IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

A.No.460/81

BETWEEN PERCY ALEXANDER DICKSON of Whangarei, Manager

Plaintiff

AND JOHN CHARLES SHANLEY of Auckland, Manager and MARGARET CLARE SHANLEY his wife

First Defendants

AND PROPERTY EXCHANGE LIMITED a duly incorporated company having its registered office at Auckland, Real Estate Agents

Second Defendant

Hearing: 17, 18 April, 1984.

Counsel: A.G. Galbraith for Plaintiff.
P. Dymond for First Defendants.
G. MacAskill for Second Defendants.

Judgment: 18 April, 1984.

(ORAL) JUDGMENT OF VAUTIER, J.

The plaintiff in this case is seeking to recover damages against the defendants in respect of the loss which hs sustained arising out of his purchase of a coffee bar business in Albert Street, Auckland. The first defendants are the vendors of the business and the second defendant is the agent which acted for the vendors on the sale.

The facts stated briefly are these: The plaintiff, early in 1980, had decided that he wished to enter the business

of operating a coffee bar and he became interested through the agency of the second defendant in the business which was owned and operated by the first defendants. He inspected the business and spoke to the first defendants, particularly Mr Shanley but did not discuss with him the conditions of the lease under which he and his wife occupied the premises used for the coffee bar. He did, however, as the employee of the second defendant who was engaged in endeavouring to effect the sale admits, discuss the question of the terms of the lease with that gentleman, a Mr Reilly. He learned from him that there was a period of existing lease under which the first defendants occupied still to run and that a right of renewal of this lease was available. There was also mention made to the plaintiff by Mr Reilly of what was referred to as a "demolition" clause in the lease. As to this the plaintiff's evidence was that he was told by Mr Reilly that this was a clause which was in most of the leases of premises in the older buildings around Auckland and it was there to safeguard the owners of those buildings in the situation where they wanted to demolish the building in order that a high-rise building could be erected on the site. The plaintiff says that he was told by Mr Reilly that Mr Reilly did not think this clause would affect him at all in relation to the purchase of the business as they, that is the owners, were doing the building up. Mr Reilly in his evidence admitted that there was some discussion about this demolition clause and I will refer to this aspect in more detail later.

The plaintiff, Mr Dickson, being satisfied as to other apsects, signed an agreement for sale and purchase which is dated 4 February, 1980. This provided for a total purchase

price of $25,700 of which $10,000 was for goodwill, $15,000 was for plant, fittings and fixtures and $700 for stock and trade. Possession was to be given on 21 February, 1980 when the balance of the purchase price over and above the deposit, less however the sum of $5,000 was to be paid over. Possession was duly given and taken on 21 February but on 1 July the owners of the building who had earlier consented to the assignment of the lease of the premises from the first defendants to the plaintiff, gave notice to the plaintiff requiring him to vacate the premises after the expiration of six months from the date of receipt of the notice. This notice was expressed to be given in terms of Clause 40 of the lease which was in the following terms:

> "If at any time after the 1st day of July 1980 the Lessor shall desire to reconstruct rebuild or remodel on any part of the building on the land on which the premises are situated and if the Lessor shall decide in its absolute discretion that such work shall be more conveniently carried out with the premises hereby leased being vacant then the Lessor may give to the Lessee six (6) months' notice in writing requiring the Lessee to vacate the said premises and the Lessee shall vacate and deliver up to the Lessor possession of the premises in accordance with the terms of the said notice and the term of the lease of the Lessee shall absolutely cease and determine on the expiration of such notice but without releasing the Lessee from any liability for rent up to such date or any prior breach of this lease."

It should be mentioned that the lease itself was not seen by the plaintiff prior to his entering into the contract. It had not, according to the evidence of the defendant Mr Shanley, been perused by him either at that time. The lease became available to the plaintiff only after he had entered into the contract and at the time when the agreement for sale and purchase had been forwarded to his solicitor in Whangarei to enable him to attend

to the necessary obtaining of the deed of assignment of the lease and the settlement of the transaction as a whole. The plaintiff said that he was, because of the notice thus received, left with no alternative but to sell up the plant and fittings which he had acquired under the agreement and to vacate the premises. This he did prior to the end of December, 1980 receiving only a nett amount of $2,617.05 for the plant and fittings.

