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N.Z.L.R

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

A. No. 180/82

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BETWEEN BRUCE ROBERT FINCH of 206 Taranaki Street, Wellington, Motor Vehicle Dealer

Plaintiff

A N D AUCKLAND WHOLESALE LIQUOR LIMITED a duly incorporated company having its registered office at D.S. Duns & Co., A.M.P. Building, Cathedral Square, Christchurch, and carrying on business in Wellington as Liquor Merchants

Defendant

Hearing: 25 and 26 August 1986

Counsel: M.P. Reed for Plaintiff
D.A.R. Williams for Defendant

Judgment: 8 September 1986

JUDGMENT OF QUILLIAM ACJ

The plaintiff claims to recover damages by reason of the repudiation by the defendant of a transaction involving the sale and purchase of a commercial property.

The plaintiff, through the medium of a company called Finch Motors Limited, carried on the business of a new and used car salesman from rented premises in Taranaki Street, Wellington. He held a franchise for the sale of Subaru vehicles. His premises were not altogether suitable for his business and, in particular, he was under some pressure from the Subaru suppliers to obtain better premises for the display and sale of their vehicles. He had

accordingly sought the assistance of Mr Letica, an employee of S. George Nathan & Co. Ltd, real estate agents, in an attempt to find alternative premises. At first that approach was unsuccessful but in May 1982 he was informed by Mr Letica that the premises occupied by the defendant as a wholesale liquor store may be available for purchase. These premises were in Taranaki Street and directly opposite the plaintiff's existing car yard. He regarded them as particularly suitable as they would give him the space and type of premises he required and their location would enable him to preserve the goodwill of his business which was already in an area popular with motor vehicle dealers.

Mr Letica was able to secure an agency from the defendant (which was to be shared with the defendant's regular real estate agents in Christchurch) and he received authority to prepare an offer for the sale of the defendant's property to the plaintiff for $650,000. The plaintiff was not prepared to pay that price. He told Mr Letica that he was prepared to pay $353,150 and Mr Letica then prepared a fresh offer based on that sum as the purchase price. This document, which was ultimately the subject of a number of amendments, contained the following main terms:

1. Purchase price $353,150.

2. Deposit $10,000 and balance in cash on settlement.

3. Settlement to be effected on 4 August 1982 but with possession to be given and taken one month after acceptance of the offer.

This offer was not acceptable to the defendant and the outcome was a meeting which was held in the plaintiff's office on 26 May 1982. It was attended by the plaintiff, his solicitor Mr Langford, Mr O'Sullivan a valuer retained by the plaintiff, Mr Sullivan a director of the

defendant, Mr Collins the defendant's real estate agent, and Mr Letica. There was a lengthy discussion lasting about 1-1/2 hours, the purpose of which was to try and arrive at terms satisfactory to both parties. By the end of the meeting general agreement had been reached. The price was to be $450,000; the settlement date was amended to 26 August 1982; and there were added two clauses. The first provided:

> " The purchaser's counter offer (at the price of $450,000) remains open for acceptance by the vendor to be communicated to the purchaser by noon on Monday the 31st day of May 1982. "

The second, which was added by the plaintiff in his own handwriting, was:

> " I agree in addition to the above conditions to pay the agent's condition (sic) in accordance with the scale rate prescribed by the Real Estate Institute. "

It is obvious that the word "condition" was intended to be "commission" and nothing turns on this error.

The document had already been signed by the plaintiff before any of the alterations were made. The alterations were initialled by the plaintiff and Mr Sullivan. It is common ground that, notwithstanding the measure of agreement which had been reached, the document in its altered form was not intended to amount to a binding contract but represented a counter offer by the plaintiff. The shares in the defendant company were held by Mr Sullivan and Mr Butterfield equally, and they were both directors. Mr Sullivan had therefore made it clear that the approval of Mr Butterfield was necessary before the terms agreed upon could be regarded as binding. So far as the plaintiff was concerned (and probably all the others at the meeting as

well) the obtaining of this approval was expected to be a formality.

