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IN THE HIGH COURT OF NEW ZEALAND
NAPIER REGISTRY

M.86/82

BETWEEN VERONICA NORA BURNS
of Hastings,
Married Woman
Appellant

A N D MATTHEW P. JORDAN
of Te Awamutu,
Carpenter
Respondent

Hearing: 17 October 1984

Counsel: M.A. Courtenay for Appellant
G.W. Calver for Respondent

Judgment: 9 November 1984

JUDGMENT OF GALLEN J.

This appeal arises out of a decision involving a transaction between the appellant and the respondent concerning a sale and purchase of goats.

On 10 October 1981 the parties, both goat breeders, agreed on the following sale and purchase:-

(a) The sale by the plaintiff (the appellant) to the defendant (the respondent) of 1 Saanan doe;

(b) The sale by the defendant (the respondent) to the plaintiff (the appellant) of 1 Angora doe.

The sale and purchase was by way of exchange with no moneys due by equality of exchange. The value of each animal at the time was assessed by the parties at $500. The learned District Court Judge found the following matters as fact:-

1. That it was a condition or term of the contract that the Angora was to be a pure bred;
2. That it was a condition or term of the agreement or contract that the plaintiff (the appellant) was to do all things necessary for the Saanan doe to be registered in the name of the defendant (the respondent);
3. That the Angora doe was not in fact pure bred;
4. That the plaintiff (the appellant) has not performed her obligations under 2 hereinbefore;
5. That the defendant (the respondent) innocently misrepresented to the plaintiff (the appellant) that the Angora doe was a pure bred.

The learned District Court Judge held that the representation that the Angora doe was a pure bred was made and was a misrepresentation. On the basis of his findings of fact, he considered it inequitable that the animals should be returned to the original owners. He held that the plaintiff (the appellant) was entitled to damages in terms of the provisions of s.6 of the Contractual Remedies Act 1979 and he

held that the quantum of damages was to be assessed as at the date of the agreement, 10 October 1981 and not at the date of hearing or judgment. The appeal is in respect of this last conclusion only.

The appellant maintains that having regard to the circumstances, the damages should have been assessed as at the date of judgment. She now submits further, that it is appropriate that the damages should be assessed as at the date of the appeal. The respondent maintains that the appropriate time for assessment of the damages was at the date of the agreement. The effect of the varying contentions is considerable. The learned District Court Judge assessed the damages as at the date of the agreement as being $485 together with interest at 10% until payment.

It appears that pedigree goats, like other animals farmed for profit, are subject to substantial fluctuations in value. The appellant contended at the hearing that the value of the goat at that time was $2,000 and obtained an amendment to the pleadings in that respect. The respondent, who had counter-claimed, submitted that the value of the animal in respect of which he sought relief, was also $2,000 by the date of the hearing. The appellant now says that values have further increased since the date of the hearing and that the appropriate time for assessing damages, is at the time of the appeal. The appellant sought leave to introduce affidavits establishing the value as at the date of the hearing of the

appeal. I reserved my decision on whether or not these affidavits could be filed and have not read them. I shall refer to this matter later in this decision.

The learned District Court Judge did not give reasons for his acceptance of the date of the agreement as being the relevant date, but I have no doubt that he did so on the basis that the general principle clearly is that damages are normally to be assessed as at the date of the contract, see for example Newark Engineering (N.Z.) Limited v. Jenkin (1980) 1 N.Z.L.R. 504 at p.509, but it is to be noticed that Cooke J. referred to the principle in that case as being a prima facie rule:-

> ".....that in an action for fraudulent misrepresentation on a sale the measure of damages is the difference between the price paid and the fair value at the time of purchase....."

The fact that this rule is by no means absolute was emphasised in Johnson and Another v. Agnew 1980 A.C. 367, p.400 where Lord Wilberforce said:-

> "The general principle for the assessment of damages is compensatory, i.e. that the innocent party is to be placed, so far as money can do so, in the same position as if the contract had been performed. Where the contract is one of sale, this principle normally leads to assessment of damages as at the date of the breach - a principle

> recognised and embodied in section 51 of the Sale of Goods Act 1893. But this is not an absolute rule: if to follow it would give rise to injustice, the court has power to fix such other date as may be appropriate in the circumstances."

