8/3/85

IN THE HIGH COURT OF NEW ZEALAND
PALMERSTON NORTH REGISTRY

A. 42/80

BETWEEN OWEN KELVIN JOHN GILES
ESTELLE RAEWYN GILES

Plaintiffs

63

motion on appeal filed
CA 36/85

A N D WILLIAM DONALDSON
ROBERT JOHN KINNIBURGH

First Defendants

A N D MICHAEL DAVID GRAY

Second Defendant

A N D MICHAEL DAVID GRAY

Third Party

Hearing: 28-30 November 1983
1 December 1983
March 1984

Counsel: C.J. Walshaw for the Plaintiffs
E.G. Elliott for the First Defendants
R.O.R. Clarke for the Second Deft & Third Party

Judgment: 19 DEC 1984

JUDGMENT OF ONGLEY J.

The plaintiffs in this action were the purchasers of a block of land near Levin under an agreement for sale and purchase made between them and the first defendants on 14 March 1980 through the agency of the second defendant.

The land concerned was a 525 acre block situated in high country to the east of Levin. The price agreed to be paid was $80,000.00.

The plaintiffs were first attracted to the land by an advertisement which appeared in the "Waikato Times" at the beginning of March 1980 as a result of which they travelled to Levin from Hamilton where they were then living. On the night of their arrival in Levin, 13 March, they were taken to the property by a Mr Pemberton, a salesman employed by the second defendant, in the hours of darkness, and on the morning of the following day they were shown over it by him. In the course of this inspection it is alleged that Mr Pemberton made a number of representations about the land which proved to be false. As set out in the amended Statement of Claim those representations were as follows:

"(a) That the property sold had a government valuation of sixty-five thousand dollars ($65,000.00) and was worth at least that sum.

(b) That the first defendants had the legal right of access to the property over two (2) roads through the forestry and that the plaintiffs as purchasers were entitled to the same legal right of access under an arrangement with the Department controlling the forestry and that in the event of the plaintiffs selling part or all of the property the plaintiffs could ensure that the purchasers from the plaintiffs would also have such legal right of access.

(c) That the property sold had six (6) titles drawn on the plan and as a consequence six (6) separate blocks could be sold from the property.

(d) That one of the said blocks referred to as the top block on which a bach was situate was saleable at a price of about forty thousand dollars ($40,000.00)."

An arrangement was made for the plaintiffs to visit the office of the second defendant at Palmerston North later that day, as they did between 4 and 5 p.m. Before reaching the second defendant's office they had almost made up their minds to pay $80,000.00 for the land if the owners would agree to sell at that price. The asking price was $100,000.00 but the salesman had indicated that an offer of $80,000.00 might be acceptable. At the agent's office they met William Donaldson, one of the first defendants, and Mr Michael Gray, the real estate agent employed by the vendors to effect a sale of the property, with both of whom they discussed the proposed transaction over a period of some hours. It is alleged that at this meeting Donaldson told the plaintiffs that there was $40,000.00 worth of millable timber on the property which is the alleged misrepresentation referred to in paragraph 5(d) of the amended Statement of Claim. The agreement was signed by vendors and purchasers that night subject only to approval "as to form" by the plaintiffs' solicitors. The deposit of $8,000.00 was paid to the agent on the signing of the agreement. The balance of purchase moneys was to be paid as to $67,000.00 in cash on the date of settlement and as to $5,000.00 by the vendors taking a second mortgage over the property with interest at 10% per annum for a term of 3 years.

