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IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

No. A.351/83

BETWEEN ALAN STURGEON FALLOON
AND MAY OLIVE FALLOON

Plaintiffs

NOT
RECOMMENDED

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A N D ALAN LINDSAY JOHNSTONE

Defendant

A N D DALGETY NEW ZEALAND
LIMITED

Third Party

Hearing: 3 March 1986

Counsel: Carolyn Risk for Plaintiffs
D.I. Jones for Defendant

Judgment: 06 MAR 1986

SUPPLEMENTARY JUDGMENT OF HOLLAND, J.

On 11 July 1985 after a two day hearing I delivered an interim judgment indicating that I would make an order for specific performance of a contract between the plaintiffs and the defendant for the sale by the defendant of a block of land containing approximately eight hectares at the contract price of $60,000 but without specifically requiring the defendant to sink a well on the land with a bore of 14 inch diameter to a depth of 120 feet which had been held by me to be a contractual term between the parties. The plaintiffs sought damages in addition to the order for specific performance of part of the contract in respect of the breach by the defendant of part of his contractual obligations. I

decided that there was insufficient evidence for me to assess those damages and I adjourned the case for further consideration. I have now heard further evidence.

Counsel for the plaintiffs submitted that this was a proper case for an order for specific performance under the equitable jurisdiction of the Court and did not seek relief under the provisions of the Contractual Remedies Act 1979. Counsel for the defendant made no submissions that if relief were to be granted to the plaintiffs it should be under the terms of the Contractual Remedies Act 1979 instead of an order for specific performance. The contract between the defendant and the plaintiffs was for the sale of the land for $60,000 with a deposit of $2,500 and a provision for settlement to be effected on 28 October 1983. The contract contained a special condition 28, particulars of which are set out in page 4 of my judgment of 11 July 1985. In the circumstances I held that the defendant was under a contractual obligation to sink a well to 120 feet and that such well was to be 14 inches in diameter. The contract then provided that the well was to provide a volume of water of a minimum of 250 gallons per minute at the head or such lesser amount as was acceptable to the purchaser. There was no contractual requirement to provide a well producing a flow of 250 gallons per minute or any flow, but it follows from my findings that if the well did not produce 250 gallons per minute at the head or such lesser amount as was acceptable to the purchaser then the purchasers would be entitled to withdraw from the contract and have a refund of their money.

In the course of sinking the well with a bore of 14 inches in diameter the casing split when the well had been sunk

approximately 90 feet. The defendant then obtained 10 inch diameter casing and then claimed to have sunk that 10 inch casing to a depth of 120 feet where he found no adequate supply of water. I rejected his evidence to that effect and found that the well had not been sunk below 100 feet and that the defendant had stopped at that stage on the advice of a water diviner that he would not obtain water at 120 feet. There was some water at approximately 90 feet but it provided a flow of something less than 30 gallons per minute which was not adequate for the purchasers who indicated at the hearing for the first time that although the contract provided for 250 gallons per minute a flow of a minimum of 60 gallons per minute would be adequate.

The plaintiffs in their amended statement of claim had sought an order for specific performance that the defendant carry out the terms of the contract and in particular the conditions in paragraphs 2 and 4 of condition 28. At the conclusion of the hearing when making his final address, senior counsel for the plaintiffs abandoned the prayer for an order that the defendant specifically perform that part of the contract relating to the sinking of the well and sought an order for specific performance of the contract with a deduction from the purchase price of $15,000 which was said to be the cost of sinking such a well. After hearing argument, and for reasons which I have earlier expressed, I came to the conclusion that it was competent for the Court to order specific performance of part of a contract and that in the circumstances of this case such an order should be made. I did, however, say that it did not appear to me that in the terms of the relief sought by the plaintiffs that the correct measure of damages to be awarded

ancillary to an order for specific performance was the cost of sinking such a well but was the difference in value of the land which the plaintiffs received in the state in which they received it from the value of the land if such a well had been sunk. I am now satisfied that in that statement I oversimplified the problem. There was here no warranty that a well would be sunk which would produce an adequate flow of water. There was a promise to sink a well of a certain dimension to a certain depth and if the well did not produce an adequate supply of water then the plaintiffs would have the right to withdraw from the contract but they would have had no right to damages simply because there was an inadequate flow of water.

