IN THE HIGH COURT OF NEW ZEALAND
INVERCARGILL REGISTRY

MSR, IHW
ACB, RM
SET 3

No. 108/88

BETWEEN [redacted] HINTERLEITNER, ROLPH LEONARD HINTERLEITNER, DIANA MARIA HINTERLEITNER HORNE, & LEONIE ELIZABETH HINTERLEITNER

Plaintiffs

A N D [redacted] HEENAN & MARGARET HILDA ELIZABETH HEENAN

Defendants

Hinterleitner v Heenan 9.1.89

Hearing: 5, 6 December 1988

Counsel: J.A. Walker for Plaintiffs
R.G.R. Eagles for Defendants

Judgment: 9.1.89

JUDGMENT OF HOLLAND, J.

The plaintiffs seek an order for specific performance of a "verbal agreement" alleged to have been made in the first half of 1985 between the first named plaintiff, Rudolph Hinterleitner, on the one hand and the first named defendant, William John Heenan, on behalf of himself and his wife, the second named defendant, on the other hand, that the defendants would sell to the plaintiffs a corner of the farmland owned by the defendants near Arrowtown comprising approximately 3,000 square metres for the sum of $35,000 subject to the plaintiff obtaining planning approval from the Queenstown Lakes District Council. The defendants deny that any such agreement was

entered into. At the commencement of the hearing the defendants sought and obtained leave to amend the statement of defence by specifically pleading that if any contract were established there was no memorandum or note in writing in terms of the Contracts Enforcement Act 1956. There was no element of surprise in this application as it had been recognised by the parties at all stages that the Act would be relied upon as an alternative defence.

Although it is not clearly spelled out in the statement of claim, it appears that the second, third and fourth named plaintiffs who are the children of the first named plaintiff were added because it was alleged that there were discussions between the defendants and some of the plaintiffs earlier this year from which an agreement by the defendants to sell to all four plaintiffs might be inferred. At the conclusion of the evidence counsel for the plaintiffs very properly recognised that the evidence could not support such an inference and he abandoned any claim involving the last three plaintiffs as being parties to any agreement.

This is a sad case where Mr Rudolph Hinterleitner, henceforth described as the plaintiff, and the two defendants with whom a substantial friendship had been formed, have fallen out notwithstanding a series of transactions of an informal and satisfactorily concluded nature over a ten year period mainly relating to the plaintiff carrying out odd building and maintenance contracts for the defendants from time to time.

Although there is a direct conflict of testimony as to the conclusion of an oral agreement, there is really very little conflict in fact of most other matters relevant to the issues presently before the Court.

It is common ground, and indeed admitted in the pleadings, that in or about September 1982 the plaintiff asked the defendants if he could use an area in the corner of their farm near Arrowtown for the purpose of storing his plant and equipment as a builder. The area of land in question was approximately 3,000 square metres and comprised part of a closed road and part of the other land owned by the defendants. The particular area had not been surveyed. It contained quite substantial Wellingtonia trees and other trees and scrub and formed no useful part of the defendants' farm operations. The defendants agreed to the plaintiff's occupation of the land for that purpose and also agreed that no rent would be charged.

The plaintiff and his wife and the defendants had known each other socially and by virtue of work for some time. The wife of the plaintiff, and the second named defendant, were quite close friends, and friendships also existed between the children of the plaintiff and the defendants. In those circumstances there was nothing surprising or unusual in the informal arrangement whereby the plaintiff used the small property as his builder's yard without any formal arrangement or any provision for payment of rental.

Some time in 1985 the plaintiff and his wife contemplated separation, and although the evidence is not clear as to the date of separation, I infer that actual and final separation occurred round about that time. Early in that year the plaintiff approached the first defendant as to the possibility of his buying the 3,000 square metre property for the purpose of erecting what he described as a family home. It was in the mind of all parties that the plaintiff, because of the forthcoming or actual separation from his wife, would have to sell his Arrowtown home in order to meet his obligations to his wife under the Matrimonial Property Act. In fact he has paid his wife her share of the matrimonial property before the house has been sold.