On their return to Hamilton the plaintiffs discussed the agreement to purchase with their solicitor, Mr Bennetts, and according to his evidence they told him that there was no legal access other than an unformed or "paper" road; that the land was in six titles; that it could be subdivided and one lot could be sold for $40,000.00; and that the Government Valuation was $65,000.00. He was wary, naturally enough, of the access situation and immediately telephoned his agents in Wellington to obtain a search of the title which reached him on the next day. He then became aware that there was only one title and that there was no legal access to a public road. Before settlement Mr Bennetts had two telephone conversations with Mr Florentine of Palmerston North, solicitor for the vendors. Mr Bennetts was reassured by what he knew of the willingness of the forestry people in the Waikato to make such arrangements and believed as a result of his discussions with Mr Florentine that access would be permitted by the forestry to an approved purchaser of the land. As a last resort he believed that access could be obtained to the land by an application to the Court under S.129B of the Property Law Act 1955 as landlocked land. He informed the plaintiffs of the true position relating to access, as he understood it, and informed them as well that there was only one title for the whole block and not six separate titles. Despite those factors the plaintiffs still wished to buy the property and instructed Mr Bennetts to complete the purchase on 31 March 1980 in accordance with the agreement.

Before settlement was effected Owen Giles had visited Levin again and in travelling over the forestry road to the property had been informed by a forestry employee that he had "absolutely no right on the road", to quote his evidence. That encounter did not deter the plaintiffs from going ahead with the purchase and on 31 March they became owners of the land by paying $62,000.00 in cash from their own resources plus $5,000.00 raised on overdraft at their bank and by securing an advance from the vendors of $5,000 on second mortgage, with the ultimate intention of obtaining institutional finance on first mortgage to build a house on the land.

Following settlement Owen Giles again visited Levin and on making enquiries from the County Council discovered that the true Government Valuation was only $6,500.00. He made no approach to the owners of the forest land to make an arrangement as to access but appears at that time to have confirmed his understanding that there was no legal access. Inquiries showed that there was little if any millable timber on the land. He returned to Hamilton armed with this information and on his instructions Mr Bennetts wrote a letter dated 6 May 1980 to the first defendants' solicitors purporting to rescind the contract. The letter read as follows:

> "Re DONALDSON & KINNIBURGH to O.K.J. GILES & E.R. GILES
>
> We write to advise that our clients, the abovenamed Mr and Mrs Giles have now informed us of certain facts which they have now established and which

make it clear that they were induced to enter into the agreement dated the 14th day of March 1980 to purchase your clients five hundred twenty five (525) acre property at Levin as a result of serious misrepresentations by your clients and their agent.

Our clients advise that the following factual representations were made by the agent:

a. That the property had a government valuation of $65,000.00.

b. That access to the property was provided by two (2) roads through the forestry and that our clients were entitled to use this access as of right under some arrangement with the department controlling the forestry and that our clients could ensure that purchasers from them would have similar rights of enjoyment of the two (2) means of road access.

c. That the property had six (6) titles drawn on the plan and as a consequence our clients would be able to sell off six (6) separate blocks from the property.

d. That in particular our clients would be able to sell off the top block on which the bach is situate for a price of about $40,000.00.

e. That there was at least $40,000.00 worth of millable timber on the property.

Our clients have now made extensive enquiries into the subject matter of these several representations and are now satisfied that the facts are not as represented but are as follows:

a. The Government Valuation is $6,500.00 and not $65,000.00.

b. Our clients as purchasers of the property have no right to use the two (2) means of road access through the forestry and indeed have already been stopped from using such access.

c. The costs of establishing a road for access purposes to the property even if

legal difficulties could be overcome is in the order of $50,000.00 including a bridge over a stream.

d. Our clients are not able to sell off six (6) separate blocks from the property and there is no means of giving legal access to the separate blocks shown on the plan endorsed on Certificate of Title 550 Folio 292.

e. That our clients are not able to sell the top block with the bach on it for $40,000.00 or any other price at all.

f. That there is no millable timber on the property with any significant commercial value.

Our clients are now satisfied, consequent upon their discovery of these misrepresentations and the seriousness of them, that they have no option but to exercise their legal right to rescind the agreement.

The seriousness of the misrepresentations and the discrepancy between the actual facts and those represented are such as to provide a compelling inference that these misrepresentations must have been made with knowledge of the real facts. Whether this be so or not will have to be the subject of further investigation by our clients, but in our view the misrepresentations, whether innocent or fraudulent, are such as to entitle our clients to rescind. Accordingly we give you notice by this letter of their decision to rescind the agreement. We also give you notice that they will be investigating further the possibility of claiming damages and of course they require a refund of all moneys paid by them.

