IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

Set 3

A.1229/84

BETWEEN ROBERT GORDON DUNLOP of New Plymouth, and CEDRIC GEORGE GRANTHAM of Hawera, Property Developers

Plaintiff

AND SMITH & BROWN (NEW PLYMOUTH) LIMITED a duly incorporated company having its registered office at Auckland and carrying on business there and elsewhere as Retailers

Defendant

Hearing: 12 and 13 December 1984

Counsel: A Galbraith for plaintiffs
R S Chambers for defendant

Judgment: 18 December 1984

JUDGMENT OF HENRY J.

This is an action seeking specific performance of an agreement for sale and purchase of a commercial property situated at New Plymouth. The Defendant company, which is one of the Feltex group of companies and the registered proprietor of the property, was seeking to effect its sale.

In early May 1984 it was in negotiation with a prospective purchaser and then on 3 May enlisted the services of a real estate agency for the purposes of finding an alternative purchaser should those negotiations not prove successful. As a consequence, Mr P J Young was instructed, as solicitor, on behalf of the Plaintiffs as prospective purchasers, and he arranged to meet Mr Turley, General Manager of the Properties Group of Feltex, at Auckland on either 15 or 16 May. He brought with him a draft agreement which was discussed at that meeting. That draft contained conditions, including one as to finance and one as to local authority approval of the Plaintiffs' intended development, with dates of 30 July for their fulfilment. There was some discussion about bringing those dates forward to 30 June, but no overall finality on a sale was reached and it was left for Mr Turley to make further contact with Mr Young if no agreement was reached with the other possible purchaser with whom negotiations were still proceeding.

Later in May Mr Young was advised that the other transaction was not proceeding and he then prepared and sent to Mr Turley in duplicate a further form of agreement executed by the Plaintiffs. This was under cover of a letter dated 1 June, and recorded that his clients had "arranged for payment of the deposit to Devon Real Estate upon confirmation that the agreement has been executed by the vendor". The agreement listed a substantial number of chattels as being included in

the sale. Following some further communication, Mr Young wrote to Mr Turley on 11 June advising that only two specified chattels would form part of the purchase price, and also raising a further matter as to possession date, this being related to certain flood protection work to be carried out by the local authority.

In response, Mr Turley rang Mr Young on 12 June, but was unable to contact him and left a message with his secretary advising her of certain matters of concern to him. I am satisfied included in that advice was reference to the fact that Mr Turley was holding an offer from another prospective purchaser, but I am also satisfied that that particular information was not in turn passed on to Mr Young, either by his secretary or by Mr Turley in their subsequent telephone conversation on that same day.

Following that last conversation, Mr Turley sent a telegram in the following terms :

> "RE S and B Devon Street
> We confirm NPC Council will be given access from 1 October 84 to commence flood protection work. We await receipt of amended agreement for sale and purchase reflecting all discussions. Key points price $550,000. Deposit $50,000. Settlement 1 February 85. Late interest 18%. Chattels included safe and venetian blinds only. Subject to finance by 30 June 84, subject to NPCC Development proposal approval by 30 July 84, subject to vendor arranging issue of C/T for Lot 4 DP 2572 by date of settlement
>
> B C TURLEY
> FELTEX PROPERTIES"

Mr Young prepared a further agreement, had it executed in duplicate by the Plaintiffs, and forwarded both copies to Mr Turley under cover of letter dated 15 June. The letter read simply :

> "We enclose agreement for sale and purchase executed by our clients and look forward to receiving a copy of the agreement in due course."

In the meantime, probably also on the 12 June, the Plaintiff Mr Dunlop wrote a cheque for the deposit, and a covering letter, which were both delivered to the real estate agent on 15 June, the instructions being not to bank the cheque until further notice. It was in fact never banked, with the consequence that no deposit was paid to the vendor or its agent.

Mr Turley rang Mr Young on 20 May and advised that the company had accepted an offer from another party. On 29 June the Plaintiffs advised that the two conditions included in the last form of agreement had been fulfilled and on 2 August the present proceedings were instituted.

The major issue between the parties is whether there was a concluded contract. For the plaintiffs, it was submitted that there were two alternative bases upon which it could be held that a contract was established. The first was that final agreement between the parties on all matters was reached during the course of the telephone conversation between Mr Young and Mr Turley on 12 June, at which all terms were

settled. The second was that the telegram of that date from Mr Turley constituted an offer which was accepted by Mr Young's letter of 15 June enclosing the forms of agreement executed by the Plaintiffs. As it is necessary to consider the whole course of dealing between the parties whichever basis is under review, and to make findings of fact relevant to it, it is convenient to deal with both bases together.

In theory the coming into existence of a contract is analysed into offer and acceptance. Sometimes that is a reasonably straightforward exercise, sometimes it is difficult in a practical way because particular pieces of evidence do not easily fit into such defined slots. The overall question remains, however, whether the parties have by their words or conduct evinced an intention to be bound in legal relationship, being to all outward appearances agreed on the same terms upon the same subject matter.

