NZLR

IN THE HIGH COURT OF NEW ZEALAND
NEW PLYMOUTH REGISTRY

A.No.64/83

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BETWEEN RONALD KENT ASHFORD of Auroa, Furniture Maker and NARELLE PATRICIA WYLIE of Auroa, Furniture Finisher

Plaintiffs

AND NOEL GLENDINNING JONAS of Onaero, Farmer

Defendant

Hearing: 22, 23 August, 1984.

Counsel: Valery Sim for Plaintiffs.
G. Ross for Defendant.

Judgment: 23 August, 1984.

(ORAL) JUDGMENT OF VAUTIER, J.

This is an action in which the plaintiffs seek an order decreeing specific performance of an oral agreement relating to an interest in land namely the grant to them of an easement over the land of the defendant. The claim is advanced on the basis that the agreement has been partly performed and should therefore in equity be the subject of the decree sought. The plaintiffs accept that in terms of s.2(2) of the Contracts Enforcements Act 1956 the agreement is unenforceable unless it can be shown that the doctrines relating to part performance are applicable in the circumstances.

I proceed, first, to refer to the background circumstances in which the parties came to deal with each other, the nature of the case put forward by the plaintiffs and the areas

of factual dispute between the parties. The plaintiffs and the defendant are the respective owners of adjoining pieces of rural land. The land of the plaintiffs consist of 3.0401ha developed as an orchard and nursery. The defendant is the owner of a large adjoining area used for dairy farming. In about the year 1977 the defendant sold off part of his farm property to a Mr Idione, a property developer, for sub-division by him. Not long after this the defendant and Mr Idione approached the plaintiffs with a proposal for the creation by damming of a small lake or pond in an area forming the boundary between the plaintiffs' property and the defendant's property. An unnamed stream apparently formed a swampy area at this point which area fell partly within the plaintiffs' land, partly within the defendant's land and partly within the area of land which had been transferred by the defendant to Mr Idione although this portion of land was later used as part of the reservation contribution for the latter's sub-division. A main purpose of the formation of this small lake, it was agreed by all parties, was to improve the aesthetic situation in that area. According to the plaintiffs, however, the other parties concerned also made reference to the possible use of the water which would be gathered in the pond as an alternative source for irrigation purposes and for fire fighting emergencies. The defendant, however, maintained that beautification of the area was the sole consideration and the only matter which was discussed when the parties were considering this matter. The proposal involved flooding portion of the land of the plaintiffs. They were asked for their consent to the proposal and the plaintiff Mr Ashford said that he gave this because of his desire to have this alternative source of water as well as with a view to general improvement of the appearance of the area.

He also maintained that the consent which he signed in respect of the application made for the necessary approval under the Soil and Water Conservation Act 1967 of the damming of the stream all proceeded on the basis that there were these alternative objectives in view. No documents were produced to the Court with regard to the application for the authority to dam the stream but it was not disputed that the application was granted and the lake formed and that, following this, the plaintiffs made application for a water right to enable them to take water from the lake thus formed for the purposes of irrigation of their orchard and nursery. Unfortuantely the application which they made contained a gross overstatement as to the amount of water which they wished to take, owing, it seems to some miscalculation in the course of converting gallons to litres. The plaintiffs concluded from the printed form which they were required to complete that they were obliged to state the maximum daily capacity of the size of pump which they proposed to use and in this way they mistakenly gave a figure of 432,000 litres per day whereas, correctly calculated, the figure should have been 98,000 litres per day. Furthermore, they had in fact no intention of using the pump for 24 hours a day and their actual draw, the plaintiff Mr Ashford said, would probably have been no more than 22,500 litres daily. These aspects of the matter, again, were not in any way in dispute. The plaintiffs at this time were very much in need of an alternative source of irrigation as the supply they had had from the land of an adjoining owner on the other side of the property had been interrupted by bulldozing carried out when a road was being constructed along that boundary and this supply, it seems was in any event insufficient.

