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LOW PRIORITY

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CP 986/88

BETWEEN	WARWICK HARRY HANSEN Plaintiff
AND	WRIGHTSONS FARMERS FINANCE LIMITED First Defendant
AND	WRIGHTSON NMA LIMITED Second Defendant
AND	EDITH MURIEL HANSEN and CHRISTOPHER BRIAN HANSEN Third Defendants
AND	DAVID GORDON CORNES Fourth Defendant

Hearing: 16, 17 February 1989

Counsel: G.L. Lang for the Plaintiff
L.J. Taylor for the First and Second Defendants
Mr Hill for the Third Defendant
Mr Scott for the Fourth Defendant

Judgment: 15 MARCH 1989

JUDGMENT OF HERON J.

This is an action for an injunction to prevent the sale of a farm property known as Ra Whenua farm, and a mandatory injunction requiring the first defendant to accept an offer made by the plaintiff to purchase Ra Whenua Farm. In June 1988 the first defendant instructed its solicitors to recover a substantial sum owed by members of the Hansen family. The Hansen family owned, through trusts, four farm properties in the Hawkes Bay, and livestock and other chattels. The first defendant (Wrightson) had advanced substantial funds to the Hansen family, both on term loan and current account, and had a security over the properties and other livestock and chattels. The liability increased, and as the value of the assets diminished Wrightson considered that some steps should be taken to rationalise the indebtedness and cause certain of the properties to be sold. Negotiations commenced between Wrightson and the Hansen family. Both parties were represented by solicitors, the Hansen family in addition having a Mr J.C. McGuinness, a farmer, as confidante and friend to assist them in the negotiations. The parties reached an agreement,

originally reached in principle on 5 September 1988, after a

very long meeting, and recorded in a deed of settlement dated 12 October 1988. The agreement is detailed, but in essence the Hansen family agreed to dispose of three properties, livestock and farming chattels, and Wrightson agreed to write off and rearrange some of its debt. Wrightson also agreed to meet the expenditure and receive income pending sale of the three properties. Wrightson in particular was given power of attorney to sell the properties.

At the meeting of 5 September the possibility of the plaintiff purchasing the property was raised. It seems that at one stage, had matters worked out more happily for the Hansen family, the plaintiff would have acquired Ra Whenua. He had worked on the farm himself for two years, and it had been in the family since 1973. It had some importance to him for that reason. The prospect of the plaintiff being interested in Ra Whenua came as no surprise. It had been discussed in general terms between the parties, leading up to the discussions of 5 September, and it was specifically raised at that meeting. According to Mr Nowland, a solicitor, the discussion took a short time only, and it was in fact raised by Mr McGuinness. He suggested that the plaintiff, or some member of his family, be given an option to purchase the property at valuation. According to Mr Nowland that proposition was raised, and the response to the proposal was that Wrightsons would sell the property to the plaintiff if he came up with an acceptable arrangement in respect of the purchase. It was indicated that he would have to meet valuation, which, at that time, was agreed to be in the vicinity of $600,000. It was also indicated that any purchase of Ra Whenua would also involve the purchase of livestock. Mr Nowland however says that such an arrangement was not an option to purchase or a right of first refusal, and he says that any more formal arrangement would have been reduced to writing. It was no more than a promise to do business with the plaintiff if he could come up with a satisfactory offer. Mr Friedlander, an employee of Wrightsons, gives much the same emphasis to the discussion, and he says, he