Following upon our clients' decision to rescind we shall not of course take any further action to register the transfer and mortgage.

We ask you to let us have your urgent advice as to whether or not your clients accept this notice of rescission. If they do not then our instructions are to issue the necessary legal proceedings in the High Court to obtain appropriate orders for rescission and such other relief as is available to our clients including damages.

Would you therefore please let us have your urgent reply.

Yours faithfully
BENNETTS BENNETTS & MORRISON"

During the month of May there was further correspondence between solicitors for the respective parties from which it was clear that the vendors did not accept the rescission. It is a somewhat extraordinary feature of the case that, although the notice of rescission was given by his solicitor with his knowledge and approval, Owen Giles said in evidence that he did not at any time wish to cancel the contract or surrender ownership of the land after he had completed the purchase. Although their election to rescind the contract was never expressly withdrawn the plaintiffs continued to treat the property as though it was their own. Mr Gray was concerned about the threat of proceedings and went to the extent of arranging an offer of $90,000.00 for the purchase of the land by a syndicate organised by him. The plaintiffs rejected that offer and said they would accept $95,000.00 but nothing came of that proposal. Later the plaintiffs put the land in the hands of agents for sale at $130,000.00 and finally at $145,000.00. There was no buyer at that price.

This action was commenced on 14 July 1980 seeking an order for rescission of the contract and refund of the purchase moneys, or in the alternative, general and special damages

under various heads. Despite the formal rescission the plaintiffs continued to act as though they were the owners of the land. On several occasions they stayed in one or other of the two dwellings on the property and in September 1982 they went to reside on the land with their family and commenced to build a house on it. In the amended Statement of Claim filed on 18 November 1983 the prayer for rescission has been deleted and damages are sought on three distinct causes of action. It is alleged first, that the misrepresentations amounted to warranties; secondly, that the misrepresentations were made fraudulently; and thirdly that they were made negligently in circumstances in which there was a duty of care owed to the plaintiffs. The plaintiffs say that they were induced by the representations to pay $80,000.00 for land, the true value of which was only $25,000.00. They claim the difference, $55,000.00 plus $10,000.00 general damages and $3,500.00 special damages on each cause of action.

I turn to consider the evidence in relation to each of the alleged misrepresentations.

Government Valuation

The representation that the property had a government valuation of $65,000.00 is alleged to have been made by the

real estate salesman, Pemberton, at the property on the morning of 14 March. Pemberton admitted that he had mentioned the figure of $65,000.00 to Owen Giles but said that he had qualified the information by saying that he had been told that that was the government valuation by a Mr Carn, an earlier prospective purchaser, and that he himself had not seen a government valuation. The defendant, Donaldson, said that he had told Pemberton that the current government valuation was $6,500.00 when first giving him particulars of the property but had informed him that a new valuation was pending. Pemberton said he did not remember being told that. In evidence he first said that he had told Owen Giles that it was Carn who had told him the government valuation was $65,000.00; he then said that he described his informant as "our clients" or "our client"; and later again as "interested parties". The expression "our clients", of course, may well have conveyed the meaning to the plaintiff that his informants were the vendors. Finally he gave evidence that following the signing of the contract he had discussed the deal with the plaintiffs and asked them if they had found out what was the true government valuation. According to him they said "its nowhere near $65,000.00". That important piece of evidence had never been put to the plaintiffs for their comment and, regrettably, I think it was untrue. Altogether Pemberton's evidence was unsatisfactory and I prefer the plaintiffs' evidence on this aspect of the case which, quite simply, is that they were told that the government

valuation of the land was $65,000.00. I am fortified in my belief that that is what was said by Mr James' evidence that on the same morning Pemberton had told him that the government valuation was $65,000.00.