Following the making of the application by the plaintiffs, as I have mentioned, to the Taranaki Catchment Commission and Regional Water Board (the Board) for the grant of a water right, the plaintiffs, they said, were, because of the tenor of their conversations with the defendant and Mr Idione as to the alternative use that the lake created could be put for irrigation purposes, shocked to learn that there were objectors to the grant of their water right which included both Mr Idione and the defendant himself. There were also two other objectors, being the owners of property further downstream from the ponded area. The plaintiffs then received a letter dated 9 October, 1978 from the Board referring to their application to take 432,000 litres of water per day and to discussions which the Board's officers had had with the defendant and Mr Idione and others. In this it was said that the Board's officers had concluded that the taking of water on the scale referred to would be likely soon to deplete the lake. The plaintiffs were infomred that the Board might be prepared to approve a monitored supply of water for the ensuing season, the implication being that the Board wished to consider just what the draw-off was which the plaintiffs were contemplating before they further considered their application. The letter concluded by saying that the application was unlikely to be granted "at this stage". Other alternatives by way of sinking of bores or wells were suggested to the plaintiffs.

Following his discovery of the mistake in calculation which the plaintiff Mr Ashford said he made known to the defendant, the plaintiffs received a visit from the defendant which they say was at their bach on their property. At this discussion,

at which both the plaintiffs were present, there was mention made by the defendant, Mr Ashford said, of the reasons which had motivated him in opposing the application of the plaintiffs for the water right. It was said, according to Mr Ashford, that the defendant did not wish to see the aesthetic qualities of the lake deteriorated by what he termed a muddy edge and he referred to the fact that he was considering establishing a home for his mother overlooking this small lake and that he would need water for that. At this same discussion the defendant, according to the evidence of the plaintiffs, made reference to the fact that he had a stream on his property from which he would permit the plaintiffs to draw the water they required. There was discussion as to the quality and volume of the water and as to whether it would constitute a continuous source. The source referred to was from a stream called the Motukara Stream, a portion of which ran through the defendant's property. It had apparently been used earlier as a continuous source of supply for a dairy factory which was no longer operating. The plaintiff Mr Ashford said that he made it clear to the defendant that he was fully acquainted with the legal implications relating to the erection of buildings and pipelines on the land of another person and the legal requirements to secure a right to convey water in this way over someone else's land. He was also, he said, aware of and made known his concern for the fact that it would be considerably more costly for him to obtain the water from the source suggested because of the much greater distance involved and the fact that the water would have to be pumped to a higher level. He made reference in relation to the matter of water rights to a relative of his who had been a circuit Court Judge in the United States and very much concerned in his work with

the matter of water rights. The upshot of the discussion, according to the plaintiffs, was that they would be granted an easement to enable water to be conveyed over the defendant's land from the stream in question. It was realised, of course, by both parties, that the water right itself would have to be obtained by application to the Board. The defendant was also concerned, according to the plaintiff Mr Ashford, with the question of the legal expenses and the surveying expenses and it was stipulated and agreed that these should be met by the plaintiffs and there was also agreement with regard to the question relating to the appearance of the pump house building. The agreement arrived at, according to the plaintiffs, was for permanent access to convey the water and a legal easement for this purpose. The whole basis of the discussion and the offer thus made, according to the plaintiffs, was the desire of the defendant to avoid water being taken from the lake which had been formed as already mentioned on the mutual boundary between the properties of the plaintiffs and the defendant. Immediately following this discussion the plaintiff Mr Ashford wrote to the Board and explained the major error which he had made in completing his application already before the Commission and advising the actual quantity of water which he would be contemplating using from the lake but at the same time he made reference to the fact that he had been offered this other source of water, namely that from the Motukara Stream and following this and according to the plaintiffs, in accordance with the clear understanding and agreement reached with the defendant they withdrew their application to take water from the lake and their application was amended to one seeking a water right to take water from the stream on the defendant's property at a

point which had been agreed by this time between the parties. There was no disagreement on the fact that a site for the pump house and the pipeline was agreed upon in discussion between the parties and indeed the defendant said that he suggested an alternative site to that which the plaintiff Mr Ashford had first proposed as being a more advantageous site in the latter's own interests.

The plaintiffs also put in train the obtaining of the necessary survey for the purposes of the registration of the legal easement and thus the firm of surveyors, Messrs. Dennis and Catchpole, were instructed and they proceeded, it seems, on to the land to take all the necessary measurements and a survey plan in the usual form for lodging with the District Land Registrar's Office was prepared dated January, 1979. The surveyor concerned, Mr Catchpole, was not called but by consent the plan prepared was put in and this contained a note to the effect that the original master copy of the plan had been forwarded by Mr Catchpole to the solicitors for the defendant for signing by him and forwarding to the District Land Registrar for approval and disposal in the usual way. The fact that this was done in February, 1979 was confirmed by a note to that effect on the surveyor's account for $141.80 which the plaintiffs paid as they said they had agreed to do.