The plaintiff said:-

> "I went to Mr Heenan and I explained the situation I was in and that I was trying to establish another home for the family and this was the one way I could achieve it and the Heenans were very sympathetic. Then it was agreed that I could have the land that was sold to me if we can get planning consent."

The first defendant says:-

> "Rudi came along and suggested that we attempt to subdivide off this corner and he would like to purchase it because it consisted of part of a roadway and there was a triangular area that belonged to another title across another road. I was quite happy to attempt the subdivision and I suggested a price of $35,000 at the time. I didn't have any real idea of the value of the property, but I imagine there would have been considerable costs in subdividing and there may have been if a new

> title was created, which was the idea in the first place to create a new title, I think there was a possibility of having to contribute to the Council Reserve Fund but I thought the costs to do the job, I had no real idea, I thought they may have gone as high as 10, 12, $15,000 and I thought that that might take the price of the section as high as $50,000. I also enquired from a couple of real estate agents who valued the section, one at $75,000 and one at $85,000. So I was fully aware of the potential value of the site. Mr Hinterleitner has told us that you simply agreed to the sale of the section at $35,000, is that what happened? Not so, I was willing to sell to him, because of his special circumstances, these related to his Austrian beginnings where in his situation I gathered it was just an impossible dream, about the time this idea of subdividing was began Rudi was involved in a separation and almost certain divorce proceedings with his wife and by the time he settled with his wife he felt this section was an opportunity to re-establish himself. I was very sympathetic towards his viewpoint."

The plaintiff proceeded to apply to the Queenstown Lakes District Council for planning approval. Both defendants signed their consent to the application and the first defendant gave evidence at the hearing supporting the application and acknowledging that the price would be $35,000. The application for planning consent was refused in September 1985. In the following year the plaintiff consulted a town planning consultant who recommended that a further application be made. This was done in October 1986 and was again supported by the defendants. The hearing took place on 26 January 1987 and both defendants were present at the hearing. It is quite clear that the Queenstown Lakes District Council looked favourably on this second application because it was anxious to obtain from the

defendants a consolidation of the several titles which formed part of their farm property. At that hearing the first defendant in the presence of the second defendant agreed to consolidate his titles. Approval to the plaintiff's application brought by him as "prospective purchaser" was made conditional upon consolidation of titles.

Following this consent the plaintiff instigated the engagement of a surveyor to carry out the necessary work involved in consolidating the titles and in subdividing the 3,000 square metre block of land which the plaintiff intended to purchase.

The plaintiff had paid all costs relating to the two applications for town planning approval. Although the total survey costs have been paid by the defendants, the surveyor at the request of the first named defendant supplied him with an estimate that approximately 25% of his account of $5,426 was related to the cost of the survey of the land which the plaintiff wished to purchase. The balance related to the amalgamation of titles. It is significant that Mr Heenan considered that the amalgamation of titles leaving the balance of his farm property in two separate titles improved the value of the farm property. The plaintiff claims that the arrangement was that he and the defendants would share the costs of the necessary survey for the subdivision of the property he was purchasing. He says that he has made no payment in this regard only because he has not been asked to do so. It is significant that

Mr Heenan requested the surveyor to divide his account so as to identify the amount relating to the actual subdivision.

The plaintiff had not sold his Arrowtown house and indeed as at the date of hearing of the present proceedings has still not done so. It is at present let to a tenant and I infer that it has been let off and on from some time in 1985. Although no proposals were made by the plaintiff to pay the purchase money, he engaged a contractor, towards the end of 1987 and early 1988, to clear a building site and this was done followed by the planting of grass. The plaintiff claims that the contractor was engaged on the basis that his costs would be shared between him and the defendants. The first defendant says that the contracting work was solely the plaintiff's responsibility but that there was a dispute between the plaintiff and the contractor as to his charges. This was resolved by the first defendant intervening and arranging a substantial reduction in the claim by the contractor. The first defendant says that he paid half of the contractor's account because the reduction which he had obtained was dependent on an immediate cash payment and the plaintiff indicated that he was in financial difficulties and could only raise enough cash to pay half the amount. It is implicit from his evidence that at the outset he had not agreed to accept any liability for the cost.

