IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

No. A.351/83

BETWEEN ALAN STURGEON FALLOON
and MAY OLIVE FALLOON

Plaintiffs

A N D ALAN LINDSAY JOHNSTONE

Defendant

A N D DALGETY NEW ZEALAND LIMITED

Third Party

Hearing: 24, 25 June 1985

Counsel: B.J. Gallagher & Carolyn Risk for Plaintiffs
D.I. Jones for Defendant
N.J. Dunlop for Third Party

Judgment: 17 JUL 1985

JUDGMENT OF HOLLAND, J.

At the commencement of the hearing of this action counsel for the defendant indicated that the defendant did not wish to proceed with its claim against the third party. No order had been sought or made under Rule 99G of the Code of Civil Procedure. Counsel for the third party applied for costs. That application was reserved but an order was made excusing him from further attendance at the proceedings.

The defendant is the proprietor of a block of land situated at West Melton containing approximately 8 hectares. It is zoned rural in the Town Planning Scheme of the relevant County Council but it is close to the city of Christchurch and for that

reason has a special appeal for horticultural enterprises or intensive farming. In 1983 the defendant wished to sell the land. It had no improvements on it other than fencing and an irrigation scheme which he was in the course of installing. He obtained a valuation of the land which valued it at $65,000 as at 30 August 1983 on the assumption that the proposed irrigation scheme was completed, that scheme involving the laying throughout the property of six inch underground mains to be served by a 14 inch well sunk to a depth of approximately 120 feet. The defendant placed the property in the hands of the third party as estate agent to sell. It was advertised in the newspaper on September 3 1983 as follows:-

> "WEST MELTON. An excellent 30 acre block of good land well fenced into two paddocks and recently top dressed and shelter planted. Water from 14 in well and 6 in underground main lines, building permit could be available. This is one of the better blocks in the area. $69,500."

The first plaintiff is a geologist. He was interested in acquiring a property in the area to undertake a horticultural project. He was attracted by the advertisement. An irrigation system was essential for horticultural development in that area but he was particularly attracted by the indication that the well was 14 inches in diameter. He had some knowledge of the earth strata in general and was aware of the large number of water wells in the area and that over a period of years the water level had dropped and was continuing to drop. The diameter of the well had a particular significance to him because first it enabled two pipes to be sunk, one of which could be driven by a submersible pump and the other could be driven free of cost by a windmill. A further

and more persuasive factor was that if it was necessary later to dig the well deeper to get an adequate supply of water an interior pipe of lesser diameter could be inserted and with a 14 inch diameter this could be done on more than one occasion.

He inspected the property with the plaintiffs' agent. He was disappointed to find that the well had not been drilled and that although the six inch pipes were in position in the ground the irrigation system was not working because there was no well. There was, however, alongside the site of the proposed well pointed out to the plaintiff 14 inch diameter casing pipes.

After his initial inspection the plaintiff still expressed interest in the property and I accept his evidence that Mr Heron, the employee of the defendant's agent, called and brought with him the formal valuation obtained by the defendant which is dated 2 September 1983 and which contains a description of the proposed irrigation system and in particular a passage as follows:-

> "As mentioned previously our valuation is based on the assumption that the bore has been sunk to a depth of approximately 120 feet, this being a 14-inch well and we would make the comment at this stage that our valuation is subject to a reasonable flow from that bore of in the vicinity of 250 gallons per minute which would suffice for irrigation purposes, but if the bore because of its size is to be used for frost protection purposes, a minimum flow of 1000 gallons per minute would be required. This valuation is therefore subject to the development of this bore producing a minimum flow of 250 gallons per minute and the irrigation system being fully developed, apart from the installation of the pump and electrical supply."