readily accepts that in the course of discussions he agreed to give Warwick Hansen the opportunity to purchase the property. He says however that that agreement needs to be viewed against the background of serious difficulties and contentious litigation between Wrightson and the Hansen family. He says that it was of concern to members of the Hansen family, and to Mr McGuinness, that such a difficulty should not colour the plaintiff's entitlement, or a member of the Hansen family, to acquire the property. Mr Friedlander was prepared, no doubt as part of the overall settlement, to give that assurance, and to indicate there would be no blanket refusal to treat with members of the Hansen family. Arising out of those mutual assurances he agreed that Warwick Hansen would be given the opportunity to make an offer, and he confirms that he indicated that an offer would have to be a realistic one, and that Wrightson would not be interested in any offer which was not close to valuation. He says that the arrangement was that the opportunity to purchase was given, and that he was to be given some priority in the sense that Wrightson would not sell the property without first giving him the opportunity to make an offer. He disagrees with Mr McGuinness's view that, in the event of Wrightson receiving a purchase offer, Wrightson would first offer the property to Hansen at the same price. That is in effect a right of first refusal. He says it was only agreed that Hansen would be given the opportunity to purchase, and it was not a question of waiting for an offer from somebody else and then giving Hansen the opportunity to match it. He says that the need to include such an arrangement in writing as part of the agreement disappeared, when what was being discussed was not a formal right of first refusal or an option to purchase, but rather mere opportunity to purchase, the arrangement being as he described it. Mr McGuinness puts it somewhat higher than that in his evidence, on the basis that it was clearly stated to him that in the event of Wrightson receiving a purchase offer they would first offer the property to the plaintiff at the same price. The effect of the assurance, he says was that such an arrangement did not need to be included in the

agreement. Mr O'Brien, a solicitor, says that he regards Mr McGuinness as overstating the nature of the understanding reached at the meeting of 5 September, regarding the possibility of the plaintiff purchasing Ra Whenua. He cannot recall all of what was said, but he did not regard the agreement to give the plaintiff an option to purchase or a right of first refusal. As he puts it, the essence of the understanding was that Wrightsons would have no objection to the plaintiff buying Ra Whenua if Hansen could come up with an acceptable proposal, and that Wrightson would not rush out and arrange a sale without giving the plaintiff an opportunity to make a proposal. He refers to the expression "have a crack at", which is also included in Mr Nowland's note. In other words, he was to be given an opportunity to purchase. The property would not be sold to anyone beforehand, and the opportunity would have to be on the basis that he would pay valuation or near to. Mr Rowan also gave evidence, as did the other witnesses (with the exception of Mr O'Brien) by affidavit, and then by cross-examination on that affidavit.

Mr Rowan confirms the early negotiations that occurred between the parties and the litigation that the parties were endeavouring to resolve. He says that quite early in the piece, indeed in August, Mr McGuinness, at a meeting which he attended, asked that Warwick Hansen be given a first option. That was agreed to, but the price was stipulated as being $600,000. In reporting to members of the Hansen family Mr Rowan says it was explained that Warwick or another member of the family would have an option to purchase Ra Whenua for $600,000. Warwick Hansen, however, indicated that he wished to negotiate with Wrightson, and thought he could negotiate a lower price than $600,000. He therefore did not want any settlement to contain a formal proposal binding him to purchase at $600,000 for land and buildings. Mr Rowan attended the meeting of 5 September 1988. Mr Rowan repeats that Mr McGuinness raised the question of the option, and further said that Warwick was not prepared to enter into an option at

$600,000 but wished to negotiate with Wrightson to purchase Ra Whenua at valuation. He says that that was met by Mr Friedlander stipulating that the price was $600,000. He says:

> "I cannot now recall the exact words of the conversation but in the spirit of the negotiations that were then taking place the developing good will to resolve the matters in dispute I was left in no doubt that Wrightsons through Mr Friedlander, (who made it clear he was dealing personally with these matters) would negotiate first with Warwick or another Hansen family member for the sale of Ra Whenua and such negotiations would be conducted fairly and in good faith."