The contract document was taken back to Christchurch by Mr Collins. It was he rather than Mr Sullivan who was in control of the transaction from the defendant's point of view. As noon on 31 May 1982 approached Mr Langford, having heard nothing as to acceptance of the counter offer, rang Mr Collins who said that Mr Butterfield, who had been away from Christchurch, had not yet returned. Mr Collins asked for an extension of time until 3 p.m. the next day, 1 June. Mr Langford obtained the plaintiff's approval to this and informed Mr Collins accordingly.

At 2.55 p.m. on 1 June a telegram was despatched from Christchurch addressed to Mr Langford which read:

> " Counter offer $450,000 accepted
> Butterfield and Sullivan "

A similar telegram was sent directly to the plaintiff. This telegram was regarded by the plaintiff and Mr Langford as the conclusion of a binding contract on the terms in the document which had been settled at the meeting of 26 May.

Mr Langford heard nothing further for about a week and he then rang the defendant's solicitor, Mr Jones, in Christchurch. He was told that the signed contract had been posted to him but that some amendments had been made to it. When the document arrived Mr Langford found that alterations had indeed been made to it. The provision as to settlement one month after acceptance of the offer had been deleted and there had been added, at the foot of the document, the following:

> " I accept the counter offer of $450,000 (Four hundred and fifty thousand dollars) subject to the deposit being

> increased to $45,000, possession being given on settlement date and the transfer or suspension of the existing wholesale licence prior to settlement.
> "

Mr Langford promptly rang Mr Jones and protested at the unilateral alteration of a completed contract and insisted that there must be affirmation of the acceptance of the counter offer as it had been made. Mr Jones did not seem to regard the matter as of any importance. Mr Langford then wrote to Mr Jones confirming his attitude in the matter. A few days later Mr Jones rang him and suggested that the outstanding matters were minor and proposed that they should be left for discussion between Mr Butterfield and the plaintiff directly. This was agreed to and Mr Butterfield rang the plaintiff. Of the three proposed alterations only two were discussed on that occasion. The result was that the plaintiff agreed to increase the deposit to $20,000 and that the date for possession should be 9 August 1982. There was no reference in that conversation to the wholesale liquor licence.

Mr Langford then received a letter dated 18 June from Mr Jones in which further reference was made to the suspension of the wholesale licence. This was not regarded by the plaintiff or Mr Langford as of any relevance to the contract but as a matter of concern only to the defendant. The plaintiff accordingly rang Mr Butterfield to make this clear and followed the conversation with a telegram confirming his attitude. The additional $10,000 for the deposit was sent to Mr Jones. The response from Mr Jones was a letter returning the deposit and saying that all counter offers were withdrawn. From this point the parties have stood firm on their respective positions. It was the plaintiff's assertion that there was a binding contract concluded on 1 June 1982 by the telegram previously set out and that what had occurred since was a proposal by the defendant for variations of that contract. The defendant's

attitude was that the telegram was no more than an acceptance of the price, that the other terms remained to be agreed upon, and that agreement had never been reached so that no contract had ever come into existence. At first the plaintiff sued for specific performance but later accepted the defendant's repudiation of the contract and sought damages only.

Two matters require resolution:

1. Whether a contract was concluded;

2. If so, the amount of damages payable.

1. THE CONTRACT

It was the defendant's case that in the circumstances contemplated by the parties the only way in which the plaintiff's counter offer could have been accepted was by the signing of the contract document in unaltered form. The document had been signed but with alterations and so it was said this constituted a fresh counter offer. Regardless of the way in which the telegram was expressed the contention was that there could never have been acceptance of the plaintiff's counter offer in that way.

