IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

C.P. NO. 248/89

BETWEEN N.G. & M.M. EVANS

Plaintiffs

A N D C.S. BROWN

Defendant

Hearing: March 15, 1990

Counsel: Mr. Campbell for Plaintiffs
Mr. Jenkin for Defendant

Judgment: 6 April 1990

JUDGMENT OF MASTER ANNE GAMBRILL

I have before me an application for Summary Judgment. The effect of the actions of the respective parties must be regarded as horrific in respect of the risks they all now face, the dispute having arisen out of a situation where vendors claimed the sum of $54.20 for interest on the late payment of the deposit. The consequences of this demand and the failure to pay the same has led to this action for Summary Judgment. Sadly the parties are before the Court today with Counsel in a hearing where resolution cannot be finally achieved and where the costs and interest obligations may continue to accrue. The Plaintiff vendors

have not received their money and the purchaser Defendant remains at risk to the vendors for interest/rent for possession. I am also informed the vendors have outstanding mortgages which have not been repaid. To think, despite the offer of the purchaser's solicitors to submit the dispute over $54.20 to the Law Society for resolution, that this dispute has been permitted by the vendor/Palintiffs' solicitors to reach this proportion of a dispute over $15,000 - $18,000 interest accrued, is 'mind-boggling'.

In my years of practising I have never seen a situation arise where the parties have all been less well served by allowing themselves to be dragged into a situation where there must ultimately be a pyrrhic but financially sour victory for one party and a loss and financially sour defeat for the other and the law applicable to the dispute as I read it herein appears to establish the Plaintiffs should not have refused the Defendant's offer of settlement.

The parties entered into a contract herein, Mr. Brown the purchaser (Defendant) signing the contract on or about 21st March 1989. The possession date was stipulated to be 5th May 1989 and the last day for arranging finance was 11th April 1989. A copy of the agreement was originally signed

by Mr. Brown as the purchaser and he received a copy which stipulated $4,500 deposit payable to Lugton Land Limited Trust Account (being the vendors' agent), upon the vendors accepting this agreement. The agreement was such that it was conditional upon three conditions (a) approval by the purchaser's solicitors by 29th March; (b) approval by the vendors' solicitors by 23rd March; (c) conditional upon the cancellation of the prior agreement the vendors had already entered into by 23rd March.

The pleadings say that the Defendant made the offer to purchase on 21st March and the offer was accepted by the Plaintiffs on 23rd March 1989. There is no evidence of such acceptance shown by the affidavit of the Plaintiffs in support of the application for Summary Judgment. Obviously it can be ascertained from the Defendant's affidavit adduced in opposition but not from the initial evidence adduced by the Plaintiffs, that the parties had certain negotiations after the contract was initially signed. The only evidence adduced by the Plaintiffs was a letter written by their solicitors Messrs. Osmond Till & Co. on 17th April 1989:

> "RE: SALE TO BROWN
>
> We confirm your telephone advice the agreement is unconditional and now enclose our settlement statement. We look forward to receiving the deposit as our clients require to use it for the

onward purchase."

Thereafter there is:

> "P.S. We note that the deposit has been paid to the Land Agent despite there being a specific term requiring it to be paid to us. This has resulted in our client having to pay interest for a longer period than should have been necessary, accordingly our client has instructed us to require interest to be paid on the deposit and note the daily rate if (sic) $2.71 and this runs from the 23 March 1989."

It is probably significant that the letter itself in more gentle terms said "we look forward to receiving the deposit". It appears prior to that letter and the demand, the deposit had been paid to the Plaintiff vendors' agent Lugton Real Estate on 12th April, accepted by it and no steps were taken thereafter by the vendors to seek to refund the same or cancel the contract. Significantly, Easter fell within the March/early April period. The Defendant deposes in paragraph 6 of his affidavit:

> "AT the time I signed the agreement which the agent (Mr. Taylor) was to deliver to the Plaintiffs I asked him when I should pay the deposit. Mr. Taylor advised me that there was no need to worry about the deposit so long as I had paid it prior to the deadline for arranging finance. The original deadline for arranging finance was 11 April 1989, but, I was asked shortly after signing the contract to agree to deferring the settlement date to 5 May 1989, (a delay of 2 weeks from the original settlement date of 21 April 1989) and I said yes, on condition that the date for arranging finance was also deferred by 2 weeks. The agent who conveyed this request to me agreed that would be in order.