In the particular case, Lord Wilberforce went on to say that where a breach of a contract for sale had occurred and the innocent party reasonably continued to try to have the contract completed, it would appear more logical and just to assess damages as at the date when the contract was lost.

The question of time is sometimes obscured where other concepts are decisive, e.g. remoteness. It is also important to remember that there is a distinction between damages payable in respect of claims in Tort and claims for breach of contract, a distinction which is aptly summarised by Cooke J. in Scott Group Limited v. McFarlane and Others (1973) 1 N.Z.L.R. 553 at p.585 where he said:-

> "It is essential to remember that we are in the sphere of damages for tort - that is to say, reparation for harm done. It is not a case in contract, where the damages broadly represent the benefit which the plaintiff was promised."

Further, a plaintiff is obliged to mitigate his damages. In the case of the sale of goods, he must normally do so by going into the market to buy a replacement at the time.

Essentially this is the reason for the existence of the general, but not inexorable principle, that the date for assessment is the date of the agreement.

It is however pointed out in McGregor on Damages 14th ed. paras.483 and 225, that where the plaintiff has already paid the contract price for the goods to the defendant, he may not be in a position to go into the market for replacement and may therefore recover at the time of trial.

The authority for this proposition is the somewhat negative one of the decisions in Gainsford v. Carroll (1824) 2 B. and C. 624 and Shaw v. Holland (1846) 15 M. and W. 136, in both of which the time of trial was rejected but only on the basis that in both cases the plaintiff had retained the purchase price and would have been in a position to buy as soon as the contract was broken. In Shepherd v. Johnson (1802) 2 East. 210, stock was to be replaced on a certain day which it was not and by the time of trial there had been a substantial rise in its value. The Court held that the plaintiff was entitled to the value at the date of trial. In Startup v. Cortazzi (1835) 2 C.M. and R. 165, the purchase price had partially been prepaid. It was held that the plaintiff was required to replace and damages fell to be assessed at the date of the agreement, but in Aronson v. Mologa Holzindustrie (1927) 32 Com. Cas. 276, Atkin L.J. treated the matter as open. In McArthur v. Lord Seaforth (1810) 2 Taunt. 257, the headnote states

that:-

> "On a failure to replace stock, the measure of damages is the price at the day when it ought to have been replaced, or the price at the day of the trial, at the option of the Plaintiff."

Lord Mansfield indicated in his decision that the plaintiff was entitled to the price at the day of trial.

I was referred to the decision of the Court of Appeal in Perry v. Sidney Phillips and Son (1982) 3 All E.R. 705. In that case, a plaintiff had purchased a house property in reliance on a survey report which had been negligently prepared and which did not cover a number of matters which required substantial sums expended on repair subsequently. The plaintiff was not in a position to meet those costs and in the initial hearing, he was given judgment for the cost of the repairs as at the time of trial. Between the decision and the hearing of the appeal, the plaintiff sold the house concerned. Lord Denning M.R. drew a distinction between cases of contract to build a structure and purchase in reliance on a negligent report. In the first case, he stated that following authority, the cost of putting right the breach in respect of a building contract is to be assessed on the basis of the reasonable cost of doing the work that it is necessary to make good the breach and that that cost is to be assessed at the time when it would be reasonable for the employer to do it having regard to all the circumstances of the case. In respect of the second situation, that is a purchase relying

on a negligent report, damages are to be assessed on the basis of the difference in value at the time of the breach, the plaintiff being entitled to interest.

With all due respect, the case is not a particularly satisfactory one. Oliver L.J. and Kerr L.J. considered that it was no longer appropriate to assess the damages on the basis of the cost of repairs because they were never going to be carried out, the plaintiff having sold the house. They effectively left open the question as to whether or not the assessment made in the Court below would have been appropriate had the house not been sold but considered that in the event which had occurred, authority established that the time for assessment was at the date of the breach.

In New Zealand, there is authority to the effect that in respect of building contracts, the loss is to be measured by ascertaining the cost of reinstatement at the date of hearing, see Bevan Investments Limited v. Blackhall and Struthers No.2 (1973) 2 N.Z.L.R. 97. I was also referred to the recent unreported decision of Barker J. in New Zealand Motor Bodies Limited and Emslie Consolidated Industries Limited v. Alexander Kingsford Emslie and Others (Dunedin High Court, A.93/32, judgment delivered 6 June 1984). At p.61 of that decision, Barker J. indicated that prima facie the date at which loss is to be decided is that date when the damage was suffered, but he went on to say that the date is not immutable it is a presumption and not an invariable rule and he drew

attention to the danger of double recovery where consequential losses were claimed if a date after the date of sale were taken into account.

