NZLR 24/6

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

A.No.1173/83

690

BETWEEN TERRENCE RAYMOND DARWENT of Auckland, Panelbeater and VICTORIA KATHLEEN DARWENT his wife

Plaintiffs

AND GORDON REID HOLDINGS LIMITED a duly incorporated company having its registered office at Auckland and carrying on business as a manufacturer

Defendant

Hearing: 21 May, 1984.

Counsel: M.E. Casey for Plaintiffs
D.F. Dugdale for Defendants

Judgment: 21 May, 1984.

(ORAL) JUDGMENT OF VAUTIER, J. (INTERIM)

This is an action in which the plaintiffs who entered into an agreement for sale and purchase of a dwelling house from the defendant are seeking relief in this Court in respect of the action taken by the defendant to rescind the agreement in the circumstances to which I will refer. The agreement in question was entered into on 26 May, 1981. It provided for a purchase price of the property of $38,500 of which $1,000 was paid by way of deposit and a further $5,000 became payable in cash on the date for possession. The agreement by Clause 1(b)(ii) thereof provided as follows:

> "(ii) The balance of $32,500 shall remain owing to the vendor under this Agreement upon the following terms and conditions.

A. INSTALMENTS: The purchaser shall pay to the vendor regular monthly instalments of not less than $433.34 each the first such instalment to be paid on the 4th day of July 1981 and thereafter on the 4th day of each month. The vendor will apply such payments first in payment of interest calculated with quarterly rests as hereinafter provided and secondly in reduction of the balance of the purchase money.

B. DUE DATE: The unpaid balance of purchase money and interest then owing shall be paid to the vendor on or before the 4th day of June 1984.

C. INTEREST: The purchaser shall pay interest on the balance from time to time owing hereunder calculated from the date of possession with quarterly rests at the rate of 18% per annum reducible to 16% per annum in respect of each quarter in which all instalments are paid within 7 days of the due dates therefor.

D. ADDITIONAL PAYMENTS: The purchaser may make additional payments in reduction of the purchase money at any time without notice and interest shall cease thereon as from the next quarter day but any such additional payments shall not relieve the purchaser of the obligation to make the regular payments required by subclause A above."

The plaintiffs duly went into possession paying the sums beforementioned but thereafter, according to the plaintiffs' statement of claim, they paid only the following sums between 4 July 1981 and 14 June 1983:

6 July 1981	433.34
6 July 1981	433.34
15 October 1981	1462.50
18 November 1981	433.34
6 July 1982	3412.50
20 December 1982	2437.50
14 June 1983	3000.00

There is a question as to whether or not in fact two payments of $433.34 or only one such payment was made on 6 July 1981 and that question has not been resolved on the evidence presented

to me.

The defendant on or about 5 September 1983 gave to the plaintiffs a notice in terms of s.118 of the Property Law Act 1952 which, after reciting the various terms of the agreement, referred to default in payment of "the monthly instalments of interest in that the said payments due on 4 June 1983, 4 August 1983 and 4 September 1983 have not been paid as required". It was accordingly said that there was then owing the sum of $1950.00 and the plaintiffs were required to remedy that default by making payment of the said sum together with costs amounting to $64.00 making a total of $2014.00. The notice concluded with the following paragraph:

> "AND TAKE FURTHER NOTICE that if payment of the said sum of Two thousand and fourteen dollars ($2,014) as aforesaid is not made before the 7th day of October, 1983 the whole of the moneys secured by the said Agreement for Sale and Purchase including the balance of purchase price thereunder shall become immediately due and payable without further notice to you and the vendor may on that date or at any time thereafter exercise its rights of re-entry and forfeiture and/or any of the other rights powers and remedies conferred upon it as vendor by the said Agreement for Sale and Purchase or by Statute or otherwise."

On 11 October 1983, it is pleaded, there was delivered to one of the plaintiffs a letter addressed to them both in which reference was made to the failure to pay the amount of $2014.00 above referred to and the letter concluded -

> "The Vendor hereby exercises the rights of rescission and re-entry conferred by the Vendor by the Agreement for Sale and Purchase".

There was also a requirement that the purchasers should deliver up possession but it was agreed between the parties, as counsel

intimated to the Court at the hearing of this action, that the purchasers should be allowed to remain in possession pending the resolution of the matter by these proceedings.

The evidence of the plaintiff Mr Darwent shows that on 11 October 1983 or thereabouts he made an effort to make payment to the defendant's solicitor of the amount of $2014.00 by having a cheque placed under the door of the offices of the defendant's solicitors but this cheque was returned by them and the situation is, on the evidence, that there had in fact been no further payment made by the plaintiffs to the defendant at the time when the notice of rescission abovementioned was given.