The agreement for sale and purchase referred to contained a clause, Clause 14, in which it was stated that the premises were held for the term of two years from 1 July, 1979 with a right of renewal for a further term of two years. Nothing appears in the agreement with regard to Clause 40 of the lease which I have quoted above.

On the basis of the facts as so stated, the plaintiff claims damages against the first defendants and the second defendant and founds his claim upon various causes of action pleaded in the amended statement of claim filed. The first of these is a cause of action advanced against both the defendants on the basis of alleged fraudulent misrepresentation. It is said that the first defendants by their agent the second defendant represented to the plaintiff that the lessor did not intend to exercise its rights pursuant to the "demolition" clause of the lease and that the plaintiff was induced to enter into the agreement in reliance upon such advice and representation which were false to the knowledge of the defendants or were made recklessly, not caring whether they were true or false.

Alternatively, a cause of action is advanced against the second defendant upon the basis of the advice given to the effect previously mentioned being unskilful and incompetent advice given negligently and in breach of a duty of care owed by the second defendant to the plaintiff. This duty, it is alleged, was owed by the second defendant because it held itself out as possessing the skill and competence in the course of its business enabling it to give advice of this kind and, secondly, on the basis that it had a financial interest in the transaction. The plaintiff also advances as a further or alternative cause of action the plea that it was either an express term or an implied term or condition of the contract that the premises were held for a term of two years from 1 July, 1979 with a right of renewal as previously mentioned.

A further cause of action in somewhat general terms is pleaded against the second defendant in the statement of claim that the second defendant is alleged to have "advised and represented to the plaintiff that the said goodwill, stock, plant and fittings had a value of $25,700 whereas in truth and in fact the value of the said goodwill, stock, plant and fittings was no more than $5,000." It appeared, however, from the submissions made that this cause of action was advanced simply on the basis that the second defendant, as agent, must be regarded as impliedly putting forward such a representation by allowing the plaintiff to enter into an agreement for the purchase of this particular business at that price and not revealing to him that the value of the business was very much less than this in the light of the actual facts with regard to the existence of the lease.

The plaintiff has also advanced further causes of action on the basis of an allegation as it appears that the circumstances gave rise to a duty on the part both of the first defendants and the second defendant to reveal to the plaintiff the existence of Clause 40 in the lease and the landlord's intention to invoke that clause.

Finally, there is a cause of action advanced based upon mutual mistake and the operation of the Contractual Mistakes Act, 1977.

I will deal in turn with the causes of action thus pleaded and the evidence which was adduced relating thereto and in the course of so doing advert to the contentions which were advanced on behalf of the respective parties. The first matter for consideration is the matter of alleged fraudulent misrepresentation. The plaintiff in this case is not able to rely upon the Contractual Remedies Act because these events occurred prior to that Act coming into force. It is accordingly necessary if the plaintiff is to succeed on this basis, that fraud be established. The plaintiff's evidence was supported in some measure by that of a lady who was also a tenant in the same building at the time when the sale to the plaintiff took place and before and after that. Her evidence related to various conversations which she had had with the first defendants, the general tenor of which was that they were, according to her, aware of the situation with regard to the effect of Clause 40 in the lease and in fact knew that the landlord was proceeding on a course of renovation of the building which was going to entail one tenant after another having his lease cancelled by the landlord by reliance

upon Clause 40. The first defendants, however, denied that they had such knowledge. They denied indeed being aware of the actual terms of Clause 40 at all and certainly insofar as it amounted to a term in the lease whereunder the landlord could terminate the lease of a particular tenant not because the landlord wished to demolish the building but simply because he intended to carry out some renovation which could more conveniently be done by obtaining vacant possession of the particular portion of the premises which he wished to obtain for that purpose.