> I believe my conversation with the agent concerning re-arranging the finance condition date and settlement date took place approximately 1 to 2 weeks after I first signed the contract document. As a result, I understood that I had until 25 April 1989 to arrange my finance and to pay the deposit. Neither the Plaintiffs, nor their solicitors, nor the agent made any request to me for payment of the deposit before I in fact made payment. I paid the deposit on 12 April 1989. No demur, objection or complaint was ever raised concerning this as far as I was aware until my solicitor advised me that the Plaintiffs solicitors had written to him claiming I had to pay penalty interest of $54.20 for late payment of the deposit. At no stage was I ever informed or advised of a requirement that I should drop the deposit in to any one else other than the agent nor that I needed to do so before the date upon which I did."

Settlement was expected on 5th May and possession was taken by the Defendant on that date. There is a clear evidentiary dispute as to the exact events happening at that time but Mr. Halse, on behalf of the Defendant, made certain telephone arrangements with Mr. Osmond Snr., that obtained possession for the Defendant. There were telephone conversations between the respective solicitors On 5th May and on 9th May the solicitor for the Plaintiff/ vendors Mr. Osmond Jnr., wrote:

> "1. We advised you in writing of the requirement for interest on 17th April.....
>
> 2. No objection (to this letter) was raised until late on the settlement day (5th May).....
>
> 3. .....interest is running....this amounts to $46.68 per day.

> .....
>
> 6. .....We formally give you notice requiring settlement.....
>
> 7. We do not accept that the Auckland District Law Society should rule on what is a matter of contract. In any even we do not see a need for a ruling. The wording of the contract is clear.....".

The Plaintiffs' solicitors in their letter then set out the reasons for requiring interest on the deposit and said the deposit that wass required was to have been paid to the Plaintiffs who have lost interest thereon. The Plaintiffs' solicitors say "Time is of the essence. The deposit is part payment of the purchase price". The correspondence that had been received from the purchaser's solicitors to the vendors' solicitors is not annexed to the Plaintiffs' affidavit. An attempt was made to settle by the Defendant/purchaser indicating the question of interest on the deposit and late settlement interest should not be determined at that point in time - settlement should take place. The final correspondence from the Plaintiffs' solicitors is dated 29th August 1989 and seeks arbitration. The offer proposed "The issue of interest at $46.68 per day was to remain extant" and is still extant - now a dispute of $15,000 or so.

Turning to the Defendant's affidavit, it appears that the contracts do vary as to whether the deposit should be paid to the vendors' solicitors or Lugton Land Limited, the Defendant's own copy (not his solicitor's) showing payment was due to the agent. However, Counsel accepts, and it is clear to me both parties have affirmed the contract and the aspect of to whom the deposit should be paid is, in effect, not in issue but the dispute occurs as to the actual time of payment and interest thereon for late payment. There is evidence from the Defendant as to what he believed the vendors' agent told him about payment of the deposit as hereinbefore referred to. No request was made for payment of it by the Plaintiff/vendors' solicitors after the vendors signed the contract, finance was arranged and the Defendant says he was ready willing and able to settle on 5th May 1989 in accordance with the contract, excluding the sum for interest on the deposit which his solicitor was holding, and this I accept to be the case. There is no contrary evidence from the Plaintiffs. The Plaintiffs depose they required interest on the deposit. The deposit had been paid prior to the date of that request.

The Defendant adduces 15 letters before the Court being correspondence between the solicitors for the respective Plaintiffs and Defendant. Regrettably the Plaintiffs who

sought Summary Judgment only adduced the three that they considered were necessary and which do not detail the extent of the dispute between the parties. The Defendant on 5th May (settlement day) offered to pay the $54.20 to the Hamilton or Auckland District Law Societies or have it held in a solicitor's trust account whilst obtaining the Law Society ruling. It was obvious that possession was taken by the Defendant on a basis that indicates an affirmation, if not a consent, by Mr. Osmond Snr., and I continue to find it 'mind-boggling' that a settlement should collapse over a dispute of principal relating to whether interest is payable on the deposit for late payment. I believe the parties are entitled to their legal rights but commercial reality and morality is and should be a factor in the conduct of a conveyancing transaction if the clients' interest are to be preserved and looked after by their respective solicitors.

I have considered the matter in the light of the text of Peter Blanchard, A Handbook on Agreements for Sale and Purchase of Land. Paragraph 305 he says:

> "Since the agreement form (which in this case was on a Law Society form) gives the purchaser the right to pay a deposit at any time before cancellation in accordance with Clause 2.1 there seems to be no reason why a later payment cannot be accepted by the real estate agent appointed by the vendor at any time prior to the giving of a cancellation notice."

This is in fact what happened. Mr. Blanchard then says:

> "The vendor is entitled to claim interest under Clause 3.3 at the interest rate for late settlement on the amount of the deposit from the day on which the contract is signed by both parties until the day on which payment is made."

It also clear that if the deposit had had to be returned and the vendors had cancelled, no interest would have been payable thereon.