In the early part of this year the plaintiff and the first defendant had a discussion about water supply. The plaintiff claims that he arranged for a well

contractor to inspect the area. In any event a well was eventually sunk on the defendants' land and that well is capable of supplying water to the defendants' house, to any house that is built on the land in dispute in this proceeding, and possibly to one or two other neighbours. It is common ground that the first defendant agreed with the plaintiff that he would be able to draw water from the defendants' well for any house that the plaintiff might build on a proportionate cost sharing basis.

The plaintiff further claims that he arranged with the first defendant for power to be installed to the site for building purposes. The first defendant agrees that he permitted the plaintiff to connect the power through his property but says that was at a stage when the plaintiff had placed a caravan on the property and he wished power connected for that purpose as, according to the defendant, the plaintiff contemplated sleeping in the caravan from time to time on occasions when he was not permitted to sleep in the home which he was sharing with a woman friend. The plaintiff, on the other hand, claims that he did not place the caravan on the property until well after the electric power had been connected. I do not find it necessary to resolve this dispute in the evidence. I do not consider that the act of connecting power could in itself be evidence of part performance of an agreement to purchase because it would be not surprising that a builder using the premises as a builder's yard would want power supplied to the premises for that purpose alone.

No doubt because the plaintiff had not sold his property in Arrowtown, there was no urgency on either side to execute the informal oral arrangement existing between the plaintiff and the defendants or to convert it into a formal document. There appears to have been no real breakdown in relations between the plaintiff and the defendants until the middle of this year when the defendants were negotiating a sale of their farm property to a developer who proposed to purchase the property and develop it into an international standard golf course.

The second defendant has, in evidence, indicated that her relationship with the plaintiff had, in reality, but not in appearance, changed because of the separation of the plaintiff with his wife and his association with either another woman or women. Both defendants to their discredit in evidence advanced one of the reasons as to why they did not feel that they could entirely trust the plaintiff and were reluctant to sell the land to him was an alleged indecent assault on the daughter of the defendants then aged 16 years some 10 or 11 years previously. I find it incredible that this could have been a real reason explaining their conduct in 1988 when the incident had allegedly occurred in 1977 and was followed by a series of informal associations of a business and social nature including the invitation of the plaintiff and his wife to attend the wedding of the defendants' daughter. Even allowing for the small population and close contact that arises in a small town and the wish to avoid scandal

and gossip, I do not consider that anything that may have occurred between the plaintiff and the defendants' daughter in 1977 which did not then cause a parting of the ways, could have materially affected their decision not to sell to the plaintiff in 1988.

The defendants had decided to sell their farm property some time towards the middle of 1987. An auction sale was held in February of this year. It is in my view significant that the property that was offered for sale excluded the 3,000 square metre corner, the subject of these proceedings. It is equally significant that prior to offering the property for sale at auction the defendants did not approach the plaintiff as to whether or not he was interested in purchasing the property, if all parties did not consider that there was an agreement to sell the corner section.

The farm property was passed in at auction but on 30 June 1988 the defendants entered into an agreement to sell their farm property excluding this 3,000 square metre corner for the sum of $700,000 with provision for possession to be given and taken on 1 December 1988. At the date of hearing possession had not been given and taken because the purchasers had been delayed in raising the necessary purchase money and the vendors were unable to give title because the new titles had not yet been issued.