After hearing the evidence as a whole and in the light of my impressions gained from seeing and hearing the witnesses, I have reached the conclusion that the evidence here does not satisfy me to the standard required that there has been misrepresentation with actual knowledge of the falsity of the representation so as to entitle the plaintiff to damages on that basis. In saying this, I mention that I accept the evidence of the plaintiff as to what he was told by the agent Mr Reilly and if there is conflict, as there is in some measure, between the evidence of the plaintiff Mr Dickson and Mr Reilly, then I prefer and accept the evidence of the plaintiff. Mr Reilly's recollection of matters seemed to be very vague and his evidence, furthermore, was contradictory in some respects, such as, for example, his initial statement that he did not even know the name of the landlord.

As regards the undoubted conflict which existed between the evidence of the first defendants, particularly that of Mr Shanley and the other tenant, Mrs Collins, I think that the

conflict arises not because any of these witnesses was making any attempt whatever to mislead but simply out of the fact that they were clearly not thinking along the same lines with regard to the matters that had arisen. Mrs Collins in particular clearly did, as is said, have various grounds of complaint against the landlord and her evidence did not make it really clear to me that it was on the basis of the existence of the so-called demolition clause in her lease or anybody's lease that the position of the tenants was thought to be precarious at the time. Altogether, I think that the conflicts lie in a incomplete understanding between the parties as to just what their respective thoughts were.

There is next, I think, to be considered the question of express or implied terms. There was of course here an express term in the agreement as to the duration of the lease. What the plaintiff seeks to put forward is that the existence of that term carries with it the implication that the first defendants were contracting to sell a business which had the benefit of a lease which was not subject to termination within the period referred to. I have considered this question carefully but find myself unable to reach the conclusion that it can properly be said that the terms of the agreement as it stands should properly be construed in the way thus contended for and that the term sought to be implied should be so implied.

Mr Dymond relied upon the statements to be found in Gardner v. Gould (1974) 1 NZLR 426 applying the decision in Trollope & Colls Ltd. v. North West Metropolitan Regional Hospital Board (1973) 2 All ER 260, 268. A more recent and

more amplified statement of the law on this point is to be found in the decision of the Court of Appeal in Devonport Borough Council v. Robbins (1979) 1 NZLR 1 at p.23 where the conditions for the implying of a term in a contract are referred to as illustrated in the majority judgment delivered by Lord Simon of Glaisdale in B.P. Refinery (Westernport) Pty Ltd. v. Shire of Hastings (1977) 16 ALR 363, 376; 52 ALJR 20, 26. These were adopted by our Court of Appeal in the judgment delivered by Cooke and Quilliam, JJ. The passage prescribes the conditions as being these:

> "It is reasonable and equitable; necessary to the business efficacy of the contract, so that the contract would not be effective without it; so obvious that it goes without saying; capable of clear expression; and does not contradict any express term of the contract. It accords also with the test adopted in the minority judgment of Lord Wilberforce and Lord Morris of Borth-y-Gest in that case (ibid, 384; 30), in that it is necessary to make the agreement work and corresponds with the evident intention of the parties underlying the agreement."

Although the matter is certainly arguable I conclude in the light of the statement of the law to which I have just referred that it would be going too far to say that reference to this Clause 40 was something that necessarily had to be brought into the contract by implication or, to put the matter another way, that a warranty or condition certifying that the clause in the lease meant what Mr Reilly said it meant, had necessarily to be implied.