The pump house was constructed, a supply of electric power brought in from a nearby source on the defendant's property and the pipeline and ancillary equipment were all completed at a total cost estimated of $3,314.00 of which the sum of $2,454.00 was for materials. The plaintiffs did the actual work themselves

and included an estimated cost of the labour. From the dates of the invoices referred to in the statement produced it appears the work extended over some two or three months in all. Thereafter the supply of water was duly obtained by the plaintiffs and it is still so being obtained by them.

It should here be mentioned that the plaintiffs and the defendant had clearly at this time become friendly neighbours and persons who met socially.

The survey plan forwarded to the solicitors was not returned or sent to the District Land Registrar and, according to the plaintiff Mr Ashford and the plaintiff Miss Wylie, a number of requests were made from time to time of the defendant to complete the necessary documents so that the matter of the granting the easement could be completed in the manner required. According to the plaintiffs the defendant, however, prevaricated about this and made differing excuses over the lengthy intervening period. At some times, it was said, he claimed he was too busy to attend to the matter but would do so as soon as he could. On at least one other occasion he made reference to some bulldozing work which he wished to carry out and said that he did not wish to sign the documents until this had been done and it was suggested he expressed anxiety about his liability if there was any damage to the pipeline if he had signed the documents. At all events the matter simply drifted on in this way until May, 1983 when the situation arose that the plaintiffs wished to sell their property. In view of this they sought to make strenuous efforts to have the easement properly completed and registered and then they were met with a complete refusal to grant the ease-

ment. The letter of the solicitors for the defendant, dated 21 April, 1983 produced showing that all that was then said was that the defendant was not prepared to grant an easement but was prepared "to allow the present arrangement to continue in the meantime". The present proceedings were accordingly issued on 28 November, 1983.

It is finally necessary to state the version of the events which is advanced by the defendant himself, he being the only witness for the defence. According to Mr Jonas in his evidence in chief the lake or pond abutting on the mutual boundary was to be formed solely for aesthetic reasons and he did not at any stage contemplate any water being taken from the lake for irrigation purposes. So far as the taking of water by the plaintiffs from the Motukara Streat at a point where it ran through his property was concerned, the defendant said that this arose and was permitted simply because of his friendship with the plaintiffs and his desire to help them in the predicament in which he knew they were because of the interruption in their existing supply of water. He claimed that there was never any question of him granting an easement over his land for the conveyance of the water and that all that he agreed to was to do what he had done with other neighbours, that is to agree to a supply of water in an informal way and as a personal favour to the plaintiffs themselves and not to anyone else. Although the plaintiff Mr Ashford had said that in the course of the discussion at the bach to which I have already referred that there was mention made of the fact of the defendant having already sold some of his land for sub-division and of the natural concern of the plaintiffs that there should be the registered easement so

that it would be a permanent arrangement, the defendant himself said nothing about this aspect or what was to happen as regards the plaintiffs' supply of water in the event of his selling the portion of land over which the plaintiffs' pipeline ran.

It becomes necessary, therefore, first of all, to resolve the matters of fact in this case in which there is dispute between the parties and a conflict of evidence. The first matter of conflict to which I refer is the matter of the contemplated objectives of the parties when the lake on the common boundary was to be formed and the permission under the Soil and Water Conservation Act sought for that purpose. Although the plaintiff Mr Ashford was cross-examined at some length as to his evidence relating to the irrigation purpose being mentioned and it was suggested that he was in conflict with both Mr Idione and the defendant on this matter, the position which finally emerged was that the situation was, in my view, obviously exactly as the plaintiff Mr Ashford had described it. This indeed was consistent with the terms of the Board's letter to the plaintiffs to which I have already referred, the letter dated 9 October, 1978 in that that letter specifically referred to discussions which the Commission's officer had had with the defendant and other persons and continued by saying "the four objectors to your application, including the landowner, the developer and the nearby motel owners, all state that the quantity of water available is barely sufficient for their requirements and no further abstractions should be allowed". The letter in question thus made primary reference to the question of the quantity of water available for the various users from the lake in question. Then, however, the position which emerged finally in cross-examination

of the defendant Mr Jonas, made matters completely clear in that he admitted that both in the application in respect of the damming of the unnamed stream and the advertisement of the application there was reference to the matter of the use of the water for irrigation. It therefore became apparent that all the energetically pursued assertions that the lake was originally formed purely for aesthetic reasons were without substance.