The agreement for sale and purchase was said to be subject to the purchaser arranging finance on terms satisfactory to it by 31 October 1988. At the date of

hearing the agreement for sale and purchase was unconditional. It was, however, appreciated by the defendants as vendors that the purchaser of the farm would be applying to the local authority for town planning approval to establish the golf course and that such approval would be required before a golf course could be established. I am also satisfied that the issue of town planning was a material issue between the defendants as vendors and the purchaser in the negotiations prior to entering into this contract. It is also clear that the corner section claimed to have been purchased by the plaintiff is adjacent to the proposed entrance to the golf course and the purchaser was concerned about the existence of a builder's yard in this position. I again find it significant that if the defendants did not consider themselves bound to sell this section to the plaintiff they did not indicate to this prospective purchaser that they would sell the corner section to the purchaser.

Meanwhile the first defendant had made an offer to the plaintiff to pay him $10,000 and any other costs that he had incurred relating to this property on the basis that, as the defendants say, the plaintiff was not going to be able to purchase the property. The defendants consider that the plaintiff would not be able to purchase the property because he would not be able to raise the money to pay the purchase price. This offer was made on at least two occasions, but it is not precisely clear when. The second time the offer was made was clearly related to the time when

the defendants were negotiating with the purchaser of their farm property who intended to develop the proposed golf course. It was accepted on both sides that if the plaintiff accepted the offer he would be expected not to proceed with the purchase of the section. The plaintiff says that the first defendant gave him three reasons, one being the desire of the golf course to have the control of the land, one being that his family was living in Christchurch and had now matured and there was no need for a family home, and the third was his association with the woman with whom he was living. The defendant says that although there was no binding agreement for him to sell the land, he recognised that it was the plaintiff's idea that had obtained the town planning approval and the subdivision which left him with a section which could be sold independently of the farm and that notwithstanding his willingness to sell to the plaintiff he did not consider that the plaintiff was able to finance the purchase.

One must admire this generous attitude of the defendants to the plaintiff. If there were no agreement whereby the plaintiff could insist on purchasing the land, he had spent considerable sums of money in applying needlessly for town planning consent and further considerable sums of money in clearing the land for a building section which would be of no benefit to him. I hope that this generous attitude which the defendants claim to have adopted to the plaintiff will continue but it is difficult not to consider that the offer of compensation was

not in part motivated by recognition of a prior oral agreement to sell.

It appears from the evidence that the purchaser of the farm property of the defendants had applied to the local authority for town planning approval for the development of a golf course prior to the contract with the defendants being concluded. The evidence does not establish whether or not the plaintiff had filed an objection to this application for approval before negotiations finally broke down between the defendants and the plaintiff, but I infer that such an objection had been lodged.

At a weekend in July this year the plaintiff arranged for his son and daughter to come from Christchurch to endeavour to persuade the defendants that notwithstanding his divorce from his wife the family was happy and that the family would combine with the plaintiff to purchase the section to enable the plaintiff to erect a home. This was done in an endeavour to persuade the defendants that the plaintiff's original purpose of wishing to purchase the section and erect a family home still existed and could be carried out. The plaintiff's daughter who was a secretary for a legal firm brought with her a written form of agreement. There was also mention of a caveat being placed on the land. There were three meetings during this weekend but in the end the defendants by the first defendant and his son indicated to the plaintiff and his two children present that they were not willing to enter into a written agreement to sell the section. The plaintiff then placed a caveat

against the title to the land and the defendants claim that this was the last straw that made them decide not to sell to the plaintiff or to the plaintiff and his family. The pleadings, rather surprisingly, admit that the defendants have formally advised the plaintiffs that they are no longer prepared to proceed with the agreement to sell the land, and further admit that the plaintiffs, through their solicitor, have offered to settle the purchase of the land. In the light of those pleadings there is no need for enquiry as to the plaintiff's readiness and willingness and ability to complete his part of the contract.