Again I accept the evidence of the plaintiffs that Mr Heron brought with him an offer to purchase which he had

prepared. That offer to purchase was a formal agreement for sale and purchase of rural land on a form with the name of the third party printed on it. It provided for a purchase price of $60,000 with a deposit of $2500 and for settlement to be effected on 28 October 1983 when vacant possession would be given. It contained on it written in in the handwriting of Mr Heron under the heading "28. Special Conditions" the following:-

> "This offer is conditional upon:
>
> 1. The purchaser arranging morgage (sic) finance on terms and conditions satisfactory to himself in every respect by the 10th day of October 1983.
>
> 2. The Vendor or his agent completing the drilling of a water well to a depth of 36.6 metres, (120 ft) the drilling, piping to the surface and screening shall be the Vendors cost and such work to be completed by possession date.
>
> 3. The supply and installation of power to the property and the supply and installation of the Well Pump to be the responsibility and cost of the purchaser.
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> 4. The volume of water from the proposed well being to the satisfaction of the purchaser, i.e. a minimum of 250 gallons per minute at the head, or such lesser amount acceptable to the purchaser.
>
> 5. The Vendor completing at his cost the supply and planting of Pine trees around boundary of the property on or before possession date."

The plaintiff did not immediately sign the offer. There is a dispute as to where the plaintiff signed the offer. Mr Falloon could not remember precisely but doubted the assertions of the defendant and Mr Heron that it was signed in Mr Heron's office. It is not in my view material. I accept the evidence of Mr

Falloon that he had the offer in his possession for some time before it was signed and that he discussed the offer with his solicitors. I believe that it is likely that he and Mrs Falloon signed the offer and that Mr Falloon then took the offer to the office of the agent, Mr Heron, because he wished to insert amendments to the special conditions. Although Mr Falloon denied ever being present with the defendant in Mr Heron's office it may be that the defendant was present when the plaintiff was having his discussion with Mr Heron and Mr Falloon did not associate another person present as being the defendant. In any event after discussion with Mr Heron, Mr Falloon inserted in paragraph 2 after the words "36.6 metres" the words "and completing surface installations". He also added at the conclusion of paragraph 4 the words "4. (cont) Testing of the well is to be carried out for such time is as necessary to establish flow characteristics of the well". Those amendments were initialled by him and either then or later were initialled by the defendant.

There is a conflict of evidence as to what was discussed prior to the signing of the offer by the plaintiffs or at least the handing over of the offer by the plaintiffs in Mr Heron's office. I am satisfied that it was drawn to Mr Falloon's attention that there could be no certainty that a flow of 250 gallons per minute could be obtained. I am also satisfied that Mr Falloon indicated that such a flow was probably greater than his requirements and that he may well be willing to accept a lesser flow. That explains the wording of paragraph 4 of clause 28 before it was amended. I do not accept the evidence of Mr Heron that prior to the contract being signed by all parties there was a discussion between the defendant and Mr Falloon in which the defendant

suggested that he might not be able to have the use of a well sinking machine which would sink a well of 14 inch diameter and that in that event a well of lesser diameter might have to be substituted.

The manner in which Mr Heron gave evidence did not impress me. I was surprised that he was able to be as confident as he was as to statements made two years ago in the course of what must have appeared to have been only an ordinary business transaction in which he was concerned solely as estate agent without bothering to inspect any records that he had in relation to the matter and I consider that he may easily have allowed himself to have been persuaded as to what occurred by the defendant whose evidence in some other respects I regard as having been dishonest. More importantly, however, I was impressed with the testimony of Mr Falloon who appeared to me to be thoroughly accurate over matters in respect of which he was positive and generally I found his evidence in all respects to be persuasive and I accept it. I also consider it highly unlikely that the defendant who had already assembled his 14 inch pipe casing and was merely awaiting it being drilled into the ground would have readily and perfunctorily agreed to have drilled a hole of lesser diameter with the consequence of purchasing further pipe or casing merely because a well drilling machine might not have been available. I am also satisfied that if the subject had been discussed with Mr Falloon he would have protested and at least have insisted on a minimum size well.

