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A. No. 336/81

BETWEEN JOHN CULYER WIGGLESWORTH of Auckland, Chartered Accountant

Plaintiff

A N D KEEGAN, ALEXANDER, TEDCASTLE AND FRIEDLANDER a firm of Solicitors carrying on practice as Barristers and Solicitors at Auckland (sued as a firm)

Defendants

Hearing: 14th, 15th and 16th November, 1983.

Counsel: S. P. Bryers for Plaintiff.
F. W. M. McElrea for Defendants.

Judgment: 21st March, 1984.

JUDGMENT OF TOMPKINS, J.

THE ACTION:

The Plaintiff has sued the Defendants, his former solicitors, for damages he alleges he suffered as the result of their negligence. The claim is for $23,625.26. This represents a deposit of $22,000 paid by the Plaintiff as purchaser under an agreement for sale and purchase. The vendor defaulted. The Plaintiff's action to recover the deposit from the vendor failed. The Plaintiff also claims architects' fees and legal costs incurred in seeking to recover the deposit.

The Defendants deny that they were negligent in acting as the Plaintiff's solicitors or that any act or omission on their part caused loss to the Plaintiff.

HISTORY:

By an agreement for sale and purchase dated the 3rd November, 1978, Alison Gwendolene Porter, of Auckland, widow, as vendor, agreed to sell to Richard Dante Mitri, of Cambridge, company director, a house property situated at 10 Arney Crescent, Remuera. The price was $210,000. The deposit payable by Mr. Mitri as purchaser was $10,000. The agreement records that possession should be given and taken on the 10th November, 1978.

The purchase price was to be paid by the purchaser paying interest at 12% on the balance, being $2,000 per calendar month, paid quarterly, from the date of possession, plus a cash sum of $50,000 on the 10th May, 1978 (?), being the day of settlement. The balance of the purchase price of $150,000 was to be secured by a mortgage from Mr. Mitri to Mrs. Porter. The agreement also contained a provision that Mr. Mitri could register ahead of Mrs. Porter's mortgage a first mortgage for a principal sum not greater than $60,000.

The mortgage to Mrs. Porter was to be for 18 months with a requirement that $100,000 be paid on the 10th November, 1979, and $50,000 on the 10th May, 1980, and on other terms set out in the agreement.

The agreement was expressed to be conditional in all respects upon the approval of the purchaser's solicitor by 5 p.m. on Friday, 3rd November, 1978. This approval was apparently given. It was common ground that this agreement had become unconditional.

In June, 1979, the Plaintiff, a chartered accountant in practice in Auckland, was looking for a house to purchase. By this time Mr. Mitri had put the Arney Crescent house in the

hands of Brian Johns Ltd., real estate agents, for sale. An employee of that company showed the property to the Plaintiff and his wife. It was known to them as Mrs. Porter's late husband had been the Plaintiff's professional partner.

The result was that on the 12th June, 1979, there was completed an unconditional agreement for sale and purchase in respect of which Mr. Mitri was the vendor and the Plaintiff the purchaser. The purchase price was $220,000. The deposit payable under the agreement was $22,000. Possession was to be given and settlement completed on the 13th October, 1979.

On the same day the Plaintiff handed to the land agent a cheque for $22,000 in payment of the deposit. He instructed Mr. Johns that the agreement was to be sent to Mr. Friedlander, one of the Defendants, who would be acting as the Plaintiff's solicitor on the purchase. The Plaintiff did not consult Mr. Friedlander prior to the signing of the agreement. This was because he and his wife had decided that they wanted to buy the property and it was, he thought, a simple straightforward unconditional purchase.

The land agent sent the agreement to the Defendants by letter dated 13th June, 1979. The Plaintiff telephoned Mr. Friedlander to tell him that the agreement had been signed and to instruct him to act as the Plaintiff's solicitor in respect of the transaction.

On the 18th June, 1979, the Defendants wrote to Messrs. Kensington, Haynes & White, Mr. Mitri's solicitors:-

" We note from the Agreement that you are the solicitors of the Vendor and on perusing the Agreement we note that it has been signed by one Ngaere Mitri as authorised agent for her husband. Would you kindly confirm that the signature in fact is the wife of the Vendor and her signature to the agreement is with the registered proprietor's authority and consent. "

On the 19th June, 1979, they wrote to the Plaintiff:-

" We have received the Agreement for Sale and Purchase in this connection and for your records we enclose a photocopy of the search of the property. You will note that the title is subject to two easements namely:-

(a) Section 351 D (3) of the Municipal Corporations Act 1954

(b) Agreement as to fencing in Transfer 122618.- should the owner of the adjoining land be the original subdivider then such person cannot be called upon to contribute towards the costs of erection and maintenance of a boundary fence.

We have written to the South British Insurance Office advising them of your interest in the property and take it that the amount of cover namely $198,000 is sufficient.

We look forward to discussing any matters which require clarification herein. "

With the letter went a copy of the title. The Plaintiff had already received a copy of the title from the land agent. After receipt of the letter of the 19th June, the Plaintiff telephoned Mr. Friedlander and asked him to check out the position concerning the ownership of the property since the title showed Mrs. Porter as the registered proprietor.

It was apparent to Mr. Friedlander from the search of the title that Mr. Mitri was not the registered proprietor. He telephoned Mr. Johns. The date of this conversation cannot be fixed precisely, but it preceded a conversation Mr. Friedlander had with Mr. Berman to which I am about to refer. Mr. Friedlander told Mr. Johns that because he was not sure that Mr. Mitri was in

the deposit. He was aware that the agent was required to hold the deposit for ten days. He was not aware of any other statutory provision upon which he could rely to require the agent to hold the deposit for a longer period.

Shortly after that conversation, and again on a date that cannot be fixed precisely, Mr. Friedlander telephoned Mr. Berman of Messrs. Kensington, Haynes & White. Mr. Berman acted for Mr. Mitri. Mr. Friedlander enquired of Mr. Berman whether there was a binding agreement between Mr. Mitri and Mrs. Porter. He also sought the date of the agreement because he wished to prepare a caveat. He was told by Mr. Berman that Mr. Mitri had an unconditional agreement with Mrs. Porter and that Mr. Mitri would be the registered proprietor by the date on which settlement with the Plaintiff was due.