The further evidence relating to the effect that this statement had upon the plaintiffs' decision to purchase is that of the defendant, Donaldson, who said that at the real estate agent's office before the signing of the agreement Owen Giles asked whether the government valuation was $65,000.00 and he, Donaldson, had said it was "considerably less" than that. Neither of the plaintiffs admitted to having any recollection of this short discussion and according to Mr Bennetts, their solicitor, whose evidence appeared to me to be given fairly and impartially, they informed him upon their return to Hamilton a few days later that the government valuation of the property was $65,000.00. That evidence may be self-serving to some extent but its admissibility was not challenged and I accept it as showing consistency in the plaintiffs' attitude.

I shall return to discuss my view of the overall significance of this evidence later in my judgment.

Access

This allegation as pleaded seems to be properly divisible into three separate representations which are as follows:

i - That the first defendants had the legal right of access over two roads through the forestry land.

ii - That the plaintiffs on purchasing would be entitled to the same legal right of access under an arrangement with the department controlling the forestry land; and

iii - That in the event of the plaintiffs selling part or all of the property the plaintiffs could ensure that purchasers from them would also have such legal right of access.

The plaintiffs well understood that there was no practical access to the property by public road but Owen Giles said in evidence that Pemberton told him that if they purchased the property the road which they had used on the night of 13 March could be used by them for access "automatically". He said as well that Pemberton had pointed out another road that came out in Queen Street, Levin, which could also be used for

access. He repeated this by saying "something was said in relation to accesses, pointed out the directions of the road and that we had automatic right of use of them as of right. I mentioned earlier about a forestry road access down to Queen Street, East, that was shown to me from the top bach." According to him, nothing was said at the agent's office that night to detract from that understanding of the access position. His wife said she heard Pemberton say there was a right to use these two accesses and she recounted a discussion with Pemberton which she said took place at the agent's office that same night in which he had repeated this representation as well as making other statements. In fact Pemberton did not spend much time at all in the office with the plaintiffs and I am satisfied by other evidence that such a discussion did not take place. Both Donaldson and Gray said that they made the access position quite clear to Owen Giles at that meeting before he signed the contract and I am satisfied by their evidence and by the evidence as to Owen Giles' subsequent conduct that that was so. Whatever else Pemberton may have said on the property I accept that he did not say that there was an "automatic" right of access over the forestry road and I do not believe that the question of the right to transfer access rights to a subsequent purchaser was ever mentioned.

My impression of Owen Giles' attitude to the question of access is that he was prepared to take a risk and that he

disregarded the efforts of both Donaldson and Gray to ensure that he took the precaution of approaching the persons who had the authority to grant access rights. They may have been over optimistic about the preparedness of forestry people to grant access to the plaintiffs but I do not think they misled him. Between the signing of the contract and the date of settlement Owen Giles travelled to Levin and on visiting the property was stopped by a forestry employee who told him he had no right to use the road. He was then advised by his solicitor that he should contact the vendors and go to see the forestry people about access but he did not do so before settlement. His attitude to this advice seems to have been very much the same as it was when he was advised to approach the forestry people by the defendants. He appears not to have appreciated the importance of doing so and I think the consequences of that omission do not lie at anybody's door but his own. He has been permitted access in fact down to the present time but he did not approach the forestry people until very much later. As a result of that approach and aided by some political intervention he has been offered an access agreement. A draft agreement has been submitted to him for his approval but he has neither accepted nor rejected it.

Separate Titles and Sub-division

I treat these two topics under a single head because I think whatever was said in connection with them was said in the same context. Plans show that at some stage in the past this block of land has been divided into six lots or sections. Apparently the origin of those plans was related to earlier Maori landholdings and they are clearly now of little significance for the purposes of subdivision of the block into two or more separate titles. Subdivision would probably involve a re-survey of the land and approval of the local authorities, which in turn would involve provision of access to a public road for all lots. Having regard to the topography of the land and the dearth of public roading in the surrounding area one might imagine that the costs of a subdivision would make such a proposal uneconomic. It is conceded by the defendants that in the course of negotiation before the signing of the contract the question of subdivision was discussed. Owen Giles' own evidence about the matter was brief. He said, "It was said that the property was in six titles and we could subdivide accordingly. He later explained from a County plan how the land was subdivided into 6 titles." Later he said that the discussion about subdivision had related more particularly to a bach at the top portion of the block which he alleged Pemberton had told him would sell for $40,000.00. It was suggested to him in re-examination that this question had been