It seems plain enough to me that as a result of those discussions there was indeed an assurance that the plaintiff would be able to make an offer, and that the property would not be sold until that opportunity was given. But notwithstanding the slight change in emphasis as to whether these assurances amounted to options or rights of first refusal, I am quite clear that they never amounted to anything more than providing the plaintiff with an opportunity to purchase the property. The understanding would be that if the price was acceptable, and the terms and conditions of the offer were otherwise agreeable, there would be no impediment to a purchase by Warwick Hansen. But I think no party contemplated the formalities required in respect of a right of first refusal in any formal sense or an option to purchase on the other hand. The point can best be illustrated by reference to the standard form of a right of first refusal or option to purchase, contained often in leases, but in any event in a form which stipulates the procedure by which the parties would negotiate before it could be said that the rights under any such particular cause had been exhausted. In my view no such formality was discussed or agreed to.

I have to interpret this contract not on the basis of the parties' subjective intentions, or what one party thought they meant, but what the parties had agreed objectively ascertained. In my view, to put it in its precise terms, the

parties to the deed had, for the same considerations that motivated them in regard to the deed, entered into a collateral arrangement that they would not sell Ra Whenua without first giving the plaintiff an opportunity to purchase the same. I think it also contained the implicit provision that they would act fairly and reasonably towards the plaintiff in order that practical advantage could be taken of that opportunity.

In this case there is some attraction in accepting the proposition that what the parties had agreed was so vague as to be incapable of being the subject of any agreement. In some respects that is so because the very arrangement I have described above has its uncertainties and its lack of precision and clarity, but I think that, in accordance with principle, the parties having agreed on a general formula, the Court should attempt to give effect to it. I believe that the dealings concerning Warwick Hansen, for valuable consideration of the kind that precipitated the signing of the deed, give rise to a collateral verbal agreement made at the time the deed was entered into in terms as I have defined above. I do not think anything more can be spelled out of the arrangement. I cannot infer a further term that any certain time for the exercise of the opportunity would be given. I do not think it went so far, e.g. having given the plaintiff an opportunity and having rejected an offer, that in the event of accepting a like offer, not necessarily identical, there was an obligation to go back to Warwick Hansen. Provided Wrightsons acted fairly and reasonably, having regard to the known circumstances between the parties, that was all that was required of them. I do not think in the climate of negotiations, particularly with the plaintiff not present, and also having regard to the fact that the plaintiff had expressly given instructions to Mr McGuinness that he did not want to be tied to an option to purchase at a fixed price, that there was any question of precise and defined arrangements as one might expect to find in a right of first refusal or the like.

THE EVENTS OF 11-12 OCTOBER

On Tuesday 11 October the plaintiff phoned Mr Friedlander and told him that he had arranged finance to purchase Ra Whenua and outlined the proposal to him. He was told that he would have to contact his solicitor giving him full details of the proposal and that the offer would have to be unconditional. He also told the plaintiff that he had an unconditional offer. Whilst in fact he did not have an unconditional offer he interpreted it as such, and indicated that he needed an unconditional offer to match it. Mr Friedlander says he wanted to make it clear that, given a virtual cash offer for a price very close to valuation, Wrightson did not want to see a further conditional offer of the kind which Mr Hansen had put forward a fortnight before. His offer would have to be, Mr Friedlander said, unconditional if it was to compete. There is some question over dates. Mr Friedlander is speaking of two conversations and the plaintiff of one. I accept Mr Friedlander's interpretation of events. Following Mr Friedlander's advice to the plaintiff that he should put the offer made on 11 October in writing and full details to be supplied by the solicitor, Mr Friedlander says that he was concerned enough about the offer to ring Mr Rowan, but was told that Mr Rowan was not acting for the plaintiff but Mr Taylor of Bramwell Grossman was the solicitor acting. According to Mr Friedlander, Mr Rowan said that Mr Hansen did not have firm commitments from the necessary lending institutions, that he would endeavour to bring a firm offer together by 3 p.m. that day. During the day of 12 October Mr Taylor communicated the following offer, which is recorded in a subsequent letter as follows:

"23 November 1988

Messrs Elvidge & Partners
Solicitors
PO Box 609
NAPIER

<u>Attention Mr Laing/Elvidge</u>

Dear Sirs

<u>Warwick Hansen</u>

At the request of Warwick Hansen we confirm that on his instructions we acted as follows.