I was impressed with the plaintiff as a witness. Although it is clear that English is not his first language, he gave his evidence clearly and quietly and moderately. He struck me as a witness of truth and I believe him in his testimony that prior to the first application to the County Council there was an agreement made by the first defendant on behalf of himself and his wife with the plaintiff that they would sell to the plaintiff the land for $35,000 provided that the plaintiff was able to obtain the appropriate town planning consent. Although no specific provisions were made as to time and method of settlement, I would imply as a term that the purchase price was to be paid in cash and the settlement was to take place within a reasonable period of the consent being given by the local authority and title being available.

I do not consider that this contract came to an end when the first application for local authority consent

was refused. If it did come to an end it was revived or there was novation at the time of the second application for consent. I find it significant that during that period of 12 months the first defendant endeavoured to increase the purchase price to $40,000, but after discussion with the plaintiff agreed that it should remain at the original $35,000. Either the same agreement or a new one on the same terms was in force at the time of the second application for consent which was of course successful.

In making these findings I am rejecting the evidence given by both defendants denying that there was ever a specific agreement. I am satisfied that the defendants believed that there was no such specific agreement but that that was because they had been informed and believed that there could be no agreement for the sale and purchase of land that was not in writing and they well knew that there was no such writing. It may well have been that the defendants thought that they could safely orally agree to sell to the plaintiff for $35,000 provided that there was no such agreement in writing. I am satisfied that they did so agree. I am also of little doubt that had there not been the problems which arose when the defendants endeavoured to sell their farm, and the expressed concern of the prospective purchaser both as to the objection by the plaintiff to its town planning application and the very existence of the plaintiff's builder's yard, the defendants would have carried out their obligation. The defendants regarded the act of the plaintiff in placing a caveat

against the land and in persisting with his objection to the town planning application as being high handed and even as the first defendant described it as malicious. It may be that the defendants had some justification for resenting the actions of the plaintiff, but that resentment appears to have overlooked that all the plaintiff was endeavouring to do was to enforce an agreement which he had with the defendants. The anger which the plaintiff's action has brought about in the defendants has coloured their memory as to the precise facts. I am sad to find that the defendants now positively dislike the plaintiff and this positive dislike, for the reasons recently and earlier expressed in this judgment, has clouded their memory that there was an oral agreement by them to sell the land to the plaintiff.

I am also satisfied that the second defendant was a party to that agreement. She said in evidence that the farm was a partnership between her and her husband. She signed her approval to the application for town planning consent. I am quite satisfied that she would not have done so without requiring to be informed as to the basis of the application. At that stage the first defendant had orally agreed to sell to the plaintiff. I infer that she was told of this by her husband and if there was any absence of actual authority at the time the contract was entered into she ratified her husband's actions. Neither counsel addressed me on the effects of s.8 of the Partnership Act 1908 but I am satisfied, regardless of the provisions of this Act, that the second defendant was aware of the

discussions held between the plaintiff and the first defendant and consented to them. I reject her testimony that at that time she was unwilling to sell. She was likewise a party to any new agreement or revival of the old agreement at the time of the second application for town planning approval evidenced by her attendance at the second hearing and her cooperation with Mr Constantine, the town planning consultant whose evidence I accept.

If those were the sole issues I would have no hesitation in finding that there had been sufficient acts following the oral agreement to have concluded that there was part performance of a nature which justified the Court ordering specific performance. I am very happy to adopt all that is said in relation to the equitable doctrine of part performance in the 7th New Zealand edition of Chesire, Fifoot & Furmston's Law of Contract edited by Burrows, Finn & Todd at pages 225 to 230 on this topic, and in particular the analysis of the judgment of the House of Lords in Steadman v Steadman (1976) A.C. 536. I am happy also to adopt what was said by Mahon J. in Boutique Balmoral v Retail Holdings (1976) 2 N.Z.L.R. 222 subject to an amendment which is appropriate to this case but was not appropriate to the case before him. Mahon J. said at p226:-

> "But the doctrine of part performance requires that the plaintiff must wholly or in part have executed his part of a parol agreement in reliance on the defendant doing the same, the defendant also being shown to have acquiesced in the performance of such acts known by him to have been done in reliance on the contract, for otherwise the deemed fraud of the defendant which raises the equity will not be established."