introduced as a possibility only and he agreed. The salesman, Pemberton, had a different version of what was said. He agreed that he had showed to Owen Giles a plan which had separate lot numbers marked on it but when questioned as to whether these represented titles told him that he would have to see the County Council as he, Pemberton, did not know how the Council operated under those conditions. He denied telling the plaintiff that the top block would fetch $40,000.00 and said that this was only raised by Giles in a later phone call after he had completed the purchase. I find difficulty in deciding between those two witnesses as to what was said on the property about the number of separate titles making up the block or about the prospect of selling off the top block at a price of $40,000.00. The figure of $40,000.00 was mentioned in the agent's office that night. Mr Gray said it came from him and that he mentioned it as a gross figure that the top block would bring provided it was roaded and serviced and Council consent was received to the subdivision. It was merely a figure supplied for an exercise in assessing what the net return for such a venture might be. Mr Donaldson said that it was pointed out to Owen Giles that if sub-division had been economic he would have done it himself. I accept those statements and in the end result I find that whatever was said to the plaintiffs by Pemberton on the property it was clear to them before they entered into the agreement that the vendors made no representations as to the subdivisibility or the value of the

top section. As to whether the land was in six titles or not, the written agreement spoke for itself and if there had been any misapprehension on that score I think it was at least clear to the plaintiffs that the cost of subdivision into six sections would be uneconomic and I do not believe that the possibility of subdivision was a factor which induced them to enter into the contract. In addition, however, I do not find that the burden of proving that any such misrepresentation as is pleaded in paragraph 5(c) was made has been discharged.

Timber

There remains the allegation regarding millable timber. Here I conclude that Owen Giles misunderstood what was said to him. It is established that 47,000.00 trees were planted. They were only young trees at the time of the sale and must, even to the most untutored eye, have patently not been of millable size or age. A remark was made that they could be sold as Christmas trees for $1.00 each. Perhaps that gave rise to the plaintiffs' apprehension that there was $40,000.00 worth of timber on the land. In my view no representation was made which could reasonably have been so understood.

In the end result then I find that the only misrepresentation made in the course of negotiations on which a claim for damages may be founded was the statement as to the amount of the government valuation, made by the third party's salesman, Pemberton. It was not fraudulent. Although it was a grossly incorrect statement I do not find it to be established that Pemberton knew it to be false or acted recklessly, not caring whether it was false or not. I think he believed what he said to be true and I rather think that view receives support from the fact that he made the same statement to his friend, Mr James, earlier on the same day.

Neither has it been shown that the representation amounted to a warranty. In my view it was not the intention of the parties that the representation as to the government valuation should be a collateral contract.

It remains then to consider whether the statement was made negligently and about that I have no doubt. It is the sort of statement to which prospective purchasers are likely to attach importance. The plaintiff said in evidence that he regarded the government valuation as a guide to the market price which is an attitude that can easily be understood. The making of such a statement to a prospective purchaser in reliance on information obtained from a person who had no more reason to know whether or not it was correct than that he

himself may earlier have been considering the purchase of the property in my view exhibits a degree of care well below the standard to be expected of a reasonably prudent salesman sufficiently qualified as to be entitled to registration under the provisions of the Real Estate Agents Act. As the first defendants' agent employed to effect a sale and, in so doing, being ostensibly authorised to give information to the plaintiffs about the land his relationship with them was such that he owed to them a duty to exercise reasonable care to give the information correctly. As well he had a financial interest in the matter to which his statement related. I find that in making the misstatement as to the amount of the government valuation he was in breach of his duty to the plaintiffs.

