31/5 N2LR LOW PRIORITY

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY C.P. NO. 513/89

BETWEEN M.H. HARE

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Plaintiff

A N D KERSHAW ENTERPRISES LIMITED

Defendant

Hearing: May 4, 1989

Counsel: Mr. Moody for Plaintiff
Mr. Harrison for Defendant

Judgment: May 4, 1989

REASONS FOR JUDGMENT OF MASTER ANNE GAMBRILL

This is an application for Summary Judgment for loss incurred by the Plaintiff on resale of a commercial property situated at Lake Road, Takapuna. Mrs. Hare arranged for the property to be auctioned on 16th September 1989 and was introduced by Akarana Real Estate to Keith Angus, Auctioneer. The conduct of the auction was in Mr. Angus's hands and Mrs. Hare deposes to the fact she did not attend the auction.

The auction was held on 16th September. The terms and conditions of sale were in standard form and

Kershaw Enterprises Limited bought the property at $440,000. Mr. Keshaw tendered a cheque for $52,000 drawn by Kershaw Enterprises Limited in favour of Mr. Angus, the auctioneer. He deposes he mentioned to Mr. Angus it may not be met because of arrangements he had to make with the Bank Manager. Settlement date was 14th October. Apparently the cheque was presented and not met, subsequently re-presented and finally returned 'stopped' to Mr. Angus. Mr. Angus deposes as follows:

> "I do not accept that Mr. Keshaw phoned me on 19 September to tell me the cheque would be dishonoured."

He continues to say:

> "The first I knew the cheque had been formally dishonoured was on 3 October 1988. I immediately wrote to the plaintiff's solicitors and I also sent a copy of the letter to the plaintiff, the solicitors acting for the defendant and Akarana Real Estate.....In addition, I went out to see Mr. Keshaw at his place of residence and I waited there for two hours to see him. At this meeting he told me of the efforts that he had made with some institutions to arrange finance and it was obvious to me after the meeting that he had no finance in place. He showed me what appeared to be a reasonably extensive portfolio and said that he was confident of obtaining the finance. At that meeting he mentioned National Australia Finance, but not before. I did contact National Australia Finance.....but they were not very forthcoming about the application as they said

it was privileged and confidential."

Mr. Angus further deposes that he does not accept the deposition of the Defendant nor does he believe that the deposition of Mr. Ray correctly records the situation as he understood it. Mr. Angus deposes, and I accept, that he urged again and again on Mr. Keshaw that he needed to make a payment as evidence of his bona fides. Mr. Angus further deposes as to the meeting in Mr. Malloy's office (Mrs. Hare's solicitor) and as Mr. Angus says he, Mr. Malloy, said his only concern was to obtain payment for the Plaintiff. Mr. Angus's affidavit is directed to making it clear that there was no waiver made on behalf of the Plaintiff in respect of the obligation to pay the deposit or meet the settlement.

Mr. Malloy deposes in full to the events in his office on 13th October 1988 and I find the deposition totally in character with the deposition that would be made by an experienced conveyancing lawyer expressing his concern over the failure to meet the deposit cheque one day prior to the settlement date.

It appears in a very loose way, that Mr. Keshaw had bought the property, he had no cash available at the

time to meet the deposit, though he deposes he could have been able to arrange it if he had been given sufficient time. He had not arranged finance and was 'expecting' to arrange it after his accounts were finished in December.

The sum payable on settlement was the total sum in cash of the property offered for sale with no offer of any mortgage finance. This is somewhat commercially unreal to expect a vendor should rely on the vague assurances which were made and appear throughout the evidence for the Defendant. There is no doubt the Defendant was fully aware of the steps he was taking, he is a property developer, the Defendant company develops property and Mr. Keshaw was well aware of the risk.

Mr. Ray's affidavit describes his involvement with Mr. Keshaw as his solicitor, and he describes his belief that the transaction was allowed to "drift on". He says that he believed in the conversations he had with Mr. Angus that even if financing was arranged after the contractual date, the Plaintiff would still be prepared to settle with the Defendant. He deposes to his belief his client continued to try to obtain finance from the National Australia Bank.

It is significant that the affidavit refers only to telephone conversations which I have much more specific evidence relating thereto from the Plaintiff and I have been invited to draw an inference as to Mr. Ray's involvement, or lack of it, more particularly as he did not attend with Mr. Keshaw at Mr. Malloy's office at a meeting which the Plaintiff and the auctioneer and Mr. Malloy obviously regarded as critical if the matter was to proceed to a settlement.

I accept Mr. Malloy's deposition (a) that he regarded the failure to pay the deposit as a very serious matter; and (b) that at the outset of the meeting on 13th August he made it clear that his interest was to get his client paid and that he regarded the failure of the purchaser to pay the deposit as being extremely serious. He also deposes that if repayment was not made of the deposit, action would be taken.

The parties agree that the contract is as it stands and the defences raised are (i) waiver of the requirement to pay the deposit; and (ii) that the Plaintiff was unreasonable in the re-sale and that the best price was not achieved. The Defendant relies extensively on the doctrine of waiver and says

that if a formal notice had been given and his client required to pay the sum he would have been able to pay the deposit, thereafter he would have had to be given further notice and then because of time allowances he would have been able to complete the purchase. The purchaser, when recognising that the sale could not be completed cancelled the contract and re-auctioned the property. The Defendant complains it was sold too hastily at $300,000. The Defendant says "I felt the brevity of advertising and the speed of re-sale amounted to an unreasonable attempt to realize the market value of the property". He apparently attended the auction, did not bid again, the property did not reach the reserve but was sold thereafter for cash to MacDonald's Food Chain which I am sure Mrs. Hare would be confident she had a willing and able purchaser. Settlement took place and she sues for the losses incurred on her re-sale including land agent's commission, legal fees and other minor expenses.