The plaintiffs are seeking, first, a declaration that the agreement for sale and purchase is not rescinded but remains in full force and effect. This relief is sought first upon the basis that Clause 1(b)(ii)A of the agreement as I have quoted it above was not an essential term of the agreement and the defendant was obliged to make time of the essence before it could exercise rights of rescission which it has not done or, alternatively, it is pleaded that the notice in terms of s.118 of the Property Law Act was invalid because there was either no amount at all due and owing to the defendant by the plaintiffs at the time of the service of the notice or, alternatively, if there was any amount so owing it was only $87.60 and not the amount stated in the notice and the period of seven days allowed for payment in respect of instalments by Clause 1(b)(ii)C had not expired. Further, it is said that the notice was invalid because it made a claim for costs.

In the event of the Court holding against the contentions to which I have referred above the plaintiffs' statement of claim seeks in terms of s.118 of the Property Law Act relief against the rescission, an injunction restraining the defendant from evicting the plaintiffs from the property and incidental relief. A further claim to which I will refer hereunder is based upon clause 10 of the agreement for sale and purchase which is the usual clause giving the right to the vendor in the event of default by the purchaser to rescind the contract. That clause goes on to provide -

> "...thereupon any moneys paid by way of deposit or instalments of purchase price (but not exceeding in all 10% of the purchase price) shall be absolutely forfeited to the Vendor as liquidated damages."

As will be noted the vendor in this case by his letter of 11 October 1983 claimed the right to forfeit "the deposit and all moneys paid by you pursuant to the agreement".

As regards the first cause of action thus pleaded the case for the plaintiff is based upon an interpretation of the clause in the agreement which I have set out above relating to the payment of the balance of the purchase price and interest. It is submitted by Mr Casey that the significant aspect of the agreement as drawn is that there is no specific statement as to the monthly instalments that are referred to in the clause designated A being equated with interest payable in terms of the agreement. It should here be noted that the amount of $433.34 shown as the amount of the monthly instalment to be paid is in fact one month's interest at the rate of 16% per annum on the sum of $32,500. The basis of the argument for

the plaintiffs is that the sole obligation of the plaintiffs in terms of this agreement was to pay monthly instalments of not less than $433.34 throughout the period of three years referred tc in the agreement coupled with an obligation at the end of the three years to pay the balance owing for purchase money together with interest as provided for in terms of the agreement. It is argued that the agreement makes no provision at all for the interest at the differing rates referred to in paragraph C of the clause being payable at any particular time. In this way and on the basis of this interpretation of the wording of the agreement being the correct one Mr Casey prepared a calculation which proceeded on the basis simply of adding together all the monthly instalments due between 4 July 1981 and 4 September 1981 and deducting from this sum the total of all the payments which the plaintiffs had made over this period as set out above in this judgment. In this way he calculated that there was only the small sum to which I have previously referred owing at the time when the notice was given and in reliance upon the seven day provision referred to in Clause (ii)B qucted above and on the basis that this sum must be treated as part of the last monthly instalment due prior to the giving of the notice he submitted that there was in fact nothing owing at all at that time because the notice was given before the seven day period expired.

I find myself quite unable to accept the submissions thus advanced as to the interpretation of the agreement. It appears to me to be clear that the agreement is not properly to be interpreted in this way at all. It has to be borne in mind that the clauses as I have set them out are printed

clauses incorporated into the agreement with the figures and dates inserted. A perusal of the clauses in question makes it very plain that the draftsman has set out to draft a set of clauses which will be adaptable both to the situation of the present agreement and also to the situation much more commonly encountered where the purchaser is required to pay a regular instalment which is in excess of the interest which would be due in terms of the agreement for the period specified so that the instalments can be applied partly in payment of the interest and partly in repayment of the balance of purchase money. The provision here made for the interest to be adjusted and liability to interest at the rate referred to being abated because of payments made in reduction of the purchase money shows clearly how the matter could operate in these circumstances as of course it could conveniently have been operated to the advantage of the plaintiffs in the present case in the event of their desiring to make greater payments than the amount of $433.34 per month. It is to be noted that the agreement refers to payments of "not less than $433.34 per month" so that the plaintiffs had the advantageous situation of being able to pay off an additional amount of the purchase money at any time they wished without notice and thus secure the benefit of a reduction in their interest obligations.