On the 13th October last we telephoned Tony Friedlander of Wrightsons Limited telephone number Wellington 738238 and put to him the following offer to purchase.

That Warwick Hansen would purchase Ra Whenua on the following terms:-

Price	$600,000.00 exclusive GST - land and buildings
Settlement	21st December 1988
GST	$60,000.00 paid on the 31st of January 1989

Offer subject to:-

1. First, second, third mortgagees consenting to the mortgages being transferred to Warwick Hansen. This consent to be obtained by 20th of October 1988.

2. Warwick Hansen obtaining by the 20th of October 1988 an unconditional contract to share-farm Ra Whenua with another party.

3. Land Valuation Tribunal consent.

The offer was also made subject to the following:

1. Warwick Hansen to take over all calves and lambs.

2. Warwick Hansen meets the running costs of Ra Whēnua from the 12th day of August 1988.

3. Stonehenge Trust to take over the costs of rates and insurance from the 1st day of April 1988.

4. Warwick Hansen to meet the following payments:

   (a) The first mortgage interest bill due in December (a quarterly payment of $11,875.00.

   (b) Second mortgage interest bill due in December quarterly payment of $8,650.00.

   (c) Third mortgage interest bill due in December half-yearly payment of $5,000.00.

5. The Trustees of Stonehenge Trust would pay from the sale proceeds of the stock on Ra Whenua the sum of $250,000.00 which payment will be made on the 21st December 1988.

   On settlement on the 21st December Warwick Hansen would be required to pay approximately $77,000.00 in cash to complete the purchase.

   This offer was conveyed to Mr Friedlander who, shortly thereafter by facsimile, advised the writer that the offer was not acceptable.

   This facsimile was handed to Warwick Hansen and we would be grateful if you could arrange for a copy of the same to be returned to the writer.

Yours faithfully
BRAMWELL GROSSMAN & PARTNERS"

Again there is some contest as to the dates on which the offer was made. I accept Mr Friedlander's version of that. The important thing about the offer was that it was subject to first, second and third mortgagees consenting to the mortgages being transferred to Warwick Hansen, this consent to be obtained by 20 October 1988. Secondly, it was necessary for Warwick Hansen to obtain by 20 October an unconditional contract to share farm Ra Whenua. A third condition was that Warwick Hansen was to take over all calves and lambs. According to Mr Friedlander, that arrangement conferred a benefit amounting to some $25,000 and detracted from the offered purchase price making it in effect an offer of $575,000 because revenue that Wrightson would forego by allowing Mr Hansen to take over the lambs and calves was in excess of the expenses that Mr Hansen agreed to meet.

An important point emerges at this stage. Having regard to Wrightsons perception as to the stocking of Ra Whenua the calculation of foregone revenue is overstated and in fact, having regard to the actual number of stock which were then on the farm, the offer was more attractive than first appeared. Mr Friedlander says that later in the year, when the stock was sold, an exact figure could be obtained and the offer was therefore something in the order of $596,455. The parties,

during the course of a very urgently arranged hearing, have had to make certain assumptions and endeavour to limit the various enquiries. What the parties have now agreed is as follows.

1. That Wrightson did not in fact make any assessment of the value of the calves and lambs expenditure part of the offer.

2. If it had made an assessment based on budget figures prepared for the Stonehenge creditors meeting in June 1988 (which it had in its possession) it would have valued the plaintiff's overall offer at $574,034.

3. If it had made an assessment based on what the plaintiff says were actual stock numbers it would have valued the offer at $609,128.50.