The further question requiring consideration is whether the negligence of the salesman induced the plaintiff to enter into the contract. The answer to that question will determine whether the negligence was causative of any loss which the plaintiff may have suffered by reason of it. I find it to be established that this misrepresentation was a factor, though obviously not the only factor, which prior to the meeting in the agent's office operated to bring the plaintiffs to that state of mind in which they were "99% certain" that they would buy the property if it could be had for $80,000.00. Whether it continued to so operate up to the signing of the agreement must depend upon what view one takes of the evidence

of Donaldson as to what was said upon this topic at that meeting. Donaldson knew the true valuation was only $6,500.00. He did not regard the valuation as being of any importance, possibly influenced by the knowledge that it had been made some years before and that an up-to-date valuation would shortly be available. He contented himself by saying that the government valuation was "considerably less" than $65,000.00. The other defendant, Gray, supported his evidence to that effect. The plaintiff and his wife on the other hand do not recall that being said. I did not form the impression that either the plaintiffs or the defendants deliberately made incorrect statements in giving evidence in this case. Such discrepancies as were apparent in the evidence were readily explainable by the clouding of recollection with the passage of time. On this critical issue the recollections of the parties differ and I could not say with confidence which of them iscorrect but I conclude that if a statement as to the government valuation was made by Donaldson it was not made in such a way as to be calculated to dispel the effect of the salesman's misstatement.

In my view the circumstances called for a more positive refutation by Donaldson of the salesman's misrepresentation of the government valuation than the comment that it was considerably less than he had stated it to be. The fact that an inquiry was made as to the correctness of the

salesman's statement was an indication that the information might be a factor which would influence the judgment of the plaintiffs in reaching a decision whether or not to purchase the property for $80,000.00. Donaldson knew the amount of the valuation and could have removed any danger of the plaintiffs being misled by informing them of the correct amount. The discrepancy between the representation and the truth was so great that it is reasonable to infer that it would have been sufficient to put the plaintiffs on inquiry as to the wisdom of paying $80,000.00 for the land. If in the light of that information they had chosen without further inquiry to enter into the agreement, the effect of the salesman's negligence would have been spent and no liability in damages could have been attributed to it. At this stage Donaldson failed to correct the misapprehension which had been created by his agent in such a way as to ensure that it did not continue to act as an inducement to the plaintiffs to enter into the contract. What he did say could well have left them in that state of mind in which they believed that the valuation, though less than $65,000.00, was somewhere in that vicinity. I think they probably did continue in that belief so that the negligent misstatement made by the salesman continued to operate as an inducement to enter into the agreement.

Since the hearing I have received submissions from all Counsel on the effect of the notice of recission of the

contract given by the plaintiffs upon their right to claim damages in causes of action which are founded upon the subsistence of the contract. At the trial this question appeared to pose problems of some complexity, the resolution of which would depend in various ways upon the ultimate conclusions of fact. I am indebted to Counsel for their submissions. I believe that the complexities have been mitigated to an extent by the finding that the only misrepresentation to have been proved is the statement relating to the government valuation and the further findings that that representation was not fraudulent and did not amount to a warranty. As an innocent misrepresentation it would not have entitled the plaintiffs to an order for recission of the executed contract for sale and purchase of the land and therefore the notice of recission, not having been accepted or acted upon in any way by the defendants, was of no effect. That being so the plaintiffs are not precluded from pursuing their remedy in tort.

The plaintiffs are entitled to recover damages against both first and second defendants for loss suffered as a consequence of their agent's negligent misstatement. The measure of their economic loss in the circumstances of the case is the difference between the price which they paid for the land and the true value of the land at the time of purchase. The property is an extremely difficult one to value as is

demonstrated by the range of values from $34,000.00 to $105,000.00 adopted variously by the four expert witnesses. Several of those witnesses contented themselves with giving an opinion as to saleability rather than provide a detailed appraisal of the kind to which one becomes accustomed. All are reputable and experienced men and were genuinely at odds as to the value and the nature and extent of the factors which would affect the saleable value of the land. All had regard to such sales in the district as could be looked upon as being comparable to the sale of this land but there are so many variables that it is not surprising that their interpretations of the information differed materially.