The background to the telephone conversation of 12 June, the resulting telegram and the forwarding of the agreements executed by the Plaintiffs, I have already set out in summary. It is clear that by Mr Young's letter of 1 June the Plaintiffs were making an offer to purchase; it is also clear that this offer was refused by Mr Turley. That then led to the letter of 11 June from Mr Young, but which in my view cannot be construed as a further offer. It refers in particular to a matter not covered in the earlier form of

agreement, does so in a way raising the issue by way of discussion, and concludes by requesting Mr Turley to telephone when he has been able to consider the matters mentioned. The position, therefore, at that time is that there is no offer open from the Plaintiffs, neither is there an offer made by the Defendant. This brings me to the 12 June. Mr Young's evidence as to the content of the telephone conversation of that date is quite short. He spoke of an incorrect date for fulfilment of one of the conditions, which had been stipulated in the earlier agreement as 30 July instead of 30 June. He advised Mr Turley of arrangements reached with the local authority, which he said were satisfactory to his clients provided he was assured access to the premises could be given to the Council on 1 October. He concluded by saying that when the telephone call was finished so far as he was concerned "there were no unresolved points". He also stated that Mr Turley had enquired when he (Mr Young) could get the agreement back up to Auckland, as he wanted to know where they stood.

Mr Turley in his evidence referred to discussions concerning the flood protection work, settlement date, and access by the local authority. He was cross-examined at some length with a view to establishing that all queries which he had raised were dealt with and resulted in an indication from Mr Young that they were or would be acceptable to his clients, and I think that was the effect of the conversation.

But Mr Turley was adamant that at no time did he agree to sell, and made his own position quite clear - namely, that for any further offer to be considered, it would have to contain those terms. He anticipated such an offer would be forthcoming.

I accept Mr Turley's evidence. He impressed me as a truthful and honest witness. I am satisfied it was never his intention to conclude an agreement at that time, nor was it his intention to convey any such impression to Mr Young. I am reinforced in this conclusion by his consistent actions and statements thereafter, and also by the fact that at that time he had for consideration an offer from a Mr Boon which he wished to compare with what was being offered by the Plaintiffs. Further, when looked at objectively, I do not think the evidence as to what was said during that conversation (which is not in dispute) evinced an intention of either side to be bound; neither do I consider Mr Young at that time believed there was a final binding contract. He had not himself said anything which indicated he had authority then to bind his clients, or that he was intending to do so; or indeed that he regarded Mr Turley as having done so.

There is a marked absence of the kind of unequivocal expression of an agreement which one would have expected from experienced persons, or at least one of them, if such a stage had been reached. I note also that there is in subsequent discussions and correspondence no reference to an

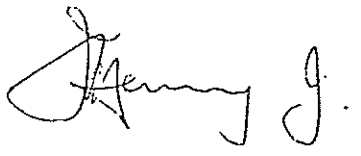
agreement having been then and there concluded. The true position, as I find it, is that they had both discussed the matters which were then in issue to a stage where the parties could consider their respective positions and move from there. Mr Young no doubt believed that the Defendant would be prepared to enter into an agreement on those terms, and anticipated its conclusion accordingly. But that is far different from having actually reached a concluded, even if unenforceable, agreement.

The telegram of 12 June which followed is confirmatory of that situation. It does not record or confirm the existence of an agreement already reached, but requests an amended agreement "reflecting all discussions" and referring to what are termed certain key points. Neither, put in context, did it constitute an offer which was capable of acceptance so as to form a binding contract. It did not refer to a preparedness to sell on stated terms, but sought the forwarding of an amended form of agreement incorporating all matters which the parties had discussed, drawing specific attention to some of them. It did not envisage a "we accept" telegraphic reply, neither did it stipulate expressly or impliedly that acceptance could be conveyed by way of the amended agreement. It was in my clear view intended to be and was on its face no more than what is known in legal terms as an invitation to treat, of the type evidenced in the classic case of Harvey v Facey [1893] AC 552.

I think also it was treated as such by Mr Young when he sent his letter of 15 June with the two copies of the new agreement duly executed by his clients, anticipating execution by the Defendant, the return of one copy, following which payment of the deposit would be made in accordance with the terms of the written document. That never eventuated, and because of that, and because of the absence of any alternative form of acceptance of what was then the Plaintiffs' last offer, no contract came into existence.

The claim, whether for specific performance or damages, must therefore fail. In the circumstances I do not find it necessary to go on and consider the alternative defence raised, namely that any agreement is unenforceable because of non-compliance with s.2 of the Contracts Enforcement Act 1956.

Accordingly, there will be judgment for the Defendant, which is entitled to costs which I fix at $2000.00 together with disbursements and witnesses expenses to be fixed by the Registrar.



Solicitors for Plaintiffs:
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Solicitors for Defendant:
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