription the element of mistake may justify the Court in treating the apparent incongruity between offer and acceptance as irrelevant, and supporting the underlying reality of substantial agreement. That approach cannot avail if the incongruity is simply the result of absence of mutuality. In that event the disagreement is real, and however minor in relation to the area of common accord must prevent the Court from finding an agreement which has never existed.

Numbers of cases apart from Reporoa Stores which have said that before a discrepancy between offer and acceptance will prevent formation of contract it must be "material", or used words of like effect. But in all those cases the term "material" is used to indicate real as distinct from found or "apparent" discrepancy.

The cases are conveniently collected in Stonham, Vendor and Purchaser p 11, in the footnotes to the section headed "Acceptance Must be Unqualified". They show that neither the use of different words which are merely a paraphrase of words contained in the offer (Holland v Eyre (1825) 2 Sim & St.144, 57 ER 319), nor the addition

of mere verbiage which does not alter the legal position (Cavallari v Premier Refrigeration Co Pty Ltd (1952) 85 CLR 20) will make an acceptance "materially" different from the offer.

The real issue is clearly put in Chitty on Contracts General Principles (24th ed) p 28 para 54 in the words:

> "The test in each case is whether a reasonable person in the position of the offeree would regard the purported acceptance as introducing a new term into the bargain, and not as a clear acceptance of the offer".

There is no more room in the present case than in Howard v Mullions for finding that the difference between the offer sent by the plaintiff on 22 April and the document returned altered by the defendant on 27 April is explicable as misdescription. The evidence shows quite plainly:

(i) That the plaintiff intended that its offer of 22 April would include all chattels then on the property with the limited and specified exceptions: and

(ii) That the alterations made By Mr Cundy on 27 April were intended to exclude from the property to pass to the plaintiff the chattels which he and his mother had removed the previous day.

I did not understand Mr Finnigan to question that the letter which returned the altered agreement to Mr Smith was not available as evidence for the purpose of ascertaining whether or not the parties' negotiations at that point had resulted in their reaching agreement. If I am wrong in believing he accepted that proposition, I would hold that the letter is so available. It is not only legitimate but commonly necessary in order to determine whether parties have reached agreement to look at evidence of the course of negotiations between them, whether that evidence be oral or in the form of letters or other written material accompanying documents apparently contractual in form: see -

1. Cheshire and Fifoot's Law of Contract (5th NZ Ed) p 105 which cites Pym v Campbell (1856) 6 E & B 370 as still being the principal authority for the admission of parol evidence to determine whether a contract "has yet become effective"; and

2. Chitty on Contracts p 22 para 43.

The letter which returned the agreement to Mr Smith made it plain that, apart from the chattels listed in the schedule the balance had been removed during the previous weekend by the vendor, and that he was not prepared to leave all the chattels on the property at the time the purchaser's offer was made.

It would have been sufficient to prevent the agreement returned to Mr Smith being an acceptance if Mr Cundy had done no more than exclude the radio from the chattels passing with the sale, small in value as this was, but the difference between the two documents as to chattels to be included was clearly much wider than that.

Accordingly I hold that the document signed and returned by Mr Cundy to the plaintiff on 27 April was not an acceptance of the plaintiff's offer of 22 April; it was a counter offer to sell on the terms of the document so returned.

That finding requires that I turn to the second question - whether the letter of 2 May was an acceptance of the counter offer.

Mr Finnigan's first submission in support of an affirmative answer was that the letter's insistence on delivery of the paint was no more than a requirement of property which was included in the counter offer, claiming that the scope of the schedule should be limited to "House chattels", the words read at the top of the schedule. Even were I prepared to accept that submission (which I do not) the counter offer must be construed as speaking from the date it was made, and it is common ground that the paint had been removed from the property when the counter offer was made.

Next, he submitted that the letter reduced the matters in dispute to two tins of paint with an estimated value of approximately $30, and the triviality of that sum in relation to the total sum involved, was emphasised. To my mind it would have sufficed to prevent the letter being an acceptance if it left the parties at odds over a box of matches. In this case the language of

the letter speaks plainly of disagreement, and of an attempt to compromise. It cannot in my view be put forward as evidence of agreement.

I have not dealt with several other arguments put forward by Mr Priestley against construing the letter in question as an acceptance of the counter offer, as it seems to me that the letter stands or falls as a document capable of creating contract for essentially the same reasons as those which determine the first question already considered.

I hold that the second question also must be answered in the negative. The letter did not succeed in achieving agreement between the parties on the subject matter of the contract under negotiation.

There will be judgment for the defendant, who must also be allowed costs. In view of the limited time and relative simplicity of the proceedings I do not consider it to be a case calling for certification. The defendant is allowed $2500 for costs, together with witnesses' expenses and disbursements as fixed by the Registrar.

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Solicitors
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