Following, and as a result of this conversation, Mr. Friedlander in a further telephone conversation, told Mr. Johns that he could no longer stop Mr. Johns from disbursing the deposit. He said that the matter raised in the earlier conversation had been satisfactorily investigated.

As a consequence, on the 28th June, 1979, Mr. Johns sent to Messrs. Kensington, Haynes & White a cheque for $17,350. The balance of the deposit of $4,650 was retained by Brian Johns Ltd. as its commission on the sale.

In the meantime, on the 22nd June, 1979, Mr. Friedlander on behalf of the Plaintiff registered a caveat against the land. It claimed that the Plaintiff had an estate or interest in the land by virtue of:-

" An agreement for sale and purchase dated 12th June, 1979, made between John Culyer Wigglesworth as purchaser, and Richard Dante Mitri as vendor, the said Richard Dante Mitri being the purchaser under and by virtue of an agreement for sale and purchase dated 3rd November, 1979, and Alison Gwendoline Porter as vendor. "

On the 26th June, 1979, the District Land Registrar sent notice of the registration of this caveat to Mrs. Porter, but this notice was incorrectly addressed to her c/o Messrs. Kensington, Haynes & White.

The Porter sale had been due to be settled on the 10th May, 1979. Settlement had not taken place. Mr. Mitri in April had advised his solicitors that he would require $60,000 by way of first mortgage. Mr. Berman wrote to Mr. Mitri on the 2nd May, 1979, advising that this amount would be available through Kensington, Haynes & White Nominees Ltd. Settlement still did not take place because by then Mr. Mitri was in arrears with the interest payments due to Mrs. Porter and was not then able to discharge this liability.

The Porter sale was settled on the 29th June, 1979. By then Mr. Mitri's solicitors had the Plaintiff's deposit. By using part of it, plus the $60,000 first mortgage, and allowing for the $150,000 second mortgage back to Mrs. Porter, they were able to pay $63,541.45 to Mrs. Porter's solicitors, being the amount then required to settle. Mr. Berman is as certain as he can be (and indeed it seems highly probable) that when he settled on the 29th June, 1979, he was unaware of the caveat. He was, of course, aware of the agreement Mr. Mitri had entered into with the Plaintiff. He says that had he been aware of the caveat he would not have settled with Mrs. Porter because, acting also as solicitor for the first mortgagee, he would then have been unable to register the transfer and that mortgage.

On the 13th August, 1979, there was presented for registration the release of the mortgage from Mrs. Porter to the National Bank of New Zealand, the transfer from Mrs. Porter to Mr. Mitri, the mortgage from Mr. Mitri to Kensington, Haynes & White Nominees Ltd., and the mortgage from Mr. Mitri to Mrs. Porter. As a consequence, by notice dated the 14th August, 1979, the District Land Registrar gave notice to the Plaintiff, c/o the Defendants, that these documents had been lodged for registration and that the caveat would lapse unless within fourteen days an application for an order to the contrary had been made to the court, and that such order was made and served on the District Land Registrar within a further period of 28 days.

On the 24th August, 1979, the Defendants, on behalf of the Plaintiff, filed a notice of motion for an order directing that the caveat do not lapse. This motion was given a provisional date for hearing of the 5th October, 1979. No steps were taken to obtain an earlier hearing date. Consequently, the caveat lapsed on the 21st September, 1979. The documents that had been lodged for registration were entered in the register on the 22nd September, 1979.

The motion for an order that the caveat do not lapse was called in the Chambers list on the 5th October, 1979. It was adjourned for a hearing that took place on the 12th October, 1979, before Chilwell, J. It was treated as an application for an extension of the 28 day period specified in s.145 of the Land Transfer Act, 1952, or, alternatively, for an application for an order authorising the District Land Registrar to receive a second caveat under s.148.

In a reserved judgment delivered on the 16th October, 1979, Chilwell, J. held that the court had no jurisdiction to extend the 28 day period specified in s.145. He made an order

under s.148 that it shall be lawful for the District Land Registrar to receive a second caveat affecting the same land, estate or interest. Upon receipt by the Registrar the second caveat was to rank for priority in terms of the Land Transfer Act, 1952.

The Plaintiff lodged this second caveat on the 18th October, 1979. However, it then ranked after the transfer to Mr. Mitri and the two new mortgages.

In the meantime, on the 15th October, 1979 (the day before the delivery of Chilwell, J's judgment) the Defendants formally tendered to Mr. Mitri's solicitors $198,000, being the balance purchase price payable in accordance with the agreement. This tender was not accepted because Mr. Mitri did not have sufficient funds to pay off the two mortgages that by then were registered against the title.

Following the tender, on the same day the Defendants wrote to Mr. Mitri's solicitors:-

> " Further to our tender of settlement we are instructed to now make time of the essence for the date of possession and nominate 4.00 p.m. on the 15th day of November 1979 as that date. Kindly furnish us with your settlement statement and arrange for the release of mortgages to enable settlement to proceed as at that date.
>
> Failure to effect settlement will result in our client exercising his rights pursuant to the provisions of the Agreement for Sale and Purchase. "

Early in November an approach was made by the Defendants on behalf of the Plaintiff to Mrs. Porter's solicitors to see whether Mrs. Porter would be prepared to negotiate a sale direct to the Plaintiff and if so on what terms. By letter of the 9th November, 1979, Mrs. Porter's

solicitors advised that she would not release her mortgage unless payment in full of the amount owing to her was received, including interest to date. As this would involve the Plaintiff paying more than the purchase price under his agreement with Mr. Mitri, the offer was not acceptable to the Plaintiff.

On the 15th November, 1979, the Defendants, on behalf of the Plaintiff, again tendered the balance purchase price of $198,000. Again this tender was not accepted for the same reason.

Mr. Friedlander then discussed with the Plaintiff the courses that were open. He advised the Plaintiff that he could either bring an action for specific performance against Mr. Mitri, or rescind the agreement, claim a refund of the deposit, and possibly an action for damages.

The Plaintiff instructed Mr. Friedlander to adopt the second course. This was because he felt the position in which he then was was unsatisfactory. The transaction, to use his words, "had turned sour". He had "bad vibes" about the whole house and the property had deteriorated considerably since the time the deposit was paid. However, the Plaintiff in his evidence was adamant that had he been able to buy at the price contained in the agreement, then he had no doubt he would have been happy to settle.