Then, as regards the principal matter, i.e. the actual terms of the discussion just prior to the application for amendment of the plaintiffs' water right application, I am constrained to take note that the defendant when he gave evidence seemed to be vague on many of the essential matters traversed by the discussion. He repeatedly prefaced his statements with the qualifying words "To the best of my recollection", "I believe this" to be so or not to be so and similar expressions. On the vital matter of whether the use of the pond or lake for irrigation purposes was discussed at the time when the offer of the water from the Motukara Stream was being discussed I note that the defendant at first said "I don't believe that it was". Only a few moments later, however, when the matter of the Board's suggestions of the monitoring use and the resort to bores was mentioned he answered the question put to him:

"Was that discussed, either of those options?"

by saying -

"Not in any detail they were not".

There was thus a clear conflict in what he had said only a very short time before. There was similar uncertainty in his evidence as to when the term "legal easement" was first used and I also

find it noteworthy that there was put to the plaintiff Mr Ashford the following question in cross-examination:

> "If Mr Jonas in his evidence says that the matter was not discussed after the arrangements were put in place, the pipeline was installed, until the highway discussion if I can call it that last year, would you say he is mistaken?"

The plaintiff's answer was:

> "My evidence is that we have contacted him several times since then."

Then when the defendant himself came to give evidence it became apparent that the defendant was admitting that there had been discussions about the non-completion of the documents relating to the easement over the intervening years. The inevitable inference from such matters as this was that the defendant had from time to time given different versions of what has transpired between himself and the plaintiffs. There was the defendant's evidence, also, with regard to the important question of the mention of the survey at the original discussion on the plaintiffs' property. First, in his evidence the defendant admitted that this matter was mentioned at that time, then later he denied that it was, but having had his attention drawn to the earlier statement made by him on the previous day of the hearing he acknowledged that it was.

A further factor which I take into account is that the defendant finally in cross-examination admitted that it was a condition of his granting the right to the plaintiffs to take the water over his land that the plaintiffs should meet all survey and legal costs. It has also to be taken into account

that the defendant admitted that the survey plan was in the hands of his solicitor in February, 1979 or thereabouts and that at that time he did have a discussion with his solicitor about the matter.

Finally, in reaching a conclusion as to the findings which I should make in this case, I must refer to the impression made upon me by the witnesses in the witnessbox. I have already given some indication that Mr Jonas equivocated in many instances and seemed to be having difficulty in recollecting just what had occurred. Mr Ashford, on the other hand, particularly impressed me as giving his evidence in a very frank and straightforward manner.

Taking into account all the matters to which I have referred and weighing up the evidence as a whole I unhesitatingly conclude that there was an oral agreement entered into between these parties whereby the defendant, in consideration of the plaintiffs agreeing to discontinue their application to seek a water right in respect of the lake area, agreed to grant them a legal easement over his land to enable them to take water, if the necessary water right was obtained, from the Motukara Stream across his property.

That finding in itself of course does not enable the plaintiffs to succeed in their claim because the defendant has expressly pleaded the statute and the fact of the agreement not being in writing. It is therefore necessary to consider whether the plaintiffs can obtain the relief they seek on the equitable ground of part performance.

As to the law relating to this aspect of the case, Miss Sim has referred me to the conditions referred to in Fry on Specific Performance, 6th Edn., p.276 which it is necessary to show pertain in order that the contract may be removed from the operation of the statute. The statute in England, of course, is now s.40 of the Property Law Act:

> "In order thus to withdraw a contract from the operation of the statute, several circumstances must concur; 1st, the acts of part performance must be such as not only to be referable to a contract such as that alleged, but to be referable to no other title; 2ndly, they must be such as to render it a fraud in the defendant to take advantage of the contract not being in writing; 3rdly, the contract to which they refer must be such as in its own nature is enforceable by the Court; and 4thly, there must be proper parol evidence of the contract which is let in by the acts of part performance."