It follows from the foregoing that I also reject Mr Heron's testimony that he had not seen the valuation prepared by Mr Knight and that he did not deliver the valuation to Mr Falloon. I am also satisfied that the special conditions written into the

contract by Mr Heron arose far more from the contents of that valuation and the expressed intentions of the defendant than anything said by the plaintiff.

The defendant had substantial difficulty in obtaining machinery to sink the well. Eventually he arranged for the well to be sunk by a well driller over Labour Weekend shortly before the possession date. After the well had been sunk a distance of just over 90 feet it was ascertained by the well driller that a seam in the casing had split. The well had been sunk to a level sufficient to determine that the static water level was 17.30 metres or approximately 57 feet. An attempt was made to clear out the gravel at the bottom of the casing but this was unsuccessful because further gravel was falling in. The well driller advised the defendant that he was faced with two alternatives, either to withdraw the total casing and start again from the beginning or to telescope by putting another casing down of less diameter inside the existing 14 inch casing. It is in my view significant that it was apparent to the well driller that at that stage the well had not been sunk far enough to obtain an adequate water supply.

The defendant did not engage the assistance of a well driller to complete the drilling. He obtained 10 inch diameter casing and adopted the telescoping technique. He says that he welded together that 10 inch casing for a length of approximately 100 feet. He then endeavoured to hit that pipe down and says he got approximately a further three feet down and then says he re-engaged the assistance of a well driller. He also claims that he sunk the well to 120 feet. I reject his testimony to that effect. It was repeated by him during cross-examination. I was not impressed with

the defendant as a witness. He was evasive and I am satisfied from the manner in which he gave his evidence that on occasions he was fabricating the truth to his own advantage. He was no doubt disappointed at the fracture of the casing on the initial attempt. One of his advisers was a Mr Baikie who was called as a witness. Mr Baikie was a water diviner and well sinker, but he was not employed to do the sinking. His opinion from his experience of wells in the area was that water would not be obtained if the well were sunk to 120 feet. I am satisfied that the defendant being aware of his contractual obligation to drill to 120 feet has said that he has done so but has not incurred the expense of drilling to this depth because he considered it a waste of time. I find it incredible that the attempt to sink the well to 120 feet made as he alleges after the writ was issued was done by the defendant without an invitation to the plaintiff or his advisers to attend or at least accompanied by a witness who was able to testify as to what had occurred. When Mr Newland, the well sinker, was called back by the defendant the well was only down to approximately 100 feet. The defendant said in evidence that he had used Bisleys, Mr Newland's employer, to raise the casing back from 120 feet to 100 feet. No-one was called from Bisleys and it is unlikely that Bisleys would have intervened without Mr Newland being aware of the position. To Mr Newland, in contradistinction to the evidence that he gave in Court, the defendant said he hired a crane to lift the casing back. No evidence was called by the crane driver. I am satisfied that the well sunk by the defendant did not go to 120 feet and was not sunk more than a foot or two over 100 feet. The evidence of the defendant to the contrary is rejected.

The water to be obtained from the well registered a flow of approximately 30 gallons per minute or in any event certainly under 60 gallons per minute. Mr Falloon had indicated that he might not require 250 gallons per minute but until he gave evidence had not indicated a minimum level. He has said in evidence that a flow of 60 gallons per minute would be adequate. However, the existing well will not produce 60 gallons per minute. There is no dispute that the plaintiffs are entitled to withdraw from the contract and to be repaid the deposit. That indeed is what the defendant wants. The plaintiffs say, however, that they are entitled to have a 14 inch well drilled to 120 feet and then if the flow is less than 250 gallons per minute decide whether the flow is adequate and confirm the contract or if the flow is inadequate reject the contract.