In accordance with this decision, on the 20th November, 1979, the Defendants wrote to Mr. Mitri's solicitors advising that the contract was at an end and that the Plaintiff claimed a refund of the deposit.

Further, in accordance with this decision, the Plaintiff released the second caveat against the title.

In January, 1980, the Plaintiff commenced proceedings against Mr. Mitri to recover the deposit. Judgment was entered on the 22nd October, 1980, for $23,945.26. The Plaintiff commenced bankruptcy proceedings as the result of which Mr. Mitri was adjudicated bankrupt on the 11th March, 1981. The Plaintiff said, and this was not contested by the Defendants, that there is not likely to be any dividend from Mr. Mitri's estate.

To complete the narrative, in July 1980, the property was sold for $200,000 as the result of a mortgagee's sale initiated by Mrs. Porter as second mortgagee.

THE RELEASE OF THE DEPOSIT:

The allegations of negligence made by the Plaintiff against the Defendants arising out of the release of the deposit were:-

(a) That the said Michael Friedlander agreed to Brian Johns Ltd. disbursing the aforesaid deposit of Twenty-two thousand dollars ($22,000) as hereinbefore stated when he knew that the said Richard Dante Mitri did not have title to the land the subject of the aforesaid agreement for sale and purchase.

(b) That at the time he agreed to the disbursement of the said deposit the said Michael Friedlander was aware or had been alerted to the possibility that

(i) the Plaintiff did not have the right at law in the circumstances to require the said Richard Dante Mitri to convey the title to the Plaintiff and/or

(ii) The said Richard Dante Mitri might not be able to convey the title to the property to the Plaintiff.

(c) That the said Michael Friedlander was negligent in the circumstances in that he failed to serve written notice of any requisition or objection in respect of the title of the said property referred to in the said agreement for sale and purchase on the said Brian Johns Ltd. before the said money was disbursed in terms of the Real Estate Agents Act, 1976.

Evidence was given by both parties on what was the practice in the profession where a solicitor is acting for a purchaser from a vendor who is not the registered proprietor. I have considered this evidence conscious of the comments of Oliver, J. in Midland Bank Trust Co. Ltd. & Anor. v. Hett Stubbs & Kemp (1978) 3 All E.R. 571, when he said in relation to evidence from practising solicitors:-

> " I must say that I doubt the value or even the admissibility of this sort of evidence which seems to be becoming customary in cases of this type. The extent of the legal duty in any given situation must, I think, be a question of law for the court. Clerly, if there is some practice in a particular profession, some accepted conduct which is laid down by a professional institute or sanctioned by common usage, evidence of that can and ought to be received. But evidence which really amounts to no more than an expression of opinion by a particular practitioner of what he thinks he would have done had he been placed, hypothetically and with the benefit of hindsight, in the position of the Defendants, is of little assistance to the court, whilst evidence of the witness's view of what, as a matter of law, the solicitor's duty was in the circumstances of the case, is, I should have thought, inadmissible, for that is the very question which it is the court's function to decide."

It was common ground that a solicitor so acting should take immediate steps to satisfy himself that the unregistered vendor had an enforceable right to get on to the title so that he would be able to give a good title on settlement. It was also common ground that a proper way for the solicitor to be so satisfied would be to communicate in writing or by telephone with the vendor's solicitor and thereby obtain an assurance that the vendor, for instance, was the purchaser under an unconditional agreement for sale and purchase from the registered proprietor.

Where the witnesses evidence differed was on whether, as a normal practice within the profession, a

purchaser's solicitor should also obtain confirmation that the vendor was financially able to complete the purchase from the registered proprietor by the time for settlement of the second sale.

Mr. Robert Narev, a practitioner of long standing, experienced in conveyancing and commercial law, was called by the Plaintiff. He said that in such a position the practice in the profession was to check either, in the case of the solicitor upon whom he considered he could rely, by verbal assurance, or otherwise by obtaining and examining the documents establishing the chain of title, the settlement date, and that the amount paying by the vendor to his seller was such that he would be able to meet it from the funds due from the purchaser. However, he considered it was not the general practice to make enquiries about the vendor's financial ability to complete where the vendor was the registered proprietor.

Mr. Arthur Young, also a practitioner with considerable experience of conveyance, gave evidence for the Plaintiff. He said that the general practice was for the solicitor acting for the purchaser from an unregistered vendor to seek evidence of a documented and enforceable linkage between the registered proprietor and the vendor. As to how this should be done, he thought that the practice varied. He said:-

> " Is it the practice for vendor's solicitor to provide this information (relating to the date for settlement in the first transaction) by producing the documents themselves or leaving that to the competence of the purchaser's solicitor. I don't believe that either of those courses is standard practice. I don't believe there is a standard practice. On occasions assurances of the existence of a documented chain and of financial ability or arrangement for possession and settlement would suffice. "

In cross-examination he acknowledged that there was no general practice that assurances regarding the unregistered

vendor's financial ability to complete the purchase from the registered proprietor would be required. He thought a solicitor for such a vendor would probably go no further than say that he knew of no reason why the vendor would not settle.

Mr. Blanchard was called by the Defendants. He, too, is an experienced conveyancing practitioner and is also the author of a recognised text on agreements for sale and purchase. He considered the practice to be that a purchaser's solicitor would seek an assurance that the unregistered vendor had an enforceable right to get on to the title. In the absence of circumstances exciting submission, he would go no further. He did not consider that as a matter of practice the purchaser's solicitor would require to have produced copies of the documents through which the vendor could claim a title.

The Plaintiff relied on s.57 of the Real Estate Agents Act, 1976:-

> " 57. (1) Except in pursuance of an order of a court of competent jurisdiction or an authority signed by all the parties to the transaction, where a real estate agent receives any money (other than money received by way of rent from the letting of any land) in respect of any transaction, he shall not pay that money to any person for a period of 10 days after the date on which he received it; and if at any time while he holds any money on behalf of any party to the transaction he receives written notice of any requisitions or objections in respect of the title to any land affected by the transaction, he shall not at any time pay that money to any person except in pursuance of such an order or authority. "

The Plaintiff's contention was that when Mr. Friedlander found that Mr. Mitri was not on the title he should have enquired not only whether Mr. Mitri held an unconditional agreement but also the date for settlement under that agreement. Had he done so he would have discovered that Mr. Mitri had failed

to settle on the due date (the 10th May, 1979). This should have excited his suspicions. He should then, and for that reason, have served notice of a requisition as to title on the agent pursuant to s.57. This notice should have been to the effect that the Plaintiff had an objection in respect of the title to the land in that Mr. Mitri was not the registered proprietor, and that having regard to his failure to complete his agreement with Mrs. Porter on due date there is a doubt whether he would be able to obtain title to enable him to settle with the Plaintiff. Subject to any order of the court or agreement between the parties, this notice would have had the effect of protecting the Plaintiff's deposit until settlement when, if Mr. Mitri defaulted, the Plaintiff would have been able to recover his deposit from the agent.

