IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

13/11

NZLR

A 885/83
A 553/83

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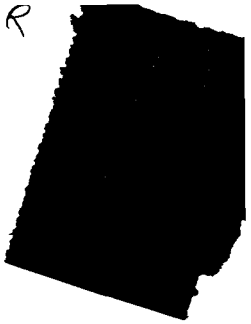

1386

BETWEEN C.L.M. BAKER AND K.A.B. MILNE

Plaintiffs

AND GRAHAM DARLEY McKECHNIE

Defendant

Hearing: 25-26 October 1984

Counsel: Mr Stewart for plaintiffs
Mr Walter for defendant

Judgment: 26 October 1984

(ORAL) JUDGMENT OF HILLYER J

This is a claim for damages for misrepresentation on a contract for sale and purchase of a house, brought by the plaintiffs against the defendant. In turn the defendant claims by way of bill writ for an amount of $15,000 which was left owing on the sale of the house on a mortgage without interest payable at a time certain.

About the beginning of 1982 the plaintiffs, who are husband and wife, wanted to buy a house. They had in mind buying an old house, as that was the sort of place they prefer. They saw an advertisement in the NZ Herald for a property at 66 St Georges Bay Rd, Parnell, stating that the property was to be sold at auction. It was said to have been built in 1850 by the Auckland town architect and

surveyor, and had other comments designed to attract people to the auction. In particular, as far as this case is concerned it said :

> "The owners have retained the original character by featuring polished kauri internal furnishings, but in so doing they have unobtrusively included every modern appointment, including ducted air conditioning and heating."

That advertisement attracted the attention of the plaintiffs, but they thought it would be too expensive for them, and in the result they did not attend the auction. They were both out of the country at the time, because they were cabin crew employed by Air New Zealand. When they returned, however, after the auction, they rang, presumably out of curiosity to find out what the place had sold for, and were told it had been passed in at the sum of $170,000. They therefore communicated with the land agent and eventually were taken to the property where they met the owners, Mr and Mrs McKechnie.

The land agent showed them through the property and amongst other things, indicated to them a cupboard in which a unit was installed. This unit had ducting connected to it, and was a gas fired unit. There is some allegation that it was referred to by the land agent and by Mr and/or Mrs McKechnie as an air conditioning unit, as well as a heating unit, but this was either denied or not admitted by the land agent, and Mr and/or Mrs McKechnie. I do not think it matters because clearly the plaintiffs, having seen the advertisement had the impression that the

unit was not only a heating unit, but was an air conditioning unit, and certainly nothing was done to disabuse them of that opinion. Indeed, I think it likely that the impression they got in conversation with the land agent and Mr & Mrs McKechnie confirmed their idea that they had something more than a heating unit.

Evidence was given by an expert in the field that air conditioning means not only heating but cooling the air. Mr McKechnie himself said he had seen the advertisement in the newspaper and had certainly thought about it, but had not gone to the extent of telephoning the land agent to say anything about the it. He said he thought that the statement was somewhat exaggerated.

In the result the plaintiffs purchased the property at the sum of $200,000, subject to their solicitors approval and a dispute then developed between the parties with which I am not concerned, as a result of which it was not until November 1982 that the plaintiffs settled the purchase of the property. Having done so they said they endeavoured to get the air conditioning unit to work. They were not intending to live in the property immediately themselves, although they said in due course it was intended to be their home. Immediately they were proposing to let the property, and pending doing so they were testing the different fittings in the house, including the unit which it appears was a Coleman gas furnace.

In December they were not of course interested in heating the house, but they were apparently endeavouring to get the unit to cool the house. Eventually after they had called in an electrician who gave it as his opinion that there was not any cooling side to the unit, they obtained expert advice to the effect that the unit was merely a heating unit. When the heating unit was not in use, it could be used as a fan to blow air through the house, which the defendant said would have a cooling effect.

It is clear however, in my view and on the evidence given by the expert that the term "air conditioning" means something more than merely blowing unheated and uncooled air through the house. That would be nothing more than a fan. Indeed, Mr McKechnie said that he always referred to it as a blower and resisted any suggestion that he might have thought that this was an air conditioning unit, and therefore might have said that it was an air conditioning unit. He appeared quite clear in his belief that it was not an air conditioning unit. It was no more than a heater with a fan that could be used in the summertime.

In those circumstances, the plaintiffs obtained evidence which has been put before me, as to the cost of installing an air conditioning unit. Such a unit is alleged to cost no less than $17,345. In addition it is said that the

cost of removing the existing gas unit would be $624 and the total of those sums is the amount claimed by the plaintiffs as damages for the misrepresentation.