In support of that submission reliance was placed mainly on the decision of the Court of Appeal in Carruthers v Whitaker [1975] 2 NZLR 667. That was a case in which there was oral agreement between the parties for the sale and purchase of a farm property and the vendor was to instruct his solicitor to draw a formal contract. This was done after discussion between the respective solicitors and a draft agreement was approved by the vendor. It was then engrossed and sent to the purchasers' solicitors. The purchasers signed the agreement in duplicate and the documents were returned to the vendor's solicitors and a

deposit paid. The vendor then decided not to sell and the question was whether a contract had been completed. In delivering the principal judgment of the Court, Richmond J said, at p 671:

> " It is established by the evidence to which I have earlier referred that at the time when the parties instructed their respective solicitors they all had in mind only one form of contract which would govern the sale and purchase of the farm, namely, a formal agreement in writing to be prepared and approved by the solicitors. When parties in negotiation for the sale and purchase of property act in this way then the ordinary inference from their conduct is that they have in mind and intend to contract by a document which each will be required to sign. It is unreasonable to suppose that either party would contemplate that anything short of the signing of the document by both parties would bring finality to their negotiations. Furthermore both parties would expect their solicitors to handle the transaction in a way which would give them proper protection from the legal point of view. There is no evidence whatever in the present case to rebut this prima facie inference. On the contrary, and as found by Wilson J, the parties in fact expected that the contract would eventually be signed by both vendor and purchasers. "

Richmond J derived support in his conclusions from the judgment of Lord Greene MR in Eccles v Bryant [1948] Ch 93 and, in particular, from the passage in that judgment at p 99, where he said:

> " When parties are proposing to enter into a contract, the manner in which the contract is to be created so as to bind them must be gathered from the intentions of the parties express or implied. In such a contract as this, there is a well-known, common and customary method of dealing; namely,

> by exchange, and anyone who contemplates that method of dealing cannot contemplate the coming into existence of a binding contract before the exchange takes place. ... When you are dealing with contracts for the sale of land it is of the greatest importance to the vendor that he should have a document signed by the purchaser, and to the purchaser that he should have a document signed by the vendor. It is of the greatest importance that there should be no dispute whether a contract had or had not been made and that there should be no dispute as to the terms of it. "

Reference was made in Carruthers v Whitaker to Storer v Manchester City Council [1974] 1 WLR 1403. That was a case in which a corporation, then under Conservative Party control, resolved to offer council houses for sale to existing tenants. A simple form of agreement was prepared and sent to tenants for completion by them if they wished to purchase. The plaintiff completed and returned the form but before the corporation could complete its own copy and send it to the plaintiff there was an election and the incoming Labour council reversed the policy as to sale of the houses and refused to complete. The Court of Appeal upheld the decision of the County Court that there was a binding contract and, in the course of his judgment, Stephenson LJ, at p 1409, observed:

> " I am of opinion that the Judge was right in holding (1) that Eccles v Bryant and Pollock [1948] Ch 93 did not lay down any rule of law .... "

From a persual of the cases referred to I conclude that the question of the method of acceptance of an offer is to be determined by the intention of the parties which, of course, is to be derived from the surrounding circumstances. For the defendant it was argued that the parties in the present case contemplated acceptance of the counter offer by the signing of the document by both Mr

Sullivan and Mr Butterfield. A distinction was drawn between acceptance and the communication of acceptance and the contention was that the telegram could never have amounted in itself to acceptance. There were passages in the evidence in which reference was made to the signing of the agreement by, in particular, Mr Butterfield, and Mr Williams, for the defendant, attached a good deal of emphasis to this. Mr Letica, in the course of his cross-examination, said, "... the impression I was left with was that it would be a formality to obtain the other signature to the agreement." He was then asked, "And the formality I take it would be Mr Butterfield would examine the counter offer and the document and if he was happy with it he and Mr Sullivan would sign and then send the agreement back to Wellington?" And he replied, "Mr Sullivan had already signed the agreement before it left Wellington and it just required another signature." Mr Sullivan was rather less specific in his evidence. He was asked, "... what did you say about the need to get Mr Butterfield's agreement?" And he answered, "Just that it would be subject to his approval."