The Defendants contended that the words "any requisition or objection in respect of title to any land" in s.57 had the same meaning as the words "any objection or requisition on the title" in the usual requisition clause in an agreement for sale and purchase. The discharge of the vendor's mortgages and the acquisition of the legal estate by a vendor having an equitable right to do so are matters of conveyance not title (Crump v. Reynell (1909) 29 N.Z.L.R. 366, Jonray (Sydney) Pty. Ltd. v. Partridge Bros. Pty. Ltd. (1969) 1 N.S.W.R. 621, C.A., Hinde, McMorland, Sim. Land Law, para. 10.072. Therefore it was contended the Plaintiff had no right to give to the agent a notice under s.57.

I do not accept that the words used in s.57 have the same meaning as the words used in the requisition clause in an agreement for sale and purchase. The requisition clause has a two-fold purpose. It limits the time within which a purchaser may requisition to 14 days, and, in the event of a requisition within time, it gives the vendor the right to rescind. Thus he

avoids a liability he might otherwise have to pay damages or compensation (see Hinde, McMorland & Sim (supra) 10.063). In both respects it benefits the vendor.

S.57 is for the benefit of a purchaser. The requirement for the deposit to be held for ten days means that at least for that period the deposit is available should there be problems with the contract. This could result in the proviso to s.56(1) being invoked whereby an agent that is in doubt as the person who is lawfully entitled to the deposit may retain it until that person has been ascertained. Then the requirement to hold the deposit upon receipt of a notice affords a further protection to the purchaser. The section refers to "notice of any requisitions or objections in respect of the title to any land affected by the transaction". These are words of wide effect. I see no reason for limiting them to what would be valid requisitions or objections to title under a requisition clause in an agreement for sale and purchase. The words would, in my view, include a notice from a purchaser that a vendor is not on the title as the registered proprietor of the land being sold. This would accord with the statutory objective of the section that a purchaser should be able to require the deposit to be held until the vendor's right to sell the land has been established. Once a valid notice has been given the agent must hold the deposit until an order of the court or all the parties to the transaction have authorised its payment. If, therefore, a vendor claims that a requisition or objection has been satisfied but the purchaser refuses to authorise the payment of the deposit, the vendor's remedy is an application to the court.

Although Mr. Friedlander was aware there was a statutory obligation on the agent to hold the deposit for ten days, he was unaware of the right of a party to a transaction to give a notice under the latter part of the section. It was

submitted on behalf of the Defendants that he was not negligent in not being aware of this statutory provision. It seems from the evidence that the provision is rarely used. I accept that a competent conveyancing practitioner may not, without enquiry, be aware of that provision:-

> " A solicitor is not bound to have a perfect knowledge of the law, but he should have a good knowledge. " (Cordery on Solicitors, 7th Ed., p.150).

But I consider that a competent solicitor, becoming aware of a need to endeavour to prevent a deposit held by an agent reaching a vendor, would, without difficulty, locate the provision. He would be aware of the Real Estate Agents Act, 1976, and that it included provisions relating to deposits on an agreement for sale and purchase. Had he reached for a leading New Zealand text on land law (Hinde, McMorland & Sim) he would have found in para. 10.064 express reference to the provision. This is not the sort of difficult legal concept such as whether an option was a clog on the equity of redemption, of which ignorance was held in Bannerman & Co. v. Murray (1972) N.Z.L.R. 411, not to amount to negligence. I consider, therefore, that if Mr. Friedlander had become aware of a need to endeavour to prevent the agent from paying the deposit to Mr. Mitri, then he would have been negligent had he not ascertained the existence of the latter part of s.57 of the Real Estate Agents Act, 1976.

There are two reasons why the Plaintiff's claim under this heading fails.

First, on the facts as I have found them, I do not consider that Mr. Friedlander was required or ought to have seen a need to do more than he did. Having received the agreement, and ascertained Mr. Mitri was not on the title, he telephoned

the agent Mr. Johns and made a firm request for the deposit to be held until he was satisfied about the vendor. Mr. Friedlander said that he reinforced this request by pointing out that there was a possibility of fraud and that if Mr. Johns paid out the deposit he could be a party to the fraud. Mr. Johns does not recollect the fraud reference. Then Mr. Friedlander sought and obtained from Mr. Berman an assurance that Mr. Mitri was the purchaser pursuant to an unconditional agreement from Mrs. Porter the registered proprietor. As an added precaution, because of the period that was to elapse before settlement, he placed a caveat on the title. Having taken these steps he then told Mr. Johns that he no longer had any reason or justification for requiring the deposit to be held. It was not until after the deposit was paid out that he learned from the Plaintiff that there may be some doubt about Mr. Mitri's financial ability to settle. Although by then the deposit had been paid out, he did make an enquiry from Mr. Berman concerning Mr. Mitri's liabilities. To that enquiry he received the reply set out in Mr. Berman's letter of the 4th July, 1979:-

> " You have requested information from us concerning our client's liabilities in respect of the land. Our client's mortgages in relation to the land total $210,000. However, he is well aware of his obligation to have sufficient funds to clear those mortgages and give your client the title in October, 1979. "

To that he replied with his letter of the 6th July, 1979, indicating that the caveat would not be released until he was completely satisfied as to Mr. Mitri's capability of meeting the shortfall.

I am satisfied that in following this course Mr. Friedlander acted properly and in accordance with normal practice. Until after he had acquiesced in the disbursement of the deposit

by the agent, there were no circumstances to excite suspicion. Having been assured that Mr. Mitri was the purchaser under an unconditional agreement from Mrs. Porter, he had no reason at that stage to believe the transaction was exceptional. In particular, even if he thought he had the right to do so, he had no reason to require the agent to retain the deposit.