Mr Rollston, called by the plaintiffs, valued the cleared and planted land at $200.00 per acre and the bush covered land at $50.00 per acre, giving an overall value of $32,800.00 plus planting and other improvements of another $8,000.00 or so, totalling in round figures $41,000.00. He adverted to the possibility of obtaining legal access to Gladstone Road through the neighbouring forest service land at a cost of $6,000.00 or thereabouts. On that basis he estimated the land to be worth just over $66.00 per acre. Mr Brown, called by the first defendants, put a figure of $55,000.00 on the land in the understanding that there was physical access upon conditions, the details of which were not known to him when he first made his assessment. On an acreage basis that is

just over $100.00 per acre. Mr Sampson, a witness for the second defendant, thought it could be sold at $200.00 per acre after extensive advertising, if limited access were available through the forestry land. Mr Wright, a valuer with a lot of practical experience in the area thought that $160.00 per acre could be obtained and he did not see that access was a problem because, if the land was legally landlocked, access could be obtained by appropriate legal procedures.

Assessing these varied opinions as best I can and adopting the approach that the land is legally landlock but that legal access could be obtained I conclude that the value of the land at the time of sale was $100.00 per acre or thereabouts. In arriving at that conclusion I have allowed a somewhat higher figure than Mr Rollston for the cost of obtaining legal access to allow for contingencies, legal fees, and a greater land cost - say a total of $8,000.00. I have also taken into account that a prospective purchaser having it in mind that the hurdle of access would have to be surmounted after purchase would be likely to pay a price reduced by more than the actual cost involved. In my view therefore the true value of the land was, in round figures, $52,000.00.

The other heads of loss claimed by the plaintiffs are general damages of $10,000.00 and special damages of $3,500.00. In Mr Walshaw's final submissions details of the claim are spelt out in this way:

> "An overdraft in the sum of $6,000.00 has been accumulated. Rent in the sum of $40.00 per week was paid between March 1980 and September 1982 to a total approximate sum of $5,000.00. Numerous trips were made between Hamilton and the property and $1,000.00 is claimed in respect of that.
>
> Legal expenses are claimed in the sum of $1,500.00 ...
>
> There has been a loss of income. An estimated conservative claim is made in respect of this in the sum of $1,000.00."

I have already said that it is clear that the plaintiffs at no time genuinely sought to rescind the contract or genuinely wished to rescind it and their purported rescission was of no effect. I am of the opinion that they treated the property in much the same way and ordered their affairs in much the same way as if they intended at all times to complete the purchase. Such trouble and inconvenience as they did encounter was largely attributable to their own legal posturing. In short I do not find any consequential damage to be proved.

The plaintiffs will be entitled to judgment against the first defendants and the second defendant jointly and severably for the sum of $28,000.00 on this head. They also claim interest. They have been principally responsible for the delay in bringing the matter to trial. In my view it could have been disposed of within six months from the date of filing of the Third Party Notice. The claim for interest will

therefore be limited to a period of 18 months at a rate of 11% per annum, which I calculate to be a sum of $4,620.00.

There remains the question as to how the liability should be met as between the defendants themselves. The second defendant's employee was not authorised to make the statement which he did make and ordinarily the first defendants in such circumstances would be entitled to be indemnified by the second defendant. However, in failing to rectify the error when he had an opportunity to do so Donaldson was at fault in failing to act as he might reasonably have been expected to do. The consequences of that failure have not been the subject of argument. It may be that the parties can settle the issue themselves and I will not deal with it in this judgment. If it cannot be settled I will hear further argument if requested.

Judgment will be entered for the plaintiffs against the first and second defendants for the total sum of $32,620.00 plus disbursements and witnesses expenses as fixed by the Registrar.

J.

Solicitors

McKegg, Walshaw & Co., P.O. Box 548, Palmerston North for Plaintiffs

Jacobs, Florentine & Partners, P.O. Box 237, Palmerston North for First Defendants

Clarke, Ogilvie & Broadhead, P.O. Box 59, Palmerston North for Second Defendant and Third Party