The Defendant's second defence relates to the losses on the re-sale and his claims that the property was sold without due regard to its then existing value and he says his company should not have to reimburse the Plaintiff for these sums. He deposes to a lease

of the property he was negotiating but this matter is not relevant to the contract between the Plaintiff and Defendant.

The Defendant, in raising his defences, points to the form of the waiver saying that the waiver may be oral and says, as stated in Chitty on Contracts, the Court may hold the Plaintiff has waived his right to require the contract be performed in this respect according to its original tenor. He also says that the forbearance by the Plaintiff to enforce the deposit amounts to a waiver.

In considering all of the matters I have reached the conclusion that this is a type of contract that the Court should and must uphold, more particularly with regard to the somewhat cavalier actions of the Defendant who goes out, buys property and makes no proper arrangements to be able to finance a cash purchase.

It is clear from the evidence that Mr. Malloy, acting on behalf of Mrs. Hare and Mrs. Hare herself when they were aware of the difficulties over the deposit, took steps immediately to ensure and clarify what was happening about that deposit. I accept the inference

Counsel for the Plaintiff asked me to draw that it is strange there was no approach whatsoever from the Defendant's solicitor at any time throughout the negotiations and it appears the Defendant handled all discussions with Mr. Agnus the auctioneer, who although he is the vendor's agent naturally would be interested in keeping the contract viable and alive to enable the recovery of his commission. There is clear law that as Mrs. Hare was not advised of the non-payment of the deposit she was not bound by the discussions of Mr. Angus in regard to the deposit.

I am entitled if there are areas of conflict of evidence to reject the application for Summary Judgment but I am also entitled, in terms of Eng Mee Yong v. Letchumanan [1980] A.C. 341:

> "Although in the normal way it is not appropriate for a judge to attempt to resolve conflicts of evidence on affidavit, this does not mean that he is bound to accept uncritically, as raising a dispute of fact which calls for further investigation, every statement on an affidavit however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself it may be."

And the decision of the Court of Appeal in Bilbie Dymock Corporation Ltd. v. Patel 1 P.R.N.Z., 85 to

take an overview of the matter and examine critically the affidavits.

I have no hesitation in applying the doctrine so carefully stated in Eng Mee Yong v. Letchumanan (supra) to the affidavits before me. There is the clear and unequivocal deposition of the Plaintiff and Mr. Malloy, supported by Mr. Angus's deposition, that makes it very clear as to the factual situation herein that (a) the parties, Mr. Malloy and Mrs. Hare were not aware and could not be aware that the deposit cheque had not been met until 3rd October; and (b) that at the instigation of the Defendant they agreed to a meeting where the position was made clear that Mr. Malloy wanted settlement on due date on behalf of his client.

In the factual situation I can read no proper evidence of waiver by the Plaintiff. I accept the Defendant's submission that he made an assumption that this information, which he claims constituted a waiver, was being conveyed to the Plaintiff herein, but I am satisfied that it is merely an assumption unsupported by adequate evidence to constitute the waiver he alleges has arisen.

The Defendant's solicitor invites me to draw the inference that as the deposit and the balance of purchase moneys are referred to as 'separate entities' in the contract, the provisions of the payment of deposit are not subject to the rights of the subsequent Clause 11 of the contract.

Counsel for the Defendant made careful submissions based on Chitty on Contracts, the case of Boote v. R.T. Shiels [1978] 1 N.Z.L.R., 445, and Meikel v. Partridge [1982] 1 N.Z.C.P.R., 463. It was suggested that time was not of the essence for payment of the deposit but again, I cannot read this into the factual depositions and the contract before me. Counsel for the Defendant then submitted that the waiver having been made, the repudiation was unlawful. The Defendant's Counsel points me to the contract and says that I cannot imply the deposit was immediately due. There is no real law in support of this submission and I cannot accept the same, it would make a farce of a commercial transaction if the community could not rely on a deposit cheque, being the obligation of the purchaser and in that obligation it being recognized it was to be tendered at the fall of the hammer on an auction.

The Defendant says that the Plaintiff has not met the vendor's obligations on a re-sale though he accepts that those obligations cannot be equated with those of a mortgagee exercising a power of sale. He relies on Sullivan v. Darkin [1986] 1 N.Z.L.R., 214:

> "The duty to mitigate loss requires the vendor to act reasonably in the circumstances and offer the land for resale at a profit price having regard to the state of the market. Adequate steps should be taken to advertise and promote the sale and to keep the property in reasonable order and condition so as to encourage a sale."

He says that the property was not widely advertised, there was a short time, and the price was significantly below that at which the property had been valued.

In the circumstances, as the vendor had been out of money since the failure on the sale on 13th October, the Christmas vacation was approaching with an empty building, I can see that the Plaintiff was entitled in the commercial world to take the steps she did having realised that the Defendant had defaulted on sale. I was also concerned as to whether all other sums claimed were properly claimable and in the time available, Counsel could not address me on these sums. These matters as stated in my decision, are

reserved for a further submissions herein.

For these reasons I would enter judgment for the loss on the re-sale of the property which is calculated as follows:

Loss on re-sale and interest thereon:	$168,214.89

Leave is reserved to make further submissions in respect of the other moneys claimed in the Statement of Claim. Costs of $1,500 to the Plaintiff plus disbursements as fixed by the Registrar.

MASTER ANNE GAMBRILL

Solicitors:

Buddle Findlay, Auckland, for Plaintiff
McElroy Milne, Auckland, for Defendant