Secondly, even if he had become aware of the latter part of s.57, and had served a notice on the agent on the grounds proposed while the agent was still holding the deposit, it is highly probable that Mr. Mitri would have forthwith applied to the court for an order that the deposit be paid to him. Settlement after all was four months away. He would hardly have been content to allow such a sum to remain in the agent's hands for that period without attempting to obtain it. In such an application he would have been able to demonstrate that he was the purchaser under an unconditional agreement for sale and purchase. Therefore he had a good equitable title to the land. Even if the Plaintiff had on such an application been able to demonstrate a possible difficulty by Mr. Mitri in discharging the mortgages, this difficulty would not, in my view, be held to be an objection in respect of the title to the land. It is therefore probable that an order would have been made, the deposit would have been paid over, and the Plaintiff would then have been in no better position than he was.

For these reasons I conclude the Plaintiff has failed to establish negligence against the Defendants based on the release of the deposit by the agent to Mr. Mitri's solicitors.

THE LAPSING OF THE CAVEAT:

The Plaintiff's allegation relating to the lapsing of the caveat is:-

> " That the Defendants were negligent in failing to obtain a hearing of the said notice of motion for an order directing that the Plaintiff's caveat not lapse prior to the expiration of the 28 day period specified in s.145 of the Land Transfer Act, 1952, and, as a consequence of the lapsing of the caveat, neither the Plaintiff's interest in the land nor any preferential right he then had to repayment of his deposit or to negotiate thereon was protected. "

The Defendants accepted -

(a) That they should not have allowed the caveat to lapse before obtaining a hearing of the motion. They were negligent in doing so.

(b) Had the motion been brought on for hearing within the 28 days required by s.45, the court would have made an order that the caveat not lapse.

Nor was any issue raised by the Defendants on whether the Plaintiff, as purchaser from a vendor who was not a registered proprietor, had a caveatable interest (see Catchpole v. Burke (1974) N.Z.L.R. 620). However, I shall later in this judgment consider the Plaintiff's interest in the land, which bears on whether that interest was caveatable.

The essential issue is whether, had the caveat not lapsed, the Plaintiff would have been any better off. Put alternatively, it is whether the Defendant's negligence in allowing the caveat to lapse caused the Plaintiff loss.

The caveat would not have protected the deposit. It could not prevent the deposit being paid to Mr. Mitri's solicitors. Therefore the lapsing of the caveat could have had no effect on any right the Plaintiff might otherwise have

had, to repayment of his deposit, nor, in my view, would it have assisted him on any negotiations relating to the repayment of the deposit.

But the caveat would have protected whatever equitable interest the Plaintiff had in the land as at the date of registration of the caveat, the 22nd June, 1979. It is therefore necessary to consider what were, at that time and subsequently, the equitable interests in the land and their order of priorities:

> " At law as in equity the basic rule is that estates and interests primarily rank in the order of creation, qui prior est tempora potior est jure: he who is earlier in time is stronger in law. "
> (Snell's Principles of Equity, 28th Ed., 47.)

Although prima facie priority in time is decisive, there can be circumstances arising out of the relationship between the parties or the conduct of the holder of the prior equity that renders the application of the general rule inequitable. The holder of the earlier equity may then be postponed.

This issue came before the Judicial Committee of the Privy Council in Abigail v. Lapin (1934) A.C. 491, J.C., when Lord Wright, in delivering the advice of the Juidicial Committee, said in relation to the emphasis placed on the conduct of the holder of the prior equity:-

> " This is in accordance with the judgment of Kindersley, V.C. in Rice v. Rice (1854) 2 Drew, 73, 61 E.R. 646, where the question was whether the equity of the plaintiff in respect of his lien as unpaid vendor should be preferred to that of a subsequent equitable mortgagee who had lent his money to the purchaser against a deposit of the title deeds and of an assignment showing payment of the purchase money in full. The opinion of the Vice-Chancellor no doubt has not been approved insofar as he says that

> priority in time is only taken as the test where the equities are otherwise equal: it is now clearly established that prima facie priority in time will decide the matter unless, as laid down by Lord Cairns, L.C. in Shropshire Union Railways & Canal Co. v. The Queen, L.R. 7 H.L. 496, that which is relied on to take away the pre-existing equitable title can be shown to be something tangible and distinct having grave and strong effect to accomplish the purpose. "

The agreement for sale and purchase of the 3rd November, 1978, extinguished one equitable interest and created two others.

Upon the completion of an unconditional agreement for sale and purchase the vendor, though retaining the legal estate, ceases to have an equitable interest in the land. He does have an equitable interest in the form of a lien on the unpaid settlement monies. The land he holds as trustee for the purchaser. The purchaser acquires an equitable interest in the land since he becomes the beneficial owner from the date of the unconditional agreement, even though his interest is conditional upon settlement and ultimate registration of a transfer (Firth Concrete Industries Ltd. v. Duncan (1973) N.Z.L.R. 188, Official Assignee v. Johnston (1974) 1 N.Z.L.R. 79).

Where by an agreement for sale and purchase a purchaser agrees to give to a vendor a mortgage in part payment of the purchase price, that agreement creates in the vendor an equitable interest in the land as mortgagee as from the date of the agreement. The equitable interest arises by the agreement to make the advance and keeps the priority it was given by that agreement (Wanganui-Rangitiki Electric Power Board v. The King (1932) N.Z.L.R. 1005, Swiss Bank Corporation v. Lloyds Bank (1980) 2 All E.R. 419, at 426, Witten-Hannah and Ors. v. National Bank of N.Z. Ltd. and Ors. (Wellington Registry, A.376/80, 2.12.82

Therefore, upon the agreement for sale and purchase

of the 3rd November, 1978, becoming unconditional, Mrs. Porter ceased to have an equitable interest as owner but she acquired an equitable interest as mortgagee. Mr. Mitri acquired an equitable interest as purchaser under the agreement.

I now consider whether, by entering into the unconditional agreement for sale and purchase of the 12th June, 1979, the Plaintiff acquired an equitable interest in the land. At the hearing before me both counsel based their submissions on the assumption that he did. But as this is crucial to the consequence of the lapse of the caveat, and counsels' assumption differs from the opinion expressed by Mahon, J. in Catchpole v. Burke (1974) 1 N.Z.L.R. 266, some further consideration is required.