As regards the first defendants, I turn then to the further cause of action based upon s.6 of the Contractual Mistakes Act 1977. In the light of the evidence as adduced

in this case, it appears to me that this indeed is the important aspect requiring consideration. It is necessary, first, to note the terms of the section:

> "Relief may be granted where mistake by one party is known to opposing party or is common or mutual - (1) A Court may in the course of any proceedings or on application made for the purpose grant relief under section 7 of this Act to any party to a contract -
>
> (a) If in entering into that contract -
>
> (i) That party was influenced in his decision to enter into the contract by a mistake that was material to him, and the existence of the mistake was known to the other party or one or more of the other parties to the contract (not being a party or parties having substantially the same interest under the contract as the party seeking relief); or
>
> (ii) All the parties to the contract were influenced in their respective decisions to enter into the contract by the same mistake; or
>
> (iii) That party and at least one other party (not being a party having substantially the same interest under the contract as the party seeking relief) were each influenced in their respective decisions to enter into the contract by a different mistake about the same matter of fact or of law; and
>
> (b) The mistake or mistakes, as the case may be, resulted at the time of the contract -
>
> (i) In a substantially unequal exchange of values; or
>
> (ii) In the conferment of a benefit, or in the imposition or inclusion of an obligation, which was, in all the circumstances, a benefit or obligation substantially disproportionate to the consideration therefor; and
>
> (c) Where the contract expressly or by implication makes provision for the risk of mistakes, the party seeking relief or the party through or under whom relief is sought, as the case may require, is not obliged by a term of the contract to assume the risk that his belief about the matter in question might be mistaken.
>
> (2) For the purposes of an application for relief under section 7 of this Act in respect of any contract, -

(a) A mistake, in relation to that contract, does not include a mistake in its interpretation:

(b) The decision of a party to that contract to enter into it is not made under the influence of a mistake if, before he enters into it and at a time when he can elect not to enter into it, he becomes aware of the mistake but elects to enter into the contract notwithstanding the mistake."

The position as regards the evidence in this case is that the plaintiff gave evidence as to what he was told regarding the clause in the manner to which I have already referred and said that had he realised that the tenancy could be terminated by the landlord if the building was remodelled he would certainly not have entered into the contract at all. When Mr Shanley came to give evidence he made it completely clear that he himself would not have entered into the contract either had he been aware just what was said in the lease with regard to this matter of termination of the tenancy on the landlord deciding to remodel the premises or any part thereof. I refer to his evidence when he referred to a discussion which he had with Mr Reilly for the purposes of the proposed sale of the business in which Mr Reilly, according to Mr Shanley, spoke of the "demolition" clause in the lease in just the same sort of way as the plaintiff says it was described to him. He then, however, went on to say in answer to the question -

"...were you concerned about the demolition clause?... no.

Why not?...I didn't think it had any application to the coffee shop at the time."

Then later in his evidence he said, after referring to the fact that he had never read the actual clause itself -

> "If I had known what I subsequently learned about the clause I would have been concerned."

He later said:

> "If I had been aware of the possibility of what did happen, being able to happen, I would not have entered into an agreement for sale and purchase of the business without having the position clarified.
>
> Did you appreciate that it wasn't just a demolition clause?...in terms of what subsequently happened to Mr Dickson, no I didn't appreciate that.
>
> If you had appreciated that at the time would you have been concerned?...I would have been very concerned.
>
> Why would that be?...well it would have meant that there was something within the business that was going to be made an impediment. If I had been aware of the chain of events that happened and the possibility of that happening at that time, my first step would have been to have gone and spoken to the landlord directly about it, if I had been aware of this - and there's no way I would have entered into an agreement for sale without having that clarified."

The evidence to which I have referred clearly brings this case in my view within the scope of s.6(1)(a) of the Act. Substantially, I think, the evidence shows that both the plaintiff and Mr Shanley were under the same misapprehension with regard to the lease under which the premises were held. Mr Dickson, by reason of what was told to him by Mr Reilly who was the defendants' agent in the matter, thought that the clause would not affect the lease of the premises otherwise than in the situation of the landlord wishing to pull the building down. He was able to form a judgment from what he could see of the building and, as he said, in view of the renovations carried out at the time there seemed no practical likelihood of the building being pulled down.