Upon the evidence as to what took place at the meeting I have no doubt that it was never the intention of the parties that the only method of acceptance of the counter offer was to be the signing of the agreement. Unlike the position in Carruthers v Whitaker it was not, at that time, contemplated that the doucment needed to be referred to the defendant's solicitor. The only person to whom the document was to be referred was Mr Butterfield. There was no suggestion, when the meeting concluded, that any further negotiations were intended and I am satisfied that the only real need for Mr Sullivan to refer the matter to Mr Butterfield was in respect of the price, which was substantially less than the defendant's original asking price.

The matter is, in any event, put beyond doubt by the terms of the document itself. What it provided was that the counter offer remained open for acceptance by the vendor "to be communicated to the purchaser" by the specified time. The "counter offer" referred to in that clause could only mean the document in its entirety as amended at the meeting. The only question was whether that document in that form was acceptable to Mr Butterfield. Once his approval was communicated to the plaintiff the contract was complete and I do not accept that this needed to be done by the sending of the signed document. It is of significance that the telegram was sent five minutes before expiry of the time within which acceptance was required to be communicated.

The other matter which was argued was that the telegram referring, as it does, only to the "counter offer $450,000" amounted to no more than an approval of that price, leaving unresolved any of the other terms. I regard this argument as altogether untenable.

The circumstances were that in a meeting of close bargaining all the terms had been agreed upon by those present at the meeting. As the document in its amended form required approval by Mr Butterfield it was open to the defendant to refuse approval altogether, to propose a counter offer, or to give approval of the transaction as it stood. The decisive feature of what occurred is that there was a time limit for acceptance. Had there been no response at all from the defendant by the expiry of that time limit then no contract would have come into existence. Clearly Mr Butterfield and Mr Collins knew this. First Mr Collins sought and obtained an extension of time. Then, five minutes before the expiry of that time, the telegram was sent. If the telegram was intended to be acceptance of the price only then there was no point in sending it. The time for aceptance would have expired before any of the other terms could be discussed. The telegram was undoubtedly intended to be a compliance with the clause in the document

as to communication of acceptance. The reference to the price was, in my view, no more than a means of identifying the transaction.

In case it should be thought I have overlooked it, I should make brief reference to the question of the defendant's wish to have time to arrange for the transfer or suspension of the wholesale liquor licence. This was something which had been discussed in the course of the meeting in the plaintiff's office. I do not feel it necessary to discuss this further because, whatever attention was paid to it, the matter was resolved by the agreement which had been reached by the end of that meeting. The settlement date was agreed upon with that subject in mind.

I am satisfied that a binding contract was concluded by the sending of the telegram on 1 June and that the only question remaining is the amount of damages resulting from the defendant's wrongful repudiation of that contract.

2. DAMAGES

Three items of special damages were agreed as to amount, namely:

Legal fees	$ 1,000
Bank fees	7,500
Agent's commission	8,725
	$17,225

The evidence was that Mr Letica and Mr Collins were jointly acting as real estate agents for the defendant and had

agreed to share equally the commission. In terms of the contract the commission was payable by the plaintiff. It was acknowledged by counsel that if the sale was an effective one then the agreement between the agents did not affect the liability for commission and so the plaintiff is liable to pay the full amount and to recover that amount from the defendant.

The matter of concern in respect of damages is the claim for $108,000 for loss of bargain. There was no dispute that if a binding contract existed the plaintiff was entitled to seek damages for loss of bargain, but the amount of that claim was very much in issue. The basis of the plaintiff's claim was that the defendant's property had a special value to him because, in particular, of its location and that by being able to purchase it for $450,000 he had secured a bargain which was of appreciably greater value to him than it might have been to someone else. It was accordingly said that the loss of that bargain was to be calculated as the difference between the purchase price and the real value of the property to the plaintiff. On behalf of the defendant it was argued that the evidence disclosed no loss to the plaintiff at all.