In their amended statement of claim the plaintiffs plead that it was a term of the contract between them and the defendant that the water well referred to in paragraphs 28.2 and 28.4 of the special conditions of the contract shall be 14 inches in diameter. It is common ground that the plaintiffs duly confirmed finance before the specified date and that the provision as to trees in paragraph 5 has no bearing on the matters in issue in these proceedings. The plaintiffs seek an order that the defendants specifically perform the agreement by drilling a well 14 inches in diameter to a distance of 120 feet and equitable damages stated to be particularised before trial but not particularised even at the end of the trial. In the alternative an enquiry is sought as to damages for breach of contract.

I find that the defendant by his own actions and through the actions and deeds of his agent represented to the plaintiffs that the well which he contracted to sink to 120 feet would be a 14 inch well. Those representations arise from the advertisement in the newspaper indicating that there was a 14 inch well producing water on the property, the valuation of Mr Knight shown to Mr Falloon before he made his offer referring to 14 inch well, the plan of the property prepared on behalf of the defendant and shown to Mr Falloon prior to his signing his offer on which there was designated a well with 14 inches alongside it and the fact that on the visual inspection of the site were placed by the defendant casings for the well 14 inches in diameter. It induced the plaintiffs to enter into the contract.

I was urged in the submissions advanced on behalf of the plaintiffs to find that the diameter of the well being 14 inches was a term of the contract. It is not specifically expressed as a term of the contract. The contract was one reduced to writing where it would be expected that all important terms of the contract would be included in the writing. The obligation to sink the well to a depth of 36.6 metres does not contain any provision as to the diameter of the well. Had the obligation been expressed merely as one to drill a well to the specified depth I should have thought that no more could have been implied than an implication that the well would have been of a diameter sufficient to carry water at least at the rate of 250 gallons per minute. The evidence shows that a well of diameter of 8 inches would be capable of carrying this capacity of water. Although a representation was made that the well would be 14 inches, if the contractual obligation was expressed as merely to drill a well to 120 feet the law would not permit an

implication that the well was to be 14 inches in diameter as a term of the contract as such is not necessary to give efficacy to the contract.

It was submitted, and I accept, that both parties had in mind a 14 inch well but they did not specify a 14 inch well in the contract because neither party contemplated the possibility of the failure of the projected sinking of the 14 inch well. The parties, however, did not stipulate merely for a well to be drilled. The stipulation was that the vendor complete the drilling of a well. The use of the word "complete" means an operation which had commenced but had not been finished. As a verb "complete" is defined in the Shorter Oxford Dictionary as:- "To bring to an end, finish". "Complete" on the evidence can only have been intended to apply to the operation contemplated by both parties, namely the sinking of the 14 inch well. By use of the word "completing" I am satisfied that the vendor undertook to sink a well of 14 inch diameter to a depth of 120 feet. He is in breach of his contract in that not only has he not sunk any well to 120 feet as he claims, but he has certainly not sunk a well 14 inches in diameter to that depth. It was submitted to me on behalf of the defendant that he should be excused from that obligation because the evidence demonstrates that a well sunk to 120 feet will not produce an adequate supply of water whatever the diameter of the well. The evidence does not satisfy me that such is the case. It is dependent entirely on the testimony of the defendant that he sunk his 10 foot well to 120 feet which I have rejected and on the opinion of Mr Baikie which I find to be based on too limited a foundation to give any effect to.

I was troubled, as I indicated at the commencement of the hearing, whether a Court can order specific performance of part of a contract which is in itself an obligation merely to establish facts in respect of a condition which may make the contract enforceable or may entitle one party at least to withdraw. I received no argument from either side on this issue. Counsel for the plaintiffs indicated in his final submissions that after hearing all the evidence the plaintiffs are willing to take the risk as to the flow of water and that provided a well is drilled to a depth of 120 feet with a 14 inch bore by an independent and competent contractor they will waive the provision as to the flow of water and take the land. They seek an order that the plaintiff perform the contract by transferring the land to the plaintiffs for the consideration expressed in the contract of $60,000 less $15,000 which I find to be the cost of sinking a 14 inch well to 120 feet.