When the clause relating to interest is read along with the clause relating to instalments, as of course it must be, it is completely clear in my view that the scheme of the agreement is that the obligation to pay interest is intended to be complied with by the plaintiffs paying the monthly instal-

ments provided for. The clause gives the defendant the right immediately any payment is received to apply that payment in satisfaction of the interest obligation. That interest obligation is 18% but is reduced to 16% provided in any one quarter all three instalments have been paid within seven days. The calculations that Mr Casey has put forward are, he acknowledges, all on the basis that they had no further obligation than to pay monthly instalments at the rate mentioned. The interest obligation he treats as an entirely separate one and as I have indicated one not arising until the end of the term of this agreement. The fact of the matter however is, of course, that the defendant, as the receipts produced and the terms of the notice indicate, has applied payments made to a discharge of the interest obligations under the agreement. That in my view the defendant was clearly entitled to do and the result is that once any payments had been appropriated in this way it was not open to the plaintiffs at a later stage simply to contend that payments made by them must be attributed solely to the monthly instalments which are provided for. If the matter is treated, as I consider it must be, on the basis that the interest was accruing throughout the agreement and the plaintiffs had a continuing obligation to pay interest then of course as Mr Casey concedes there would indeed be a considerable amount owing by them at the time when the notice was given although I agree not necessarily the precise amount of $1950.00 which is claimed in the notice. The calculations have not been done by either of the parties. The proper basis in my view would necessitate an examination of the payments throughout bearing in mind that the defendant was entitled to 18% interest throughout unless the plaintiffs complied with the

requirements of Clause C as to making all payments of $433.34 within the first seven days after each such instalment became due in terms of the agreement.

The question of the interest and the terms of the agreement however does not in my view need to be considered with more exactitude by me because I accept Mr Dugdale's submission that the present situation in law is that a notice under s.118 of the Property Law Act is not necessarily invalid because the vendor has overstated the amount that is due at the time when the notice was given. He relied upon the case of Clyde Properties Limited v. Tasker [1970] NZLR 754 and that decision of course has, as was mentioned, been applied recently by the Court of Appeal in the case of Commodore Pty. Limited and Others v. The Perpetual Trustees Estate & Agency Company of New Zealand Limited CA 74/81, 66/81, 67/81, 79/81, judgment 22 March, 1984. It has been accepted in those decisions that so long as the object of s.92(6) of the Property Law Act which was there being considered is substantially fulfilled by the notice as drafted then it will not be invalidated by such an error as there occurred where the amount was overstated. It appears to me to be clear also that the point concerning the claim for costs being included in the notice does not avail the plaintiffs in this case. Mr Dugdale has accepted that the decision in Skinners' Company v. Knight [1893] 2 Ch. 271, 280, shows that costs cannot properly be claimed in this way but the fact that costs are so claimed again will not invalidate the notice. The cases of Clyde Properties Ltd. v. Tasker (supra) and the Court of Appeal decision to which I have referred, were concerned with the section of the Property Law Act relating to mortgages but it appears to me that the same reasoning and the same principle

should be applied as regards notices under s.118.

It was further submitted here that the notice should be regarded as invalid because it indicated that its primary purpose was to indicate to the plaintiffs that the full balance of the purchase price had immediately become due and payable by reason of the default referred to and that this was not in fact the situation. For this purpose Mr Casey relied upon the statement in the case of Commodore Pty. Ltd. v. Perpetual Trustees Estate & Agency Co. of N.Z. Ltd. (supra) in the judgment of Somers, J. to the effect that the notice under s.92 has as its purpose that of ensuring that the mortgagor is given a period within which to remedy his default without further sanction. For this reason, as is said in the judgment, the notice must clearly tell the mortgagor what is required of him and what will happen if he ignores it, and reference is made to the case of Sharp v. Amen [1965] NZLR 760. I do not consider that in the present circumstances the reference in the notice to the balance of the purchase price becoming payable in this way has the effect of invalidating the notice. The differences between s.92 and s.118 have to be borne in mind and furthermore the notice here goes on to state quite clearly that the effect of default will be that the vendor may thereafter exercise its rights of re-entry and forfeiture or any rights and powers conferred upon it by the agreement for sale and purchase. The evidence shows that the plaintiffs in this case had received at least two previous notices under s.118 and they were, by the notice, clearly made aware of the fact that their continued default in payment of the monthly instalments had brought about the situation wherein the vendor had

decided to exercise its rights unless the default then existing was remedied. The plaintiffs, as the evidence showed, had hurriedly remedied their default on the previous occasions showing that they were well aware of what was required of them by the notice in the form given but on this occasion they chose to take no action until it was too late because the defendant had exercised his remedies.

I accordingly conclude that the plaintiffs are not entitled to relief upon the basis that the defendant has not validly rescinded the agreement. Section 118 however of course makes provision even where the right of rescission has been validly exercised for this Court to grant relief. It is worthy of note, perhaps, that in the case of Woods v. Tomlinson and Another[1964] NZLR 399 referred to by Mr Dugdale the view was taken by the learned Judge that the fact that a plaintiff seeks relief in terms of ss.118 to 120 in itself indicates that the plaintiff is accepting that there was a valid forfeiture. However, I do not place reliance upon that for the purposes of this judgment.