With respect the learned Judge may have placed too narrow a test in requiring the plaintiff to "have executed his part of a parol agreement". I would substitute the phrase "have acted to his detriment pursuant to a parol agreement" for the phrase used by the learned Judge but otherwise adopt what he said.

Whether the conduct of the plaintiff is looked at for the purposes of establishing that the conduct would not have taken place without there being a contract, or whether the conduct is examined following a finding first that there has been an oral contract, the conduct is of such a nature as to amount to part performance on either basis and is so clear as to require no further analysis. In particular I rely on the action of applying for Town Planning consent, the arranging of the contract for clearing the land and preparing a building site, and the agreement to pay part of the costs of a survey.

Counsel for the defendants relies on the observations of Goulding J. in New Hart Builders Ltd v Brindley (1975) Ch. 343 at p352-3 where he said:-

> "I must consequently examine the plaintiff company's alternative contention under the well known equitable doctrine of part performance. The acts relied upon as constituting part performance are the planning applications made and prosecuted by the plaintiff company from December 1966 until planning permission was obtained in June 1970. Particulars of such proceedings are set out in the plaintiff company's reply. They were lengthy, troublesome, and expensive. The relevant facts are not in dispute save that the defendant suggests that the first application was made before the date of the option agreement. I do not however find that suggestion established by the evidence.

> I see some difficulty in applying the doctrine of part performance at all to an agreement conferring an option while the latter remains unexercised. Can the grantee of the option be heard to say that he has effected part performance of an agreement which imposes no duty upon him whatever? I do not mean to express any opinion on that point.
>
> On any view the plaintiff company's planning proceedings cannot in my judgment rank as part performance unless by their own character they are referable to the existence of an agreement between the plaintiff company and the late Mr Brindley. Mr Sparrow, for the plaintiff company, laid much stress on the fact that the Brindleys gave assistance to the plaintiff company in pursuing the applications for planning permissions. However, I see nothing improbable or unusual in the co-operation of a would-be developer and a landowner to obtain planning permission in the hope that both will eventually profit, without necessarily having bound themselves by contractual terms. Thus the planning activities do not prove the existence of a contract, and the plaintiff company has in my view failed to make out the allegation of part performance. The defence under section 40 of the Law of Property Act 1925 is accordingly a good answer to the plaintiff company's claim."

The learned Judge in that case was obviously greatly influenced by the fact that the oral agreement sought to be enforced was an option and not an agreement for sale and purchase. He was also influenced by the likelihood of a developer applying for town planning approval in advance of an agrement for sale and purchase.

The issue of whether acts amount to part performance is a question of fact which will vary according to the circumstances. In the present case the Court is not concerned with the acts of a land developer and there is no question of the plaintiff only having an option to buy. I am satisfied that the acts of the plaintiff in applying for

town planning consent in the circumstances and in agreeing to pay part of survey costs and in clearing a building site are consistent only with the existence of an agreement for sale and purchase and were carried out pursuant to such an agreement.

However, that is not the sole issue. I am satisfied that the first defendant at all material times was aware that he was doing a favour to the plaintiff in agreeing to sell him the land at a price which was probably less than its true market value. In any event, it was material to the first defendant that the plaintiff should not purchase the land and within a short period resell it at a substantial profit. He accordingly insisted on a term that if the plaintiff should wish to sell the land he should first offer the land back to the defendants. The existence of this term in this form has at all stages been acknowledged by the plaintiff except in the final stages. The plaintiff said:-

> "The question of Heenans having first option of buying the land if I was to sell it, it's been discussed at one time, I can't remember whether we discussed it again or, but I remember at a later stage Mr Heenan dropped the idea and when he came up to selling the farm as a whole he did say that he wasn't too worried any more, he was just going to get out of the farm, that was it."