The statements in Fry, of course, pre-date the decisions in Kingswood Estates Co. Ltd. v. Anderson (1962) 3 All ER 604 and Steadman v. Steadman (1974) 2 All ER 977 which now must be regarded as the leading authorities on the question of the doctrine of part performance. I therefore deem it desirable to refer to the way in which the matter is set forth in Chitty on Contracts, 24th Edn., Vol.1, para. 254:

> "Acts must point to existence of a contract. The acts of part performance relied on must be such as to be referable to some contract, and may be referred to the alleged one; they must prove the existence of some contract, and be consistent with the contract alleged. In Maddison v. Alderson (1883) 8 App.Cas.467 the House of Lords held that an oral contract between an intestate and a woman, that he should devise to her a life estate in land, in return for her promise to serve him as his housekeeper without wages, could not be enforced merely because the woman had served without wages for many years up to his death, since her service might have been for reasons other than the alleged contract. In his work on Specific Performance Fry L.J. further stated that the acts of part

> performance must be referable to "no other title" than the alleged contract; but this view "has long been exploded." If the obvious explanation of the acts is that they were done with reference to a contract, the doctrine of part performance applies although some ingenious alternative explanation for them can be suggested. It is only necessary that the acts relied on should, on the balance of probabilities, point to some contract, and either show the nature of or be consistent with the oral contract alleged."

The decision in Steadman v. Steadman (supra) already referred to, to which there is reference in Chitty following the passage which I have just quoted has, of course, extended the ambit of the doctrine as previously understood, particularly with reference to the question of payment of money which in itself has not on the basis of the earlier authorities been regarded as in itself sufficient to constitute part performance. It is not, of course, necessary here to rely upon the actual decision in Steadman v. Steadman (supra) because the acts of part performance relied upon are of quite a different nature and indeed are acts which in my view fall within the earlier authorities and in particular comply with the requirements of the earlier leading case of Maddison v. Alderson (1883) 8 App.Cas.467 in being clearly actions referable to the actual contract alleged by the plaintiffs. They are these, as relied upon by the plaintiffs, i.e. first, the amending of the plaintiffs' application for a water right and the substitution of the application for a right in respect of the Motukara Stream. That, I accept, as was submitted, is consistent only with some prior agreement between the plaintiffs and the defendant because of course if a right was obtained that water could not be used other than by it being conveyed over the land of the defendant. Next is the matter of the entry on the land of the defendant for the

laying of the underground pipes, the erection of the pumphouse, the installation of the pump and the installation of the electric power cabling. As to this aspect Miss Sim, I think, justifiably relied upon the early decision in England of Morphett v. Jones 1 Swanston 172, 37 ER 45. The passage there referred to is from the judgment of the Master of the Rolls Sir Thomas Plumer and reads thus:

> "...where a person not in possession makes an agreement with the owner, and enters into possession, such possession has always been held to be a performance, because it is an unequivocal act referable to the contract. The act of a stranger on the land cannot be explained except by reference to a contract; it has always been considered as evidence of some antecedent contract, and lets in the enquiry what that contract was;"

Here, of course, I am considering the matter of part performance in accordance with the authorities and it must be remembered that I have already reached the conclusion that the oral agreement to which I have referred was indeed entered into. It is suggested on behalf of the defendant that this action of entry on the land and the erection of the equipment and so on can be regarded as simply preparatory and done in the expectation of or hope of a right being granted in the future. The fact however is that it is certainly an action which falls within the requirements which have been laid down as to whether an act is or is not capable of being regarded as part performance because it of course could not have been done without the defendant's permission. It could, of course, have been done in pursuance of such a licence as the defendant contends was in his contemplation and was agreed to be granted by him. However, I have rejected as unreliable his evidence as to that aspect of the matter.

The final matter relied upon by Miss Sim is the instructing of the surveyor and the forwarding of the survey plan in registrable form to the solicitors and the payment of the survey costs. These actions are indeed not only consistent with such an agreement as the plaintiffs are putting forward; they are also in my view clearly actions done in fulfilment of an obligation of the plaintiffs in terms of the contract as indeed the defendant concedes they were at all events as regards the payment of the survey costs. The same of course applies as regards the first matter relied upon, that is the amending of the application. That, on my findings, was an obligation resting upon the plaintiffs in terms of the bargain they had made with the defendant.

Mr Ross has referred me to the decision of Mahon, J. Boutique Balmoral Ltd. v. Retail Holdings Ltd. (1976) 2 NZLR 222 at p.226 where there was reference to the criticism of various legal writers of the conclusions reached by the House of Lords in the case of Steadman v. Steadman (supra) to which I have already referred. The learned Judge concluded that the head note in the All England Report of the decision in Steadman reading as follows -

> "In order to establish facts amounting to part performance it was necessary for a plaintiff to show that he had acted to his detriment and that the acts in question were such as to indicate on a balance of probabilities that they had been performed in reliance on a contract with the defendant which was consistent with the contract alleged" ((1974) 2 All ER 977, 978) -

could be misleading and was capable of misconstruction and with that I agree. I think it is indeed necessary for the purposes

of considering the matter of part performance to consider whether or not the acts performed are acts performed in execution of obligations arising under the propounded contract as the Judge said. Here, however, as I have indicated, they to my mind clearly were.

