ACB

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

A.70/84

SET. 3.

BETWEEN CORNELIUS ANTONIUS KIVITS and ELIZABETH HUBERTINA JOSEPHINE KIVITS and MITCHELL GOYA KIVITS

Plaintiffs

A N D JAMES WILLIAMS and PHYLLIS JACQUELINE WILLIAMS

Defendants

Hearing : 27th February 1984

Counsel : N. Browne for Plaintiffs
R. Bartlett for Defendants

Judgment : 27th February 1984

(ORAL) JUDGMENT OF BARKER, J.

This is an application for an interim injunction to restrain the defendants, pending further order of the Court, from registering in the Land Transfer Office, a Memorandum of Transfer relating to part of the land comprised in Certificate of Title 18C Folio 999 (North Auckland Registry).

On 25th May 1983, the plaintiffs entered into a written agreement with the defendants to sell land described as "66 Florence Avenue, Orewa", "Lot 8 on DP 63201". The purchase price was $18,125. Lot 8 on DP 63201, as shown on the deposited plan, contains 1776m^2.

The only affidavit in support of the injunction comes from one of the plaintiffs, Cornelius Antonius Kivits. This affidavit is subject to a number of quite severe criticisms:

(a) It does not state that it is being made on behalf of all the plaintiffs; therefore, the Court has no evidence as to the views of the other plaintiffs;

(b) It does not contain any statement as to the financial position of the deponent or indeed of the other plaintiffs - a matter of considerable relevance to the question of an undertaking as to damages;

(c) It quite wrongly asserts the alleged state of mind of the defendants at the relevant time. This hearsay assertion is included without any basis.

The writ and statement of claim were filed on 8th February 1984. Despite Mr Bartlett's agreement to accept service for the defendants, he was not served with the writ until 24th February 1984; i.e. last Friday, the date on which the application for interim injunction was filed.

Mr Bartlett has, with commendable despatch, prepared an affidavit, lodged in Court this morning; this goes into considerably greater detail than the affidavit filed on behalf of the plaintiffs. One would have thought that the plaintiffs, on whom the onus of proof rests, might have favoured the Court with considerably more information; many of the factual matters to which I shall refer are found in the defendants' affidavit.

The defendants claim that the plaintiffs' real estate agent showed them the section in May 1983; she represented that the land was for sale at $16,000 and that its area was 1776m^2. The agent has provided a statement (which she also made in cognate proceedings to which reference will be made). She states that she knew the defendants were interested in purchasing the section with the intention of erecting four units thereon; before initiating the sale, she checked with the local body and found that it was possible for such a building to be built within the relevant town planning ordinances. Her statement was not challenged; nor did Mr Browne seek to file an affidavit in reply to contradict the statement of the agent.

The defendants wrote to the local body making enquiry of a number of matters relating to town planning. The solicitors for the vendors on the purchase - the plaintiffs in these proceedings - were the same solicitors now acting for them. The defendants settled the transaction in the normal way; they paid over the settlement moneys on 10th June 1983. They then proceeded to stamp the transfer; they produced it for registration in the Land Transfer Office on 17th June 1983. However, on 15th June 1983, a caveat had been lodged by one Lucia Antonia Maria Kivits alleging an oral agreement subsequently reduced to writing, to purchase from the present plaintiffs a triangular piece of land of Lot 8 DP 6381 comprising some 245m^2. This triangular piece of land is apparently not within the fenced area of 66 Florence Avenue, Orewa; it is within the area shown on the lot on the deposited plan.

This piece is occupied by Lucia Antonia Maria Kivits and one of the present plaintiffs, Cornelius Antonius Kivits. There are said to be some buildings on the land. Again, the plaintiffs' affidavit was vague as to the nature of those buildings. The male defendant asserts in his affidavit that these buildings are portable sheds. They are said to encroach on to the land in question.

It is clear, however, that there is no dwellinghouse built on the triangular piece; on the rather flimsy information available to me, there may be outbuildings of some sort.