I have to interpret that information on the basis of the contractual obligations that the parties had. But whilst those matters were no doubt in the minds of the parties so far as certainty was concerned, Mr Friedlander is quite plain in his assertion that he did not make an assessment of the value there and then. Had he done so he is likely to have been unimpressed by the offer and I think it is very likely that, had the offer not being subject to financial conditions, the chances of it being accepted, based on the facts as he understood them, was very unlikely. If it had been a cash offer then clearly he would have looked at the figures in his possession and would not have foreseen the change in those figures. He would then have had an unconditional offer substantially less than the all but unconditional offer from Mr Cornes, which I refer to shortly.

Mr Friedlander says that Mr Hansen had by then more than ample opportunity to put in an offer and arrange his finance. He had been talking about buying Ra Whenua since August and after being assured from 5 September onwards that he had an opportunity to purchase he made no progress towards making an

unconditional offer. The plaintiff's case is that Wrightsons ought to have waited the week requested of them by Mr Taylor. Mr Taylor, who had been instructed only on the preceding day, was not prepared to have him sign an unconditional offer and the plaintiff's case is based on the hypothesis that if one week had been extended, whilst the proposal contained in his offer would not have come to fruition, in other words the mortgagees would not have agreed, he would by then have been able to find finance from another quarter. Indeed, the parties again no doubt having regard to the exigencies of time agreed on a further statement of facts. Those statement of facts need to be recorded in their entirety. Firstly, the plaintiff accepted that he would not, by 20 October 1988, have obtained the consent of the first and second mortgagees to the transfer of the mortgages in their favour to the plaintiff. The first and second defendants, however, accept that although it was not known to them at the time they rejected the plaitiff's offer on 13 October 1988, there was a real possibility that the plaintiff would have been able to confirm finance by 20 October 1988. The reasons are set out in the agreed statement of facts and which involve a totally different financial package, none of which was communicated by the plaintiff as being in his contemplation. I must say I have some difficulty with that acknowledgment. Whilst looked at now these arrangements could have been made, they were not made, because the offer was rejected by telex on the instruction of Mr Friedlander at 3 p.m. on 13 October 1988. On 17 October Wrightson, pursuant to power of attorney, sold Ra Whenua to Mr D.W. Cornes for $590,000 conditional on the sale of a property and subject to Land Settlement approval.

The plaintiff had, on a number of occasions, approached Mr Friedlander and as I have referred to earlier it is common ground that the plaintiff did not want an option to purchase at $600,000. He wanted to use his negotiating position as best he could in order to get a better price. Consequently he did not come to his top price until matters had moved considerably so

far as alternative offers were concerned. I think it is highly relevant to the reasonableness of the defendant's actions in rejecting the offer to remember that Wrightsons had no knowledge of the willingness of the plaintiff's wife's family to contribute and, indeed, such suggestions had previously been rejected out of hand. I have to view the defendant's conduct not against any precise contractual provision where times would be stipulated, as one might have expected with a formal option or right of first refusal, but in the context of the defendant's admittedly clear contractual obligation to act reasonably and fairly towards Mr Hansen. The offer was full of uncertainties and was rejected on that ground. Had it been a cash offer than clearly Mr Friedlander would have turned his mind to the value of the stock and would have seen that the offer was in fact on the information he had less than the almost unconditional offer and was in effect not an offer for $600,000 but of something substantially less. Mr Friedlander, it seems to me, could not have been visited with the actual knowledge and it would be reasonable only for him to rely on the information which he had in his possession which was apparently such that suggested that the benefits to Wrightsons by the offer were substantially less due to the number of stock that the plaintiff would be taking over. The obligation was to act reasonably and fairly towards the plaintiff and in that regard the arrangement was made, some five weeks before the plaintiff attempted to obtain a transfer of the existing mortgages, a matter which no doubt was of convenience to him without the necessity of having to involve his wife's family. Now the arrangement is said to be that the other source of finance could have been arranged within the week available and the plaintiff was thwarted from doing so because of the rejection of the offer.