I questioned the first defendant about the precise nature of this option to repurchase. The first defendant says that it was in the event of a proposed sale within ten years and that althoughthat term was discussed

the price at which the first defendant was to repurchase was not discussed. He says he expected that the price would be a figure which reflected the difference between the market value and the sale price of the land at the time of the defendants' sale to the plaintiff. The plaintiff was not asked about the particularities of this option for the defendants to repurchase but acknowledged the option's existence and in cross-examination acknowledged that this right to repurchase continued except in the one passage earlier set out. I accept the evidence of the defendant that the details of that option to purchase were never worked out. They were, however, more than a simple right of first refusal.

I do not consider that there was ever an agreement varying or waiving the right which the defendants claimed at all stages to repurchase the property to prevent the plaintiff reselling at a quick profit. It may have been less important to the defendants at the time they decided to sell the farm but if that occurred it was a factor which resumed importance when the defendants were negotiating with a purchaser proposing to develop an international golf course on the farm in circumstances that this particular section would be practically at the entrance to this golf course. I am satisfied that the oral agreement at its conception contained with it a term giving the defendants the right to repurchase in the event of the plaintiff selling within 10 years and there was no agreement to vary this term and no conduct from which waiver of the term could be implied.

This clearly was a situation where it was the intention of the parties to enter into a binding agreement and in applying the dicta of the Court of Appeal in Attorney-General v Barker Brothres Limited (1976) 2 N.Z.L.R. 495, it is the Court's duty to do its best to give effect to the parties' intention. There is, however, no sufficient means or standard which can be found "whereby that which has been left uncertain can be rendered certain". Clearly the purchase price at which the defendants would repurchase the property would not be its market value at the time of repurchase as there would be no point in reserving the option in the circumstances of this case when the vendors did not require the land for their own purposes. It was likewise recognised by the defendants that the purchase price for the repurchase would not be the same as the price at which the defendants had sold the property to the plaintiff. In some circumstances it might be possible to imply a purchase price to be determined by arbitration, but it is necessary to determine some formula on which such an arbitration would take place. One asks the immediate question, is it to be a percentage by way of reduction from the market value at the time of the repurchase which is the same percentage as the difference between the actual sale price of $35,000 and its value at the time of the agreement for purchase? On the other hand, is it to be no more than the difference between the true value of the land and the original purchase price plus some allowance for interest and inflation?

The evidence satisfies me that there would have been no agreement by the defendants to sell the property without some provision to ensure that in the event of a resale by the plaintiff within ten years, they would have had the right to repurchase the property at a lesser figure than the plaintiff was intending to sell it for, if the proposed sale price was more than $35,000. There was such a provision in the oral agreement made by the plaintiff and the defendants, but it is a provision which is so uncertain by nature as to be unenforceable as a contractual stipulation.

The question might have arisen as to whether the term or condition is severable but in the light of my finding that there would have been no sale by the vendors without such a provision I do not consider any grounds exist for severance.

I am reluctantly forced to the conclusion that although the parties entered into an oral arrangement which, if it had been converted into writing, would have been a legally enforceable agreement for sale and purchase, in part, it contained a vital term which was imprecise and uncertain, and the circumstances are such that the Court cannot imply what the term would have been. It follows that the plaintiff has no agreement which is enforceable.

On 3 October 1988 I made an order that the caveat lodged by the plaintiffs against the defendants' land should not lapse until further order of the Court. That order shall henceforth cease to have any effect.

I have already expressed my hope that the defendants will recognise the moral right which the plaintiff might have for compensation in respect of moneys which he has spent pursuant to this oral arrangement and perhaps something for the loss of the benefit of the arrangement. There is, however, no legal remedy available to the plaintiff. The proceedings are dismissed. In the circumstances this is an appropriate case for the Court to take the relatively rare course of deciding that the successful defendants should not have any order for costs.

A D Holland J

Solicitors:

Gallaway Haggitt Sinclair, Dunedin, By Their Agents,
Messrs French Burt Partners, Invercargill for Plaintiffs
Eagles & Eagles, Invercargill, for Defendants

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