In Catchpole v. Burke (supra), Mahon, J. had before him an application by a purchaser from an unregistered vendor that his caveat not lapse. The application was declined on the grounds that the sub-purchaser had no interest capable of supporting a caveat.

At p.269 Mahon, J. considered the effect of s.41 of the Land Transfer Act, 1952, on a sub-purchaser's interest. That section provides that no unregistered instrument "shall be effectual to pass any estate or interest in any land under the provisions of this Act". Mahon, J. considered that that section does not prevent a purchaser from a registered proprietor acquiring an equitable estate sufficient to support a caveat, but he considered it did in the case of a sub-purchaser. He concluded:-

> " The recognition of equitable interests in land under the Act is therefore limited, in my opinion, to those interests created by transactions to which the registered proprietor is a party. In this case the agreement for sale between purchaser and sub-purchaser creates contractual rights inter se and one of those rights will be the right of the sub-purchaser to

> seek specific performance and thus force the purchaser to seek the same remedy against the vendor. But even if, in accordance with the opinion expressed in Wroth v. Tyler (1973) 2 W.L.R. 405; (1973) 1 All E.R. 897, the sub-purchaser has this potential right to specific performance by the purchaser of his contract to transfer to the sub-purchaser the title to the vendor's land, nevertheless that contractual right cannot vest in the sub-purchaser any estate or interest in the vendor's land. As against that transaction, the vendor's title is not only indefeasible but immune from any equity possessed by the sub-purchaser. "

He considered the position would be otherwise if the purchaser had effectively assigned to the sub-purchaser the benefit of his contract with the vendor.

In the Court of Appeal (1974) 1 N.Z.L.R. 620, the appeal was allowed in reliance on a line of authority that had not been cited to Mahon, J. However, the court made some comments obiter on Mahon, J's views. At p.624, Wild, C.J. said:-

> " For my own part I would reserve my opinion on the views expressed by Mahon, J. on the effect of s.41 of the Act. That section must be read in its context. It forms part of Part III of the Act which relates to registration. Bearing in mind that "instrument" is defined in the Act as meaning any document relating to the transfer of or other dealing with land, what I think s.41 is really saying is that an instrument merely as such will not pass any estate or interest, but that upon registration of it in the prescribed manner the estate or interest will pass. I see nothing in s.41 to negate the general law that an agreement for sale and purchase of land passes a beneficial or equitable estate for which there is the authority of Jessel, M.R. in Lysaght v. Edwards (1876) 2 Ch.D. 499:
>
> > '. . . . .the moment you have a valid contract for sale, the vendor becomes in equity a trustee for the purchaser of the estate sold, and the beneficial ownership passes to the purchaser. . . .' (ibid 506).
>
> "

McCarthy, P., having agreed with the other ground upon which the appeal was allowed, also expressed some doubt on the rights of the parties as expressed by Mahon, J. He thought consideration would need to be given to:-

> " The effect of s.41, particularly having regard to what was said by the High Court of Australia in Barry v. Heider (1914) 19 C.L.R. 197, in relation to a comparable section, and the possible creation, notwithstanding that section, of equitable interests or rights in equity in a purchaser under an agreement for sale and purchase, interests or rights which are capable of enforcement by action. "

Speight, J. at p.625 also expressed the view that the question of a caveatable interest is distinctly arguable.

In Barry v. Heider (supra) the High Court of Australia considered whether a mortgagee of an unregistered purchaser acquired an equitable interest. This then is a situation comparable to a sub-purchaser. The main contention advanced by the appellant was that an unregistered instrument is inoperative to create any right with respect to the land itself. That argument was founded upon s.41 of the Real Property Act, 1900, which contains provisions similar to s.41 in the Land Transfer Act. Griffith, C.J., commenting on this contention at p.205, said:-

> " It is now more than half a century since the Australian colonies and New Zealand adopted, in substantially the same form but with some important variations, the system sometimes called the "Torrens" system, which is now in New South Wales embodied in the Real Property Act, 1900. With the exception of one decision in South Australia, soon afterwards over-ruled, the contention of the appellant has never been accepted in any of them. "

Nor was it accepted by Griffith, C.J.

conclusion at p.216:-

> " Consequently, s.41, in denying effect to an instrument until registration, does not touch whatever rights are behind it. Parties may have a right to have such an instrument executed and registered; and that right, according to accepted rules or equity, is an estate or interest in the land. Until that instrument is executed, s.41 cannot affect the matter, and if the instrument is executed it is plain its inefficacy until registered - that is, until statutory completion as an instrument of title - cannot cut down or merge the pre-existing right which led to its execution. "

Helpful in considering the proper interpretation of s.41 is the decision of the Full Court of Queensland in O'Regan & Anor. v. Commissioner of Stamp Duties (1921) St R Qd 283. The case involved the application of revenue statutes, but that in turn required a consideration of whether an equitable interest in land had arisen as the result of an unregistered transfer. Delivering the judgment of the court, Lukin, J., after referring to Barry v. Heider (supra) had this to say concerning the comparable provision:-

> " We think the meaning of the word "effectual" is made clearer by a contrast of its meaning with that of the word "effective". "Effective" merely means producing some effect. But "effectual" means the producing of some special or intended effect and doing it so completely as to leave nothing further to be desired. For the various reasons set out above it seems to us that the word "effectual" in the words "no instrument shall be effectual to pass any interest etc. until registration" cannot be taken to mean that no instrument shall have any effect whatever, but to mean "no instrument shall have power to confer an unquestionable and indefeasible title etc. until registered". It does not affect, as between the transferor and transferee, equitable or statutory rights, interests or claims arising out of transactions between the registered proprietor and the unregistered transferee, so long as the interests of persons acting and dealing on the faith of the entries in the register were the registered proprietor and not unduly prejudiced. "

I prefer the approach adopted in Barry v. Heider (supra) and O'Regan & Anor. v. Commissioner of Stamp Duties (supra) and the tentative view expressed by Wild, C.J. in the Court of Appeal in Catchpole v. Burke to that expressed by Mahon, J. in Catchpole v. Burke in the High Court.