This is the critical part of the case and I have given anxious consideration as to whether, firstly, a refusal to agree to a finance clause expiring in one week was in itself a breach of the provisions to act fairly and reasonably; and, secondly,

whether in the event that that week was contemplated the offer was in any event unacceptable having regard to its acknowledged uncertainties and, in particular, had Mr Friedlander gone past a consideration of finance which he would have had to have done when faced with an unconditional offer it would have been acceptable in any event. It seems to me that the overriding factor was the financial provisions. The evidence confirms that Mr Friedlander's apprehension about any such offer was well founded, because contemporaneous with the plaintiff's offer is the rejection by the first mortgagee of any agreement to rearrange the mortgages. The mortgages represented all but $77,000 of the purchase price and would be manifestly difficult for the plaintiff to arrange, let alone manage.

It must be remembered that Mr Friedlander, on 22 September 1988, was offered much the same package and the plaintiff had been told then that it was only if the Avery family interests could inject some equity that there was a prospect that the deal would go ahead. It was its inherent unlikelihood of becoming unconditional that was concerning Wrightsons. Again there were discussions between Mr Friedlander on 29 September 1988 when the plaintiff was told that such an offer was unacceptable. Again he asked for time to negotiate alternative finance and Mr Friedlander agreed to that on condition that he return to him by 5 October. On 6 October he had not. On Tuesday 11 October, as I have already recorded, the proposal seems to me to be much the same, as far as finance was concerned, as the ones made earlier. Again there was no mention of cash equity from other sources, or a significant change in the prospects of obtaining finance. That depended on all mortgagees agreeing to transfer the same level of indebtedness that I have referred to. It is surprising that in the plaintiff's opening affidavit he makes no mention of these earlier discussions and negotiations.

Whilst the ultimatim by Mr Friedlander to the plaintiff to make the offer an unconditional one, and finally the rejection of

the conditional offer rather than deferring action for seven days seems harsh in hindsight it cannot be isolated from what Mr Friedlander knew of the plaintiff's prospects.

The plaintiff had declined to make his wife's family resources available until the very last minute. He did not convey any change in that position to Mr Friedlander at any time. It was a critical point in the parties' earlier discussions, and known to the plaintiff that it was a matter affecting Mr Friedlander's judgment of the plaintiff's prospects. The most convenient course to the plaintiff seems to be his desire to transfer existing indebtedness and right up to the last minute he persisted in making his offer conditional on that happening. I am not prepared to find that Mr Friedlander was being unfair in his dealings or in respect of the quite general but unspecific arrangement that the parties had undoubtedly made.

There would come a time when Mr Friedlander would have to choose, given two offers, which one had the greatest chance of success. He was entitled to be told in exercising his judgment that the plaintiff did not in fact intend to rely on the condition as to finance but some other arrangement which was not even suggested to him as a possibility at the time the plaintiff made his final offer. For that reason I am unable to find the plaintiff in breach of the term as to fairness in dealing with the plaintiff.

As a matter of causation I am also of the view that given that the collateral contract required of Mr Friedlander and his company, to either accept the plaintiff's offer or refrain from dealing with any other purchaser for seven days, at the expiry of that time no unconditional offer would then have emerged from the plaintiff. No-one suggests that afer that time, the defendant was not free to deal elsewhere and accordingly accept Mr Cornes' offer. In legal terms, if there has been a breach of the arrangement (which I do not hold) on the probabilities it would have lead to no loss.

In the end all the factors that have been discussed have to be put into the melting pot to see if on the balance of probabilities an acceptance of the offer made verbally would have led to the unconditional purchase by the plaintiff of the farm. Nor am I assisted by the defendant's concession that there was a real possibility (unknown to the first and second defendants) that the plaintiff would have been able to confirm by raising finance elsewhere and by waiving the condition in the contract.

It is agreed that the plaintiff would not by 20 October 1988 have obtained the consent of the first and second mortgagees. He had already had a proposal for additional finance rejected by one of the mortgagees (the A.M.P.) on 6 October. By letter of 12 October he had been told that the transfer of the existing security was not possible without the provision of additional security. At what point was he then going to abandon the A.M.P. proposal and proceed with the proposal now said to have been a real possibility by 20 October?