From the evidence which I have heard on the resumed hearing the defendant has now arranged for the ten inch well to be sunk to a depth of 120 feet and at that depth there is no water. It is common ground that water will probably be obtained if a well is sunk to a further but unknown depth.

Although the plaintiffs were induced to enter into the contract because of the representation that there was a 14 inch diameter well and they claim that the very wide diameter of the well was important, I am satisfied that in the circumstances of this case there was practically no difference in value to a purchaser of the land in having a well of 14 inches of diameter as against 10 inches of diameter. Certainly the 10 inch diameter casing restricted the diameter of two well casings inside it which might well be needed but the smaller well casings were capable of producing a flow more than adequate for any purchaser's reasonable needs. This was common ground by the experts called in the resumed hearing on both sides.

It was also common ground that the provision of an efficient working well would not add to the value of the land on sale, the cost of providing that well. Mr Ryan, the valuer called by the plaintiff, also said that an efficient 14 inch well would not create any increase in value of the land over an efficient 10 inch well. He considered that with an efficient well the land would have been worth $6,500 more than the land without any such well. He did not give his opinion as to the increased value of the land with a 10 inch well sunk to 120 feet which did not produce water.

I am satisfied here that the issues have become clouded by the decision of the purchasers to take the risk of the well not producing an adequate supply of water at 120 feet. At the time of the hearing the defendant had not sunk any well to 120 feet. He now has sunk a well of 10 inches in diameter to 120 feet and I am satisfied that the plaintiffs have received land of exactly the same value as would have been the case with a dry well 14 inches in diameter. I must assume because of the action of the plaintiffs at the trial in taking the risk as to the well that had that been the position prior to settlement they would have waived the condition and completed the purchase. There is, however, the cost of connecting the well to the pipes already in the ground. There was really no challenge in this regard to Mr Ryan's evidence that a reasonable assessment of damage in regard to this failure would be $500. The defendant has indicated that he would connect the dry well himself if necessary. It does not appear that at this stage such a connection is necessary but it will be later. It was clearly in the contemplation of both parties that an adequate supply of water would be obtained at 120 feet and the defendant would have had

to have borne the cost not only of sinking the well but connecting it to the pipes which may well have been more than $500 but which on the evidence would have added $500 to the value of the land.

In all these circumstances, I am satisfied that the only damages which should be ordered in addition to the order for specific performance are damages of $500. This is not a case for allowing interest. The plaintiffs have retained the bulk of their purchase money and no doubt have received some return from that. The delay in settlement is due to the breach of contract of the defendant but the plaintiffs will have the advantage of paying the purchase price in money which has depreciated quite substantially during the three year period.

I now consider the question of costs. The plaintiffs having succeeded are prima facie entitled to costs. Although the value of the land in question is undoubtedly $60,000 or more, the amount at issue between the parties was substantially less than that. I accordingly do not consider it appropriate to allow costs of trial as on a specific sum. In addition, the plaintiffs had to apply after the action was set down to amend the statement of claim in material respects which to some extent changed the nature of the plaintiffs' claim. I also believe that in relation to costs that it is possible that the litigation might have been avoided or simplified if the plaintiffs had at an early stage indicated to the defendant that they would accept a flow of 60 gallons per minute instead of leaving this until the hearing. It must further be recorded that even at the conclusion of the hearing the plaintiffs again sought to amend their statement of claim. Further, the plaintiffs have not been successful to any marked degree, in the resumed hearing concerning the question of damages. Taking

all matters into account, it is appropriate that the defendant should pay the plaintiffs' costs of $1,500 together with disbursements, witness expenses and other necessary payments to be fixed by the Registrar.

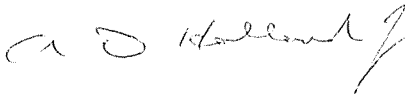
The formal Order of the Court is:-

(1) That the third party be dismissed from the action by consent but with leave reserved to apply for costs.

(2) That the defendant do specifically perform the agreement described in paragraph (1) of the amended statement of claim but deleting therefrom the provisions of special conditions 28.2 and 28.4.

(3) That the plaintiff should have judgment for damages in the sum of $500 against the defendant.

(4) That the plaintiff shall have judgment for costs against the defendant in the sum of $1,500 together with disbursements, witness expenses and other necessary payments to be fixed by the Registrar.



Solicitors:

Papprill, Hadfield & Aldous, Christchurch, for Plaintiffs

H.W. Thompson & Morgan, Christchurch for Defendant