In this case, what the parties contemplated was that each would obtain an animal of an equivalent value, but with different characteristics suitable for their differing purposes. The learned District Court Judge concluded that it would not be appropriate to order that the animals be returned. At this stage, 3 years after the original agreement, without any information as to the present condition of the animals and taking into account that they would obviously have aged, I agree with his conclusion that it would be quite inappropriate to order that the matter be dealt with in this way. However, in my view it would be unjust in this case to order that damages be assessed as at the date of the agreement because effectively the respondent has obtained the animal he bargained to receive as a result of the arrangement and has therefore had the benefit of the appreciation in value of that animal, while the appellant who has suffered as a result of the innocent misrepresentation, has obtained an animal which has not either met her expectations or appreciated in value in the same way.

In my view therefore, this is one of those cases contemplated by Lord Wilberforce in Johnson v. Agnew (supra) where the circumstances dictate that a date other than the date of breach should be the date on which damages are

assessed and in my view the appropriate date was the date of trial.

The appellant however, contends that the date of the hearing of the appeal is the appropriate date. There is authority to the effect that matters which have occurred subsequent to the date of trial, may be taken into account on an appeal. The case already referred to of Perry v. Sidney Phillips and Son is an example of that. There is certainly some logical basis for contending that on the same considerations which suggest the time of trial is the date for assessment, the time for final resolution on appeal is the time at which the plaintiff's loss should be assessed. However, I think there is a distinction between the determination of the rights of the parties and the assessment of damages based on that determination. The parties' rights were determined as at the time of trial. The appeal has only related to damages. The plaintiff's rights have been fixed as at the date of trial and any fluctuation in value subsequent to that is a fluctuation in value of the monetary benefit awarded to her which is normally compensated by way of interest because she has not had the advantage of the use of the money. In none of the cases where the time of trial has been accepted as the appropriate date has there been any suggestion that in the subsequent appeal the award should be updated. While appellate Courts do have power to take into account matters which have occurred after the date of the

decision, the general principle is clear that the damages are assessed once and for all at the trial. It is generally considered undesirable to re-open such an assessment except in the most unusual cases and I do not think that a fluctuation in the value of money which effectively is the position after the monetary loss has been assessed at the date of trial is such an unusual circumstance - see the discussion in Murphy v. Stone Wallwork (Charlton) Limited (1969) 2 All E.R. 949.

At the time of trial the appellant sought and obtained an amendment to allege that the animal concerned had a value of $2,000 at the date of hearing. The learned District Court Judge found that the goat in question had an actual value of $15 at the date of the transaction. It appears the value may have been less at the time of trial. An expert witness called for the plaintiff, a Mrs White, said that if the animal had been as it was represented to be, it would probably have been worth between $1,200-$1,500 at the time of trial. A Mrs Hartley gave precisely similar evidence.

The respondent at the earlier hearing called a Mr Shaw, an expert witness who referred to the values of Saanen goats but not to the value of the particular Angora goat, the subject of the appellant's claim. In some respects it would be desirable to refer the matter to the learned

District Court Judge for re-hearing on the question of damages. The amount involved is however small and it is important that this matter should be concluded as soon as possible.

According therefore to the views expressed above, the appeal is allowed and on the basis of the evidence which was called at the earlier hearing, I consider the appellant was entitled to recover the sum of $1,385 less $15, being the value which the expert witnesses considered the animal should have had, had it been as represented, less its actual value.

The appellant will therefore be entitled to judgment in the sum of 1,370 dollars together with interest at the rate of 10% from 13 August 1932 until payment. The appellant is also entitled to costs, disbursements and witnesses' expenses assessed on the scale appropriate in the District Court, together with costs on the appeal which I fix at 100 dollars.

The decision of the learned District Court Judge in respect of the counter-claim will stand.

P. Gallen J

Solicitors for Appellant: Messrs Langley, Twigg and Company, Napier

Solicitors for Respondent: Messrs Simpson, Bate and Partners, Hastings