Such an order could in my view be made by applying the provisions of the Contractual Remedies Act 1979, if under the provisions of section 9 of that Act the contract has been cancelled by the defendant. It may well be that it has been cancelled by the defendant's assertion that he has complied with the contract and will do nothing more when in fact he has not complied with the contract. Counsel for the defendant submits that before the provisions of the Contractual Remedies Act 1979 can be invoked there must be a pleading seeking the Court to exercise its powers under that Act. I reject that submission. The Act applies to all contracts made after the commencement of the Act on 1 April 1980. The Court's obligation is to apply the statute whether it is pleaded or not.

I am however satisfied that the plaintiffs are entitled to the orders sought by them under the ordinary principles of law in claims for specific performance of contracts. In Spry on Equitable Remedies 2nd Edition p101 it is said:-

> "In the second place, it appears to follow from general equitable principles that the plaintiff may, if he wishes, waive his right to the specific performance of particular terms, be they conditions or warranties, as to which difficulties of enforcement arise, and obtain merely the specific performance of the other terms; a waiver of this nature, which consists merely in limiting the claim for specific enforcement so as not to include the particular terms in question, does not detract from the right of the plaintiff to obtain damages at law for their breach. Relief on this basis will not be granted if it is contrary to an intention appearing in the agreement or if such considerations as substantial hardship would give rise to injustice."

Later at p102 after referred to the effect of Lord Cairns Act the author states:-

> "Probably it will ultimately be accepted that a plaintiff will be entitled to specific performance of so much of the relevant agreement as is specifically enforceable and damages as to the remainder (whether legal damages or equitable damages within the general jurisdiction of the court), where this course is most conducive to justice between the parties, especially if any other result would lead to unreasonable prejudice or hardship."

In this case the plaintiffs are willing to waive the condition as to the flow of water and to waive the specific term requiring the sinking of a 14 inch well to 120 feet and accept damages in lieu. Those damages are not, however, the cost of sinking such a well. They are the difference in value of the land

with a 14 inch well providing an adequate flow of water as against the value of the land without such a well. There is no evidence on which I can make such an assessment. The plaintiffs agreed to pay $60,000 for land said to be worth $65,000 with a completed irrigation system but I am unable to make any reasonable inference as to the damages which flow from the defendant's breach of contract.

Were I to apply the Contractual Remedies Act 1979 I would be able to make an order vesting the defendant's land in the plaintiffs upon payment by the plaintiffs to the defendant the balance of the purchase price less some sum in respect of the well not being sunk. Clearly even a dry well 14 inches in diameter would be of some value to the plaintiffs in assisting them in drilling to a greater depth for water but I am unable on the evidence to assess a fair sum considering that the breach of contract was no more than a breach of a term which in the contemplation of the parties might in the event of an inadequate well have led to the contract being brought to an end.

No application was made for a non suit. Although the plaintiffs are obliged to prove their case, it would be unjust for me in this case to grant a non suit. The case is adjourned for further evidence to be called restricted solely as to the appropriate measure of damages if specific performance is granted or refused or if some sum by way of compensation is awarded under the Contractual Remedies Act 1979.

Counsel asked that in any event I hear further argument as to costs. There can be no doubt that the third party is entitled to costs against the defendant who joined it. Those costs should be as on an action brought against it for a claim not

exceeding $20,000 but which in the circumstances I fix at an overall figure of $750 together with disbursements and other necessary payments to be fixed by the Registrar. Those costs are to be paid by the defendant. Counsel for the defendant submitted that because of the amended pleadings of the plaintiffs all or some of those costs should be borne by the plaintiffs. The defendant's right to apply in this regard is reserved as is the position of the costs between the plaintiff and the defendant generally.

A D. Holland J

Solicitors:

Papprill, Hadfield & Aldous, Christchurch, for Plaintiffs
H.W. Thompson & Morgan, Christchurch, for Defendant