The purchase price has been held by the solicitors for the plaintiffs in a trust account pending resolution of the proceedings. It was not until settlement had taken place that the plaintiffs for the first time asserted that there was a mistake in their contract with the defendants. Despite that assertion, no proceedings of the present nature were brought until this month.

An application came before Greig, J. on 19th September 1983 to remove the caveat placed on the title by Lucia Kivits and Cornelius Kivits; in a reserved judgment on 23rd September 1983, the learned Judge, for the reasons then articulated, ordered that the caveat do not lapse until tomorrow, namely 28th February 1984. He reserved leave to the caveator to apply for a further extension; no extension has been sought although there is only one day left within which to apply. His Honour also ordered that the caveators stamp an agreement said to evidence the oral agreement between the

caveator and the present plaintiffs; I am told from the Bar that this document was never stamped.

I therefore assume that the caveators in those proceedings have lost interest in maintaining the caveat; I ignore those proceedings for the purposes of this hearing although I should have thought, as a counsel of perfection, that Lucia Kivits should have been made a party to these present proceedings. However, she was not; because one of the plaintiffs is a registered proprietor of both sections, one can assume that she has some knowledge of the proceedings.

The male defendant in his affidavit states that he is anxious to proceed to develop the site. He has had use neither of the land nor of the money he paid over approximately 8 months ago. Pending resolution of the dispute, he has been unemployed; mortgage money has been difficult to obtain; he is concerned that, with the ending of the price freeze, it is obvious that his proposed development is going to cost much more than it would have had he been able to commence last year.

He states he does not know whether the plaintiffs are in a position to pay what could be quite substantial damages if the injunction were not ultimately sustained. He also refers to a meeting between solicitors which he attended (at which the previous solicitor acting for the plaintiffs attended) concerning the building said to encroach from Lot 9 and said to be owned by Miss Lucia Kivits and Mr Cornelius Kivits. He claims that, at that meeting, all parties were

satisfied, from measurements taken, that the development was more than 3 metres from the boundary line; it therefore complied with the county's location requirements. He says there has never previously been any allegation that a building was erected on the site in question. Again, no application is made to answer that allegation.

Against this background, Mr Browne for the plaintiffs, despite the delay in issuing the proceedings, submits that there is a serious question to be tried. The statement of claim seeks either rectification at common law or orders under the Contractual Mistakes Act 1977 cancelling the agreement. It is alleged, in respect of the rectification cause of action, that the written agreement does not accurately record the agreement of the parties; in respect of the other cause of action, it is alleged that there was a substantial unequal exchange of values - a matter specifically referred to in Section 6(1)(b) of the Contractual Mistakes Act 1977.

As to that, Mr Bartlett is correct to point out that there is no evidence in the affidavits to indicate any substantial imbalance of values. In fact, the disputed area of land is about 1/8 of the area of Lot 8; one would have thought that there should have been some allegation in the affidavits to the effect that, if the plaintiffs had thought that they were selling this land as a whole, including the triangular piece, they would have sought a much greater purchase price; there is no such allegation.

Mr Browne submitted further that the balance of convenience required that the plaintiffs' position be preserved.

I am not sure that there is a sericus question to be tried. On the scant information made available to me by the plaintiff, I am not at all clear that any serious question has been made out for rectification; this claim seems somewhat incompatible with the claim based on mistake; with rectification there is no mistake between the parties, but the written document wrongly records their bargain. However, with mistake, there is no agreement between the parties because both thought that they were buying or selling a different thing.

The plaintiffs' affidavit, if it points to anything, points to there being a mistake on the part of the parties. I cannot hold that there is a serious question to be tried on the question of rectification.

The plaintiff, in his affidavit, assuming that he is speaking for all plaintiffs and assuming that it is possible for him to depose as to the defendants' state of mind (which I do not think is possible) claims that, at the time the document was executed, both parties were unaware that Lot 8, DP 63201 in fact included the disputed area of 245m^2; it would seem that if the plaintiffs have shown a serious question, it can only be in the cause of action under the Contractual Mistakes Act 1977.