That learned Judge accepts that s.41 does not prevent an unregistered purchaser acquiring an equitable interest in the land from the registered proprietor. With that view I with respect agree. If s.41 allows such an estate or interest to pass, then I can see no reason why it should not also allow a like estate or interest to pass from a purchaser to a sub-purchaser. That it can in the case of a mortgagee of a purchaser was accepted by the High Court in Barry v. Heider. Further, it is consistent with the situation of the parties to an agreement for sale and purchase as described in Williams on Title, 3rd Ed., 665:-

> " As regards the land (the vendor) becomes as between himself and the purchaser constructively a trustee for the purchaser with the right to be indemnified by the purchaser against the liabilities of the trust property, and the purchaser becomes the beneficial owner with the right to dispose of the property by sale, mortgage or otherwise, and to devise it by will. " (Emphasis added)

This passage was cited with approval in Firth Concrete Industries v. Duncan (supra) and Official Assignee v. Johnston (supra).

One of the prerequisites for an agreement for the sale of land to pass the beneficial interest in the land is that such an agreement must be enforceable by a decree of specific performance. The view that a sub-purchaser acquires such an equitable interest is reinforced by the fact that that sub-

purchaser has the right to enforce his interest against the original vendor. In Shaw v. Foster (1872) L.R. 5 H.L. 321, at 349, the principle was thus stated:-

> " And it is farther very clear that the interest so vested in the purchaser may be the subject of charge or assignment and that the sub-assignee or incumbrancer may enforce his rights against the vendor at all events if he assumes the position of the vendee and fulfils the duties and sustains the liabilities created by the contract. "

This principle was applied in relation to Land Transfer land in Naismith v. Smith (1954) V.L.R. 567. Hudson, J. held that the principle that I have cited from Shaw v. Foster (supra) applies in the case of a sub-purchaser of land that was under the provisions of the Transfer of Land Act, 1928.

For these reasons it is my conclusion that when the Plaintiff signed the unconditional agreement for sale and purchase with Mr. Mitri, he thereby and at that time acquired an equitable interest in the land by virtue of that agreement.

It remains to consider the mortgage to Kensington, Haynes & White Nominees Ltd. As the result of an earlier approach Mr. Berman wrote to Mr. Mitri on the 2nd May, 1979. This letter was not produced, but Mr. Berman said that in it he indicated that a mortgage of $60,000 was available for Mr. Mitri and asked Mr. Mitri to contact Mr. Berman confirming that he needed it. This Mr. Mitri did within a day or two. The evidence does not establish what was the result of that contact. In particular Mr. Berman did not state whether Mr. Mitri indicated a desire to take up the offer of the mortgage some time in the future, or whether Mr. Mitri entered into an agreement to accept the mortgage at that time. I think the former is more likely than the latter because at that time - in early May - Mr. Mitri was still unable to settle with Mrs. Porter. He was only able

to do so when he obtained the Plaintiff's deposit in June. Anyway, an equitable mortgage of land must be evidenced in writing (Contracts Enforcement Act, 1956, s.2(1)(c), Brannigan v. Official Assignee of Brannigan (1926) N.Z.L.R. 423). If there were an agreement to mortgage as the result of Mr. Mitri contacting Mr. Berman after receipt of the letter of the 2nd May, 1979, there is no evidence of writing nor is there any suggestion of part-performance until the mortgage documents were completed and the advance made.

The memorandum of mortgage between Mr. Mitri as mortgagor and Kensington, Haynes & White Nominees Ltd. as mortgagee, is dated the 29th June, 1979. The date of the advance is stated in it to be the 21st June, 1979. Mr. Berman said the advance was made on the 29th June, 1979, when he used it to settle the purchase from Mrs. Porter.

In my view the equitable interest in the land resulting from the Kensington, Haynes & White Nominees Ltd. mortgage arose when the advance was made and the memorandum of mortgage entered into, which appears to have been the 26th June, or certainly no earlier than the 21st June. In either event it was later in time than the Plaintiff's equitable interest.

It was not suggested that there was any conduct on the part of the Plaintiff or any other party that should take away or affect the Plaintiff's pre-existing equitable title. Had the solicitors acting for the mortgagee searched the title on the day the advance was made, they would have found the caveat and discovered the Plaintiff's equitable interest.

It was, however, submitted by the Defendants that the Porter/Mitri agreement envisaged a vendor's mortgage of $150,000, plus the right to a first mortgage of $60,000.

Although the first mortgage monies were not advanced until the 29th June, 1979, this advance, it was submitted, was part of a composite transaction that should be considered to have arisen when the agreement was signed or at least when the arrangement to provide the mortgage advance was made early in May. I do not accept this submission. The agreement provided that the purchase price should be paid by the purchaser executing in favour of the vendor a first mortgage on terms set out in the agreement that included the following:-

" (e) The mortgage shall include the following clause:

'That the mortgagor not being in default hereunder, the mortgagee will, at the mortgagor's expense, execute all such memoranda of priority and other documents as shall be necessary to enable the mortgagor to have registered as a first mortgage over the land in priority to this mortgage and from time to time a first mortgage in substitution for any existing first mortgage PROVIDED THAT such first mortgage shall not secure a principal sum greater than $60,000.' "

Thus it created no agreement to mortgage binding on Mr. Mitri. Nor was this right to register a first mortgage in priority to Mrs. Porter's mortgage necessarily part of the purchase transaction. It conferred no more than a right which Mr. Mitri could exercise at any time while Mrs. Porter's mortgage was registered against the land to have a further mortgage for an amount not exceeding $60,000 be given priority over Mrs. Porter's mortgage. The existence of this right cannot, in my view, affect the time at which Kensington, Haynes & White Nominees Ltd. acquired an equitable interest in the land.

What then would have been the position when settlement of the contract between Mr. Mitri and the Plaintiff became due on the 13th October, 1979, had the caveat not lapsed? The sale between Mrs. Porter and Mr. Mitri would have been completed. The National Bank mortgage would have been

discharged. Kensington, Haynes & White Nominees Ltd. would have made its advance and that company would have held an appropriate mortgage. Mrs. Porter would hold a second mortgage for $150,000 of the purchase price. However, the transfer and the two mortgages could not have been registered because of the Plaintiff's caveat.