The only evidence as to value by a registered valuer was that of Mr Dentice, who had been retained by the defendant to make a valuation as at 30 June 1981 in order to determine the market value "as a going concern". The valuation arrived at by Mr Dentice may be summarised in this way:

Main building	$125,800
Fencing and other improvements	10,200
Land as a site for licensed premises	346,000

Fixtures, fittings, plant and goodwill	276,000
	$758,000

It was necessary to deduct from this total the amount attributed to fixtures, fittings, plant and goodwill as these were not included in the sale except perhaps for some unspecified amount for fixtures. The nett value for land and buildings was said to be $482,000. Mr Dentice considered that an increase of about 7-1/2% would be appropriate in order to bring the value up to June 1982 and on this basis he arrived at a valuation of about $518,000. He conceded in cross-examination, however, that his original figure of $482,000 was conditional upon the retention of the wholesale liquor licence and that the premium on the value attributable to the licence was about $63,000. On this basis his nett valuation was about $419,000. He accepted, also, that the special value to the plaintiff was not included in his calculation and would need to be added.

Although Mr Letica was not a registered valuer he was asked to give some evidence of value upon the basis of his experience as a real estate agent specialising in commercial properties. His experience in this area was such that he could not fail to have acquired a reasonable appreciation of the values of commercial properties in Wellington. He believed that the purchase price of $450,000 was less than the market value, particularly in view of the special requirements of the plaintiff, and that a more realistic estimate would have been $500,000 to $550,000. It was largely upon this basis that the plaintiff claimed that he had lost a bargain of something over $100,000.

The property had, in the end, been sold by the defendant in March 1984 for $515,000, but there was no evidence as to the circumstances of this sale or as to

whether there were any special features affecting it. It was Mr Letica's view that, unless there was some special reason for that price, he would conclude that the purchaser in March 1984 obtained a very satisfactory bargain.

There can, I think, be no doubt that the property was particularly attractive to the plaintiff. It was situated in a street in which there were already a number of major motor vehicle dealers and so was in an area appropriate to the plaintiff's business. The fact that it was directly opposite the plaintiff's existing premises is also a matter of significance. There would be no loss of goodwill in establishing the business on another site because people looking for that business could not fail to see its new location. The plaintiff was already having trouble in retaining his Subaru franchise because of the inadequacy of his premises and being able to move to the defendant's property was likely to resolve those difficulties. In the result he lost the franchise and has had to move to other premises in a different area.

It is impossible to be at all precise in a matter of this kind, but I am satisfied that there was some loss of bargain to the plaintiff in not being able to complete this purchase. Mr Dentice's valuation would seem to suggest that the agreed price was somewhere reasonably close to the market value, but I am unable to feel that it makes sufficient allowance for the special value to the plaintiff. It must be recognised that the defendant's representatives knew the plaintiff's special needs and these were canvassed in the course of the negotiations. It is also necessary to remember that the price was arrived at in a prolonged session by what I can only regard as hard bargaining. Both the defendant's initial asking price of $650,000 and the plaintiff's first offer of $353,150 were no more than opening gambits at the opposite ends of the scale. The practical experience of Mr Letica based, as he said it was, on recorded sales in the area, suggest to me

that the plaintiff had had the better of the bargaining and was entitled to feel he had acquired a property peculiarly suited to his needs, and was likely to enable him to retain the Subaru franchise.

Balancing up as best I can all the circumstances, I am left with the conclusion that there has been a loss to the plaintiff, although not of the order which he claims. I think he will be reasonably compensated if he receives damages of $50,000 for his loss of bargain. The plaintiff is accordingly entitled to judgment for a total of $67,225. In case costs cannot be agreed upon I reserve leave to the plaintiff to apply for an order.

Solicitors: McNaught Langford & Co., WELLINGTON, for Plaintiff

Russell McVeagh McKenzie Bartleet & Co., AUCKLAND, for Defendant