I think the position was reached, notwithstanding the concession made by the defendants as to a real possibility, that the probabilities were that, given the plaintiff had his offer accepted on 12 October, or the more likely course being that the first defendant would have refrained from accepting any other offer for seven days, by that time the contract would not have been unconditional, or alternatively he would have been unable to make an unconditional offer by 20 October. The probabilities I find are all one way.

In this case the relief sought is a mandatory injunction directing the first defendant to sell to the plaintiff. The first defendant has already sold the property to Mr Cornes in the manner described earlier in this judgment. I have already found no breach of the collateral arrangement in its terms, but if I am wrong in that, and if I am also wrong in holding that

on the probabilities the plaintiff would not have been able to enter into an unconditional contract within the seven days, I would be reluctant to exercise my discretion in favour of the plaintiff against Mr Cornes, who has purchased, admittedly in the knowledge of Warwick Hansen's rights, but only after he had reason to belive that any obligation to Mr Hansen had been properly cleared away. He has only at the last minute been prevented from settling, and it seems to me he would in any event be entitled to take title, leaving Mr Hansen with any remedy in damages he may have had.

Mr Lang submitted that the Court of Appeal decision in Morland v. Hales & Ors., & Sommerville (1911) 30 NZLR 201 was authority for the view that notwithstanding the absence of any interest in land a right of first refusal if earlier in time was a superior equity entitling the Court to uphold it in the face of a later sale. This is the view of Williams J. but Edwards J. considered that the option being an interest in land created the earlier and therefore superior equity. Williams J.'s judgment is obiter to the extent that what was being considered was held to be an option to purchase, unlike the alleged provision here. I would have been inclined, notwithstanding the difficulties which such a concept might entail under the Land Transfer Act 1952, to nevertheless weigh the competing equities, had the plaintiff established the same. My decision renders it unnecessary to do so.

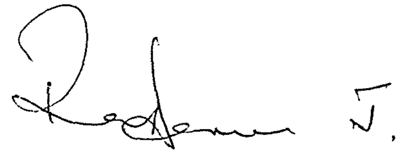
As to the assertion made by the plaintiff that the signing of the deed was awaited before he could move towards finalising his own arrangements, I do not accept that and I think it is somewhat of a diversion to explain his difficulty in raising the moneys and his desire to continue to negotiate to buy the property on the best terms.

Mr Friedlander was also concerned about accepting any offer which might have bound him to give more than seven days for the raising of finance. He expressed a concern that once

contractually bound the seven day provision would be extended. I think his obligation could have been met by simply indicating that he would not accept any other offer for a period of seven days, but I think the plaintiff was not helping himself a great deal by referring once more to the conditions relating to transfer of the mortgages when he must have had an alternative proposal in mind, and putting the offer verbally only and with terms that required further investigation. The whole arrangement required reasonable conduct on the part of Warwick Hansen and Wrightsons and to some extent I think Mr Hansen was the author of his own misfortune in presenting his final arrangement in such an informal fashion with little change in the arrangements as to finance he had been suggesting earlier, and about which Mr Friedlander was sceptical.

Support for this approach is to be found in Emmett v. Kiely [1946] S.A.S.R. 17. A right of pre-emption does not necessarily confer on the purchaser the right to make conditional offers which the vendor is bound to accept or even negotiate. Whilst the right of pre-emption in this case did not, as I find it, necessarily exclude a conditional offer it had to be such, it seems to me, that would make it unreasonable on the vendor's part not to accept it. That was not the case here.

The plaintiff is not entitled to an injunction. The earlier injunction is discharged. The defendants are entitled to their costs which I will fix if required.



Solicitors

Elvidge & Partners, Napier, for the Plaintiff

Bell Gully Buddle Weir for the Defendants