The question was raised as to whether the defendant was fully aware of the nature of an easement. As a matter of factual finding I must say that I conclude that he was so aware. His various dealings with property would, I think, clearly have acquainted him with the nature of an easement but not only that there is the admission to which I have already referred as to his attending and discussing the matter with his solicitor when the survey plan was sent. It is quite inconceivable in my view that if he was under some misapprehension as to what an easement was the solicitor having received such a plan clearly prepared for the purposes of registration of an easement would have not advised him of the position and a letter would surely have been sent forthwith to draw attention to the mistaken idea under which the defendant had acted in entering into the agreement with the plaintiffs. The situation would, I think, in any event here be governed by what is said in Halsbury's Laws of England, 4th Edn., Vol.9, p.97, para.226, as cited by Miss Sim:

> "...it is now well settled that an apparent meeting of the minds of the parties will suffice for a binding contract. Where a party has so conducted himself that a reasonable man would believe that he is unambiguously assenting to the terms as proposed by the other party, the former is precluded from setting up his real intention and is bound by the contract as if he had intended to agree to the other party's terms."

With regard to the authorities referred to by Mr Ross relating to the formation of the contract, that is Wellington City Corporation v. Public Trustee (1921) NZLR 1086, McCrae v. Wheeler (1969) NZLR 333 and McBean v. Howey (1957) NZLR 25, I say only that the findings of fact I have made in this case make it unnecessary for me to discuss those cases. They are all referable to completely different factual situations to those to which on my findings pertain in the present case.

The only other authorities to which I need make reference are the cases to which Mr Ross referred with regard to the matter of part performance and those were Pembroke v. Thorp 3 Swan. 482, 36 ER 934 and Cooney v. Burns (1922) 30 CLR 216. Those were referred to with reference to the matter of obtaining a survey and, it was submitted, support the contention that the instructing of a surveyor in the present case was an equivocal action and explicable as simply an act preparatory to or in anticipation of the entering into of a binding obligation and not acts done in actual performance of any obligation. In fact those authorities reveal a completely different situation to that here pertaining.

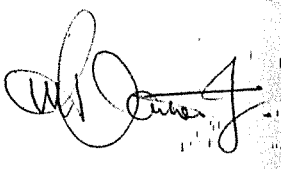
In Pembroke v. Thorp (supra) for example, the situation was that the boundaries of the land to be dealt with were uncertain and a survey or measurement as it was termed was arranged for by the claimant. That, of course, was understandably in the circumstances classed as something simply done in preparation.

My conclusion here is that there would indeed be injustice and unfairness amounting to fraud in the constructive or equitable sense in the defendant denying the plaintiffs the easement which was arranged for between them in 1979. They, on the evidence, clearly refrained from arranging for a source of water which they could have done either in the manner suggested by the Board or by pursuing their application which may have been successful in the end for the much smaller quantity they were seeking and they have of course incurred the quite substantial expense of installing equipment in the way which has been done for the purposes of this water supply carried across the defendant's property. They would clearly suffer substantially now by being denied this right to take the water across the defendant's land and I do not think that the situation can be regarded as offset as was suggested by it being simply said they have had the water free of charge for the substantial period which has elapsed. The situation of course is that the water is not that of the defendant to sell and the plaintiffs have sustained the substantial detriment to which I have referred, whereas the defendant has obtained the benefit he sought.

In all the circumstances, therefore, my conclusion is that the plaintiffs are entitled to the decree which they seek and there will be an order that the defendant specifically perform the agreement referred to in paragraph 4 of the statement of claim by signing the survey plan prepared by Messrs. Dennis and Catchpole in January 1979 and making the same available to be forwarded to the District Land Registrar for registration and by signing any amendment thereof as may be required by the District Land Registrar and also the necessary grant of a

permanent easement for the conveyance of water across his land in accordance with the plan, such grant to follow the usual form of an easement for such purposes as prepared by solicitors practising in New Plymouth.

The plaintiffs are entitled to costs. I allow costs on the scale of a claim for $5,000. I certify $50 for discovery and inspection and a second day at scale. Disbursements and witnesses expenses are to be fixed by the Registrar.



SOLICITORS:

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