Mr Shanley, on the other hand, may not have been looking at the matter in precisely the same way but he clearly did not regard the clause as one which operated as a threat to the continued operation of the lease for the term prescribed in it. The effects substantially were the same. Even, of course, if s.6(1)(a)(i) could be said to be inapplicable to the situation because there was some difference in the view which each party was taking with regard to the clause in the lease the matter would be covered by the other clauses in s.6(1)(a), particularly s.6(1)(a)(ii).

There can be no doubt, either, in my view, that s.6(1)(b) is a provision which embraces the situation here revealed. The evidence of the agent and indeed of Mr Shanley himself, made it clear that the price paid for goodwill, viz., $10,000 would be wholly inappropriate to a situation in which the lease could be determined within a few months as in fact occurred here by the landlord acting in terms of Clause 40 of the lease. There was certainly in my view an unequal exchange of values or a substantial disproportion in the consideration by reason of the mistake under which all the parties were clearly labouring as to what was being sold. All parties clearly thought that the plaintiff was to obtain the benefit of a lease which would run for the balance of the term plus a further two years if required subject only to the contingency of the lease being terminated if the building came to be demolished. That, of course, was something very different from the actual situation.

Mr Dymond has contended that the section is not applicable to the circumstances of this case because the mistake is a

mistake as to the interpretation of the contract. As to this Mr Galbraith has pointed out that the contract, of course, is the contract for sale and purchase and the misapprehension between the parties was as to a clause in the lease which is not an actual part of the contract. That may well be an answer but in my view there is the further answer that this is not a case of a mistake as to interpretation of a clause in the lease but simply, as was submitted on behalf of the plaintiff, a mistake as to the factual situation and the circumstances in which the clause in question could be applied. The parties thought it was referable to the situation of a demolishing of the building and that clearly, of course, was not so. It was applicable to very much wider circumstances than those. There really was no question of misinterpretation of the clause in the contract because none of the parties actually turned their minds to the wording of the lease; they did not know what the actual wording was but thought that it was a clause in the lease applicable in different circumstances to those in which the actual clause was applicable. In these circumstances, I think that a case for relief in terms of the Act has clearly been established.

Before turning to the relief itself, it is necessary or desirable, however, I think, to deal with the further question of the cause of action against the second defendant based upon an alleged negligent mis-statement. As regards this I accept on the authority of the case to which reference was made by both parties, Richardson and Another v. Norris Smith Real Estate Ltd and Others (1977) 1 NZLR 152, that the second defendant in this case was in a position where it must be regarded as owing

a duty of care to the plaintiff. That case was, just as at present, a case where information was given to a prospective purchaser by the land agent involved in the sale.

After consideration of the evidence as a whole, my conclusion is that there was a negligent misrepresentation in this case by Mr Reilly with regard to the nature of the lease which, of course, was an absolutely vital element as he himself recognised in relation to the sale. In the end he was not prepared to deny that he may well have expressed the matter to the plaintiff in very much the same way as the plaintiff claims he did.

The situation as regards Mr Reilly was that he was aware that there was a special clause in the lease which affected the security of the tenure of the lessee. He expressed himself as uncertain as to whether or not the lease was actually available to him in the premises of the second defendant. It seems obvious that it in fact was in that it was very soon afterwards sent to the plaintiff's solicitor and presumably so sent as the evidence indicates by the agent itself. Such a vital matter as this should in my view have clearly been the subject of further inquiry by the agent before he proceeded to express views as I find he did as to the actual ambit and effect of the clause in question. There seems to me to be no doubt on the evidence that he essayed to indicate what the effect of this clause was both to the first defendant Mr Shanley and to the plaintiff. The way in which he explained the matter gave a completely wrong meaning and effect to the clause and it was

really because of this mis-statement of the effect of Clause 40 of the lease that this agreement was unfortunately entered into with both the parties to the agreement proceeding upon a basis of mistake as to what was actually available to be sold. I accordingly conclude that the second defendant is to properly be held liable on the basis of the mis-statement negligently made by its employee in the course of his duties and in the course of effecting the sale in question.