I find that the allegation was made to the plaintiffs that the unit had an air conditioning function, and that to some extent the plaintiffs relied on that in purchasing the property. Obviously it was not the sole inducing factor, but it was a matter brought to their attention. It was demonstrated to them by the land agent and they considered that it was a matter of some significance. I hold that it was an inducing factor in their purchase of the property.

That then amounts to a finding that there has been a breach of contract and I turn to what in my view is by far the more difficult side of this action, that is to say the determination of the proper amount of damages that should be awarded.

Evidence was called on behalf of the defendant that the difference in value between the property with an air conditioning unit in the sense of a unit that would produce cold air and a unit that only heated as this one did and blew unheated air, was only $1000. It is this difference between the value of the property as it was and the value of the property as it was represented to be on the one hand, and the cost of installing the full air

conditioning unit on the other, that has been in my view the most difficult aspect of this case.

On behalf of the plaintiffs, Mr Stewart in a careful argument has urged upon me the view that the proper measure of damages is the cost of putting the house into the condition that it was said to be in. He has pointed to the Contractual Remedies Act, 1979 S.6(1) which provides as follows :

> "Damages for misrepresentation -
> (1) If a party to a contract has been induced to enter into it by a misrepresentation, whether innocent or fraudulent, made to him by or on behalf of another party to that contract -
> (a) He shall be entitled to damages from that other party in the same manner and to the same extent as if the representation were a term of the contract that has been broken; and
> (b) He shall not, in the case of a fraudulent misrepresentation, or of an innocent misrepresentation made negligently, be entitled to damages from the other party for deceit or negligence in respect of that misrepresentation.

That merely establishes that there is now no difference between the measure of damages for fraud and the damages for an innocent misrepresentation. We are still left with the difficulty of determining what the proper measure of damages should be for a breach of contract. it seems clear that the Contractual Remedies Act has not altered the law in that regard.

Mr Stewart has referred me to a number of cases, Victoria Laundry Windsor Ltd v Newman Industries Ltd (1949) 2 KB 528,539 Inder Lynch Devoy & Coy v Subritzky (1979) NZLR 87,95, and Ellul & Ellul v Oakes (1972) SASR.377. In none of these cases however, in my view is the problem that is present in this case determined.

Mr Walter on behalf of the defendant drew my attention to the case of Auto Promotions Ltd v Davis Ogilvie & Partners Christchurch A39/77 Judgment 3.8.83. Hardie Boys J said:

> "Damages are intended to place the plaintiff in the position in which he would have been had the tort not been committed; in contract, to place him in the position in which he would have been had the contract not been broken: ie, been carried out in accordance with its terms. The court's task is to ascertain the sum which will best achieve that result and of course it is for the plaintiff to establish his claim. But there is no rule (apart from the law of evidence) as to the means by which he does so. Nor must he do so with precision, although he obviously ought to attempt to do so."

In McGregor on Damages, 14th Ed (1980), the learned authors say:

> "Whether in all these cases of defective performance affecting property, the plaintiff is entitled to measure his basic loss of the diminution in the property's value only by the diminution in market price, or may alternatively claim the cost of putting the property into proper condition, is a question to which no clear-cut answer is possible. Each case must be looked at separately to see what is reasonable."

One of the problems in this case is that if the $17,000 odd that is claimed as being the cost of installing an air

conditioning system in this house is spent, the plaintiffs will finish up with what I describe as a Rolls Royce of air conditioning compared to what is a Mini Minor type of unit. The new unit would first of all be brand new, compared to the unit which had obviously been in there for some time. Secondly, the new unit is designed to heat and cool every room in the house; 85 percent odd of the house is to be treated with the new unit, whereas the old unit was ducted to only 48 percent of the house, approximately.

Furthermore, the old unit was gas fired, the new unit would be taking advantage of all the modern technology with a cooling capacity of 10.9 kw and a heating capacity of 13.7 kw.

The old unit was adequate to heat the house, indeed it was said to do it very well and the whole of this very large extra sum is going to be spent solely to produce what was said to be something which was not commonly installed in houses in Auckland. It is a fact that an air conditioning unit requires all the windows in a house to be kept shut, and the normal thing in Auckland residential houses is not to have air conditioning of this nature.

One of the plaintiffs said that it was desirable because of the nature of their work, by which I assumed he meant they might have to sleep during the day, having come back

from their overseas journeyings, but the old unit did not serve the bedrooms in the house and although there was some debate about the matter, in my view it was obvious to any person looking at the old unit, that it served only the living rooms of the property.