Assuming that there is a serious question to be tried under the Contractual Mistakes Act, I look at the balance of convenience. In my view, the balance of convenience lies heavily with the defendants. There is no allegation of fraud or any wrongful conduct on their part. They have been out of both their money and the land for a period of almost

9 months. There is no allegation in the affidavit of a substantially unequal value - one of the matters referred to in the Act. It seems clear to me under Section 7 of the Act that, even if I allow the transfer to be registered, the Court can, in making an order in the substantive action, direct that the property be re-assigned to the plaintiffs. Moreover, if the plaintiffs do succeed in establishing that there was a gross imbalance of consideration, the Court has ample power to award damages under Section 7(3)(d) of the Act. It seems to me that damages would be an adequate remedy in the circumstances and that I should not order an interim injunction.

There are also a number of other matters which weigh with me in exercising my discretion arising out of the conduct of the plaintiffs, which I record as having been taken into account by me in reaching this decision:

1. The delay of the plaintiffs in issuing these proceedings. They should have been issued promptly after the alleged mistake was found in June 1983. It is quite intolerable that the defendants have had, through no fault of their own, to put up with this delay; they have been deprived of both the land and of their money. The fact that what appears to be misconceived proceedings to keep the caveat alive were issued between other parties which have given the plaintiffs the de facto protection which they now seek, is irrelevant. They should not have taken advantage of those proceedings. They should have brought their own proceeding much earlier. In fact, their delay has manifested itself right down to the present. I can see no reason (and none was advanced by Mr Browne in reply) why the proceedings were issued on 8th February, yet the application for injunction was not filed until 24th February.

2. There are no details of the financial situation of the plaintiffs; assuming that the first-named

plaintiff is speaking on behalf of all, these should have been provided in his affidavit in support of the interim injunction. The technicality of a failure to file an undertaking as to damages could be overcome by filing the undertaking before the order was sealed. That, however, is not the same thing as failing to supply relevant information in the affidavit in support. It is no answer to say that the information can be produced in Court; the defendant would have no realistic opportunity of replying. This matter is of some relevance because of the matters canvassed in the defendants' affidavit; their financial loss could be large if they are unable to proceed with their building programme.

3. With regard to the problem of possible encroachment; this seems to have been raised by the plaintiff for the first time in these proceedings; there is a course available under Section 129 of the Property Law Act 1952 which the plaintiffs or the neighbours can pursue; nothing that I say can prevent them from doing that.

4. Finally, it may be that the plaintiffs have other remedies. If the agent was not instructed to sell this triangular piece of land but in fact did so and made representations to the defendants, then it is not the defendants who are to be held responsible; the plaintiffs may have a cause of action against their agent. I express no view on that. Also, the solicitors could have been required to have investigated this matter. They dealt with the defendants' solicitors and accepted the settlement moneys from them without any statement of the alleged discrepancy in the land being transferred. If they had failed to point out this rather vital matter to the purchasers' solicitors, then that fact might provide another remedy for the plaintiffs. However, the other inference may well be that the plaintiffs did not inform their solicitors or indeed the land agent. I have no way of knowing what the true position is as to either of these matters. I merely mention them as possible other remedies available to the plaintiffs which do not impose hardship on the defendants.

Looking at the status quo, it was recently stated

by Lord Diplock in Garden Cottage Foods Ltd. v. Milk Marketing Board, (1983) 3 W.L.R. 143, 148, that the status quo must be considered at the time immediately before the writ is issued. In this case, the status quo shows that there was a caveat held by someone else with a right to seek renewal; no application had been made for its renewal; there was no proceeding by the plaintiffs. Alternatively, the status quo might be that which existed at the time when the plaintiffs paid their money and in good faith received the transfer and titla for stamping and registration. One would have thought that the plaintiffs' complaints might have been raised at that stage instead of now.

In my view, the plaintiffs' application is hopelessly delayed: justice does not permit it to continue.

Accordingly, the application for interim injunction must be declined. Costs are reserved.

A. D. Barker J.

SOLICITORS:

Kensington, Haynes & White, Auckland, for Plaintiffs.

Sheffield, Young & Ellis, Auckland, for Defendants.