The question then is whether or not this is a proper case for the Court to exercise its discretion and grant relief. Mr Dugdale accepts that the case is one where the Court has jurisdiction to grant relief but he submits that it should not be exercised in this case having regard to the serious and persisting defaults of the plaintiff and, further, to the fact that the evidence here shows that except possibly to a very minimum degree the plaintiffs have not reduced the amount owing under the agreement at all over the period of the agreement and,

further, the evidence adduced shows that the house and grounds have deteriorated during their occupation and, further, that there is no cogent evidence that the plaintiffs will be able to find the amount which falls due as soon as 4 June next in terms of the agreement, this being the whole or virtually the whole of the balance of the purchase price previously mentioned. It certainly does in my view become a matter of some doubt as to whether or not it is proper for the Court to exercise its discretion in these circumstances. Mr Casey submits that the aspects referred to are irrelevant and that if the situation is that it is a matter simply of money being provided to satisfy the terms of the agreement and remedy the default the relief ought to be granted but in a conditional manner whereby the relief would be subject to the remedying of the default. He made reference also to the evidence which has been adduced showing that during the period since October 1983 when the agreement was rescinded by the defendant the plaintiffs have been putting aside money for the payment of the instalments which have accrued since. It was said that the plaintiffs have in this way succeeded in putting aside the sum of approximately $5,000.00 to meet their obligations.

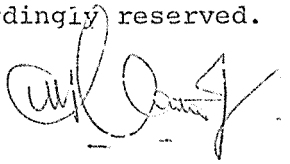
A further factor with regard to this matter of relief is that there has been, unfortunately, a delay in this matter being brought to trial, an earlier fixture obtained having to be abandoned through no fault of either of the parties. There is also a matter presenting difficulty so far as the Court is concerned in that the evidence before the Court at the present time does not make clear just what sum which it would be necessary for the plaintiffs to find to bring up to date all their obligat-

ions under the agreement construed in the way that I have concluded it should properly be construed and, furthermore, there is the matter of the effect of clause 10 of the agreement for sale and purchase. I accept Mr Casey's submission that the defendant is not entitled to rely upon any common law rights as to forfeiture of moneys paid pursuant to the terms of the agreement to it by the plaintiffs because there is an express term in the agreement. The authority referred to of Hunt v. Hyde [1976] 2 NZLR 453 I have no doubt supports this submission. The parties however are not ad idem as to just what clause 10(a) of the contract means and the case proceeded on the basis of some concession made by Mr Dugdale on behalf of the defendant as to the effect of the clause limiting the amount of any forfeiture to 10% of the purchase price.

In all the circumstances it appears to me on balance that the plaintiffs should get some relief either by way of compensation in terms of the section or by means of some relief along the lines that Mr Casey has suggested by way of a conditional order. If the situation is, as the evidence inclined, I thought, to indicate, that there is really very little prospect of the plaintiffs being able to find the amount of $32,500.00 or thereabouts in order to comply with their absolute obligation under the agreement to pay the balance of the purchase money as soon as 4 June next, then there would in my view be little point in granting relief consisting only of a conditional right to remedy the present default when a much more substantial default was likely to arise within a week or two. However, Mr Casey has put forward that in relation to this aspect the fact that there was an unresolved action in this Court with regard to the

property has resulted in a situation in which lenders would be most unlikely to be prepared to commit themselves to providing finance for the completion of this purchase by the plaintiffs. That could indeed be so and I think that justice requires in all the circumstances of this case that they be given an opportunity of endeavouring to remedy their default and finance the purchase. The matter of relief as I have indicated clearly requires that this Court should have further evidence placed before it in order to decide what relief should be given if it is to be in the form of monetary relief to the plaintiffs and on the basis of the acceptance of the forfeiture. Accordingly, I propose to make this judgment an interim judgment only dealing with the question of the form of the notice and the right to forfeiture and the claim as regards the prayer for relief will stand adjourned for a period of one month. The parties will have to seek a further fixture but it should not be earlier than one month from now. This in my view should give the plaintiffs ample opportunity to explore the possibility of financing this purchase and of course remedying such default as has already occurred on the basis of the conclusions reached in this judgment.

The question of costs is accordingly reserved.



SOLICITORS:

Wallace McLean Bawden & Partners, Auckland, for Plaintiff.
Bowen Roche & Hill, Auckland, for Defendant.

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

A.No.1173/83

BETWEEN TERRENCE RAYMOND DARWENT of Auckland, Panelbeater and VICTORIA KATHLEEN DARWENT his wife

Plaintiffs

AND GORDON REID HOLDINGS LIMITED a duly incorporated company having its registered office at Auckland and carrying on business as a manufacturer

Defendant

(ORAL) JUDGMENT OF VAUTIER, J.