It does appear therefore, as though there would be very substantial betterment of the unit if it was replaced by putting in an aid conditioning system.

Mr Stewart submitted that that was simply the good fortune of the plaintiffs. If it was necessary to put in a better unit to give them what they had contracted to buy, then the defendant was bound to do so, but that does not in my view appear to be either fair or what the law is. I note that in the Law of Contract 6th Ed by G.H. Treitel, 703, the learned author says:

> "The court will .. take the plaintiff's overall position intc account in determining the basis on which damages are to be assessed; it will not generally order the defendant to pay an amount which will actually make the plaintiff's position better than it would have been, if the contract had been performed."

The learned author then quotes the case of Phillips v Ward (1956) 1WLR.471. In that case Lord Denning said:

> "We had a case not long ago where a purchaser bought a Georgian house and 25 acres for 6250 pounds and then sought to recover from the tenant 7333 pounds for dilapidations, because that was the cost of repair. That would mean that he got the place for nothing and 1083 pounds in pocket as well. The official referee awarded 7333 pounds, but this court reversed him. I there

> said that the cost of repair 'is not the proper test in the case of a considerable estate. In such a case the purchase price is often not much affected by the want of repair, because a purchaser can turn it to his advantage in that, when he puts it into repair, he can get considerable tax relief. Further, when extensive land is included in the sale in addition to the house, the want of repair of the house does not influence the price so greatly as it otherwise would. So many factors come into play that the cost of repairs is not the test. The proper criterion is to take the difference in value between the premises as they ought to have been, delivered up in repair, and the value of the premises as they are, delivered up out of repair. The difference is the measure of damages to which the landlord is entitled.'"

No authorities on this point were submitted to me by either the plaintiff or the defendant, and in the time that I have had since this case finished, I have not gone further than the citations that I have given.

It does however, seem to me that in this particular case, there would be justification for my saying that I must do the best that I can on the material I have to arrive at a figure, which in my view would be a fair one. I must have regard to the fact that I do not have evidence as to what the value of the house would have been if this particular unit had had a cooling aspect to it. I have had evidence that the difference that air conditioning would make to a house in Auckland would be $1000. That it seems to me, is an inadequate amount for the loss that the plaintiffs have suffered through the misrepresentation.

The system that was proposed by the experts called on behalf of the plaintiff would have involved installing two units to heat and cool the whole house. Evidence was also led that if only the portion of the house that was dealt with by the existing heating unit was treated, the cost would be reduced by only $1600. Again that does not seem to me to be a proper recognition of the difference between what the plaintiffs got and what they would have received if this unit had had a cold air aspect to it.

Doing the best I can with all the information in front of me, and accepting that I have to make an estimate on inadequate evidence, I have come to the conclusion that an amount of $8000 would be a proper recognition of the misrepresentation that has been made.

There will therefore be judgment on the claim for the sum of $8000. That means that the defendant has been held out of the sum of $7000 for the period that the amount which was due under the mortgage was outstanding. That amount was not paid because leave was given to defend a bill writ, and an injunction was granted to restrain the defendant from proceeding further with a selling up of the property pursuant to the mortgage that had been given.

On that injunction the normal undertaking as to damages was given. Such damages on the decision that I have

given would amount to the amount of interest that would otherwise have been earned on that sum for the period that the defendant has been held out of it.

I am reluctant to leave the matter so that these parties who have been involved in extensive litigation over what is a relatively minor sum, need to come back to the Court again with the consequent expense and heartburn.

I have therefore decided that although the plaintiffs have succeeded to the extent of $8000 in their claim, having regard to the fact that that $8000 comes within the jurisdiction of the District Court, and having regard to the fact that the defendant has suffered to some extent in being held out of $7000 of his mortgage moneys to date, in all the circumstances I will not award costs to either side.

I make the declaration sought in the third amended statement of claim, that the plaintiffs are entitled to set off against the amount payable under the memorandum of mortgage to the extent thereof, the damages that I have found are payable in this case.

Having discussed the matter with counsel as to the appropriate machinery method of disposing of the money held in court, I order that the amount held be paid out to the firm of Simpson Grierson on Mr Stewart giving an

undertaking that he will forthwith on receipt of that money from the court, and a discharge of the mortgage from Mr McKechnie, pay the sum of $7000 to Messrs Graham & Co.

Undertakings accordingly given.

I reserve leave to either party to apply. It is clear I think from what I have said that I do not intend to award costs on either of the actions, 553/83 or 885/83.

P.G. Hillyer J

Solicitors:

Simpson Griersons for plaintiffs
Graham & Co for defendants