Upon Mr. Mitri's failure to settle, I consider that the Plaintiff would then have been advised that he should bring an action for specific performance against Mrs. Porter and Mr. Mitri. He would thereby seek an order that Mrs. Porter transfer the land to the Plaintiff upon the Plaintiff assuming Mr. Mitri's liabilities to Mrs. Porter. Alternatively, he would seek an order that Mr. Mitri be required to enforce his agreement with Mrs. Porter and then to transfer the land to the Plaintiff. In that even the Plaintiff would receive the land subject to Mrs. Porter's mortgage. He would then be able to discharge that mortgage plus any interest due thereon out of the balance purchase price due to Mr. Mitri. In the result he would acquire a clear title for no more than the price he had contracted to pay under the agreement.

This would be a significantly different position from that which occurred as the result of the lapse of the caveat. Then, as was made clear in the judgment of Chilwell, J., the Plaintiff's interest as purchaser ranked after both mortgages which were, of course, by then registered on the title. In those circumstances an action for specific performance would achieve little because the amount required to release the two mortgages together with interest that had accrued thereon would have been substantially more than the balance purchase price payable by the Plaintiff.

Had the caveat not lapsed and the Plaintiff received the advice to which I have referred, I believe he would have proceeded with the action for specific performance. He said that he had no doubt that had he been able to settle on the original terms he would have been happy to do so. He made a tender of settlement on the 15th November, 1979. Further, an action for specific performance would have appeared to him to have been the only way to secure the benefit of the $22,000 deposit he had paid. Mr. Mitri's precarious financial position must by then have been apparent. Certainly the Plaintiff said in evidence that by November he decided against an action for specific performance and to endeavour to recover his deposit by action against Mr. Mitri, because the whole transaction seemed to have turned sour. So it had. But in my view this was because the Plaintiff had lost the advantageous position he would have enjoyed had his first caveat not lapsed.

For these reasons I am satisfied that the negligence of the Defendants in allowing the caveat to lapse caused the Plaintiff to lose the opportunity to complete his purchase on the terms set out in the agreement into which he had entered.

DAMAGES:

The Plaintiff advanced his claim for the damages resulting from the lapsing of the caveat on the basis that he thereby had lost the value of the bargain. Alternatively, it was advanced on the basis of wasted expenditure.

The lost bargain principle in the context of professional negligence is thus stated in Dugdale & Stanton on Professional Negligence, para. 33.15:-

> " In a number of situations a professional person employed as an agent may owe an obligation to ensure that a bargain is secured for his principal. If the agent negligently fails to achieve this result, the measure of damages owed to the principal will be the value of the lost bargain to him. "

This principle was applied in the case of a negligent solicitor in Jarvis v. T. Richards & Co. (1980) 124 Sol.Jo. 793, where a plaintiff was entitled to recover the value of the flat she would have received under an agreement that she was unable to enforce because of the negligence of her solicitor.

The more common method of assesing lost bargain damages in a transaction of this kind is to take the difference between the market value and the contract price. Here there is no evidence that there was any difference. Rather the price received at the mortgagee's sale suggests that the contract price was close to the market value.

Part of the value of the bargain into which the Plaintiff had entered was the deposit he had paid in accordance with the agreement. Had the agreement been concluded he would have received the value of this deposit because it was also part payment of the purchase price. As a consequence of the loss of his bargain with Mr. Mitri he also lost the value of the deposit that he had paid.

It was submitted on behalf of the Defendants that if the deposit were to be taken as the measure of damages, then the maximum damages should be $17,350, being the amount of the deposit less the agent's commission of $4,650. The agent had a lien for that commission pursuant to s.50(4) of the Real Estate Agents Act, 1976. I do not accept this submission. It is, of course, correct that Mr. Mitri as vendor received

$21,350. But as far as the Plaintiff was concerned the full $22,000 was in part payment of the purchase price. Therefore when he lost his bargain he lost the benefit of the full sum, not the net amount after deduction of the agent's commission.

In advancing the alternative wasted expenditure approach, Mr. Bryers referred to McGregor on Damages, 14th Ed., p.26:-

> " Sometimes, however, the plaintiff may be compelled by law or by circumstances to frame his suit on a different basis as to damages, not on the basis of the loss of his bargain, but on the basis of his out-of-pocket loss. In other words, he is claiming not to be put into the position he would have been had the contract been performed, but to be put into the position he would have been had it never been made, which is a normal measure of damages akin to that in tort. In such cases expenses incurred in preparation or in part performance will be properly recoverable and will not involve an inconsistency of compensation. "

It is not necessary to rely on the waste of expenditure ground in connection with the deposit.

It is relevant to the claim for architectural fees of $540.46. These were incurred after the Plaintiff signed the contract with Mr. Mitri and after the Plaintiff entered into his contract with the Defendants, made when the Defendants were instructed to act for him. Thus it is not necessary to consider this claim in the context of pre-contract expenditure (Lloyd v. Stanbury (1971) 2 All E.R. 267, Anglia Television Ltd. v. Reed (1971) 3 All E.R. 690, C. & P. Haulage v. Middleton (1983) 3 All E.R. 94).

The account was for drawing up plans for altering the premises at 10 Arney Crescent. As the result of the loss of the bargain that expenditure was wasted. It is therefore

The Plaintiff also claimed $935.20 legal costs in bringing the proceedings against Mr. Mitri and obtaining his adjudication in bankruptcy. Mr. McElrea accepted that these were expenses the Plaintiff was bound to incur because had he not attempted first to pursue his claim for recovery of the deposit from Mr. Mitri, his failure to do so could properly have been raised by the Defendants in defence of any claim against them. These costs then are also recoverable.

JUDGMENT:

The Plaintiff is entitled to judgment against the Defendant for $23,475.66.

He is also entitled to interest at 11%. $22,000 carries interest from the 1st February, 1980, being a date to allow a period in which the Plaintiff would have been able to bring his action for specific performance against Mrs. Porter and Mr. Mitri to a conclusion. The architect's fees of $540.46 carrie interest from the 24th September, 1979, being the date of the account. The fees of $935.20 carry interest from the 25th March, 1981, being the date of the account.

He is also entitled to costs according to scale, together with witnesses' expenses and disbursements to be fixed by the Registrar.

Solicitors:

Martelli, McKegg, Wells & Cormack, Auckland, for Plaintiff.

Russell, McVeagh, McKenzie, Bartleet & Co., Auckland, for Defendants.