As to the measure of damages in relation to this negligent mis-statement, it is said that the situation is that the plaintiff has not shown just what damages have flowed from the negligence complained of in that it is not shown what the value of the business would have been had the clause been correctly represented. I think the answer to that, however, lies in the submission made by Mr Galbraith which I accept. The position here is quite different from that which was under consideration in the case already referred to, Richardson v. Norris Smith (supra). Here, the plaintiff was clearly left with no alternative but simply to dispose of the fittings and chattels of the business because on all the evidence with the situation which arose he had no business left to sell. The evidence of Mr Reilly himself makes this, I think, clear. I think, therefore, that the same loss as is appropriate as the measure of relief in terms of the Contractual Mistakes Act should be assessed as the damages in respect of the negligent mis-statement so far as the second defendant is concerned.

Turning therefore to the question of relief under s.7, there was little debate as to the quantum of the plaintiff's

loss. It is shown in the statement put before the Court as being the difference between the amounts actually paid for the business plus the solicitors' costs incurred and the nett proceeds of the sale of the chattels, etc., The total amount paid, as abovementioned, was $22,290.70 and $3,617.05 was recovered, leaving a balance of $18,673.65. It is clear, however, that a deduction of $700 should be made from this sum because the plaintiff received stock as part of his purchase and had the benefit of that stock in the business operations which he carried out over the period while he was able to carry on the coffee bar business. There is of course here, also, to be taken into account the fact that the whole of the purchase price was not paid and a balance of $4,000 secured by an instrument by way of security remained outstanding after a sum of $1,000 had been paid in terms of the agreement during the time the plaintiff was in occupation.

The first defendants have counterclaimed for this $4,000 plus interest payable in terms of the agreement at the rate of 15% per annum reducible to 13% for prompt payment. Section 7(3) empowers the Court in its discretion to make such order as it thinks just by way of restitution or compensation and of course to cancel the contract. I think that the matter is properly dealt with here in this way, that is to say by the cancellation of the contract and the assessment of a fair sum to be paid by the first defendants to the plaintiff by way of restitution or compensation.

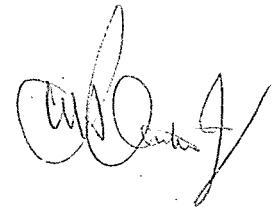
The plaintiff has claimed interest on any amount recovered and of course there is the interest claim to which I have just

referred contained in the counterclaim. When all aspects are considered, however, it appears to me that justice can be effected in this case by all questions of interest being treated as equating between themselves. I refer, of course, to the interest which the first defendants should have been able to earn on the amount which has been paid pursuant to the agreement which of course was, as regards the element of goodwill, a far greater sum than the business they had to sell warranted, but on the other hand the plaintiff had the benefit of operating the business during the time that he was permitted to remain there. In that way, he is to be regarded, I think, as obtaining some countervailing benefit. Accordingly, therefore, the judgment for the plaintiff will be against both the first defendants and the second defendant. As regards the first defendants the contract of 4 February, 1980 is cancelled as from the date of this judgment and the plaintiff is to have judgment against the first defendant and the second defendant for the sum of $17,973.65. The instrument by way of security referred to in the counterclaim is likewise ordered to be cancelled and any amounts remaining payable thereunder are accordingly no longer recoverable. In addition, the plaintiff is entitled to costs according to scale and witnesses expenses to be fixed by the Registrar.

The plaintiff is entitled to judgment against the first defendants on the counterclaim but this will be without costs.

As regards the defendants themselves, leave is reserved to both the first defendants and the second defendant to apply further with regard to the question of contribution or indemnity

in respect of their liability in terms of the foregoing judgment.



SOLICITORS:

Rishworth Kennedy & Co. Whangarei, for Plaintiff.

Robinson & Morgan-Coakle Auckland, for First Defendants.

Kendall Sturm & Strong Auckland, for Second Defendant.