The contract is dated 21st March 1989 and provides for the deposit to be paid to the vendors upon the vendors accepting this agreement. There is no clear indication of when the agreement was in fact accepted. The first indication is 31st March 1989 (outside the time provided in the agreement) when the Plaintiff/vendors' solicitors wrote, "We confirm we approve the agreement and look forward to adviceconcerning finance". On 13th April, after payment of the deposit on 12th April to the agent, the Defendant's solicitors wrote saying, "The contract is unconditional, herewith the transfer". It is only at 17th April a demand for interest was made by the Plaintiffs' solicitors. On 5th May the Plaintiffs demanded settlement including the interest sum of $54.20. The dispute was

patently clear by later that day, the Defendant's solicitors being willing to settle but wishing to seek a Law Society ruling on the obligation to pay interest. On 9th May settlement was demanded by the Plaintiffs including the interest sum and the Defendant's solicitors further offered to seek Law Society rulings. The Plaintiffs issued a settlement notice and sent a further letter on 19th May stating the last date for settlement was 26th May 1989. The Plaintiffs took no steps to exercise any rights following the settlement notice except to demand interest on settlement at $46.68 per diem. There was further correspondence between the parties and finally, many months later, on 29th August, a proposal for settlement by the vendors (Plaintiffs) which, at that stage would have required arbitration by a sole arbitrator both as to interest on the deposit and late settlement interest, although their solicitors were not prepared to accede to this earlier in the piece. Why there was the effluxion of time I am not aware, nor do I have the relevant evidence.

The settlement has effectively been delayed herein. The Plaintiffs say categorically that the default is the responsibility of the Defendant for failing to pay the $54.20. I refer to the statement in Blanchard (supra) at page 45 where it says:

> "'Default' is a purely relative term, just like 'negligence'. It means nothing more, nothing less than not doing what is reasonable under the circumstances - not doing something which you ought to do, having regard to the relations which you occupy towards the other person's interest in the transaction."

It is significant that the parties apparently still wished to settle and the effluxion of time having now taken place, it would neither be realistic nor practical for the Plaintiff/vendors to seek to cancel. The Plaintiffs rely on the statement in Blanchard (supra) at page 58:

> "The vendor's duty to deliver a transfer need not be performed until the purchaser pays any outstanding interest or other moneys due under the contract. So a purchaser who fails to tender outstanding interest (including interest for late settlement) is in default.....the vendor can then deliver a settlement notice."

See Jenkinson v. Krchnavy [1979] 1 N.Z.L.R. 613; and Green v. Somerville (1979) 141 C.L.R. 594.

The Plaintiffs say the interest due on the deposit forms part of the sums due on settlement because the deposit forms part of the purchase price.

The demand for interest on the deposit was made some days after a deposit payment was made and I refer again to the facts deposed to by Mr. Brown in paragraph 6 of his affidavit (supra) which is unrefuted. Prima facie as a general rule (the vendors having lost possession of the property), the vendors, as Plaintiffs, say they are entitled to interest on the unpaid purchase money until actual payment. However, this rule may be subject to the advice and offer of the purchaser to settle and the fact the money is held on an interest bearing deposit as long as the purchaser accounts to the Plaintiffs for interest he has received.

In considering the matters herein, I would refer the parties to Stonham, Vendor & Purchaser page 612, paragraph 1191:

> "The clause by which the purchaser agrees to pay interest for delay arising from any cause whatsoever other than the wilful default of the vendor, has been fruitful of litigation evidenced by the reported cases. Delay on the vendor's part has been held to be a wilful default, when arising out of the following circumstances: going abroad for a holiday two days before the day fixed for completion;.....refusing to deliver abstract of title due to an honest, but wrong, interpretation of the contract.
>
> Re Pelly & Jacob's Contract (1899) 80 L.T. 45. Contrast North v. Percival (1898) 2 Ch. 128."

Paragraph 1193:

> "The cases show that 'wilful default' cannot be defined in the abstract, and is not a term of art, but is a relative term the meaning of which varies with the circumstances of each case and depends for its precise connotation on the subject matter and context."

I do not think there can be any argument that the delay in settlement was caused by the Plaintiff/vendors. Whether it constitutes 'wilful delay' is a matter to be ascertained from factual evidence and the law applicable thereto. Put in the alternative, should the vendors have refused settlement?

For my part, I cannot make a finding as to whether the liability for $54.20 did arise as I have not the evidence of the vendors' agent who made the arrangement with the purchaser. Prima facie, it appears that the Defendant acted in accordance with his contract and the document he had been handed. There is no evidence refuting his statement that the parties had agreed to an extension of time for the obtaining of finance and for the settlement date, this being at the request of the Plaintiff/vendors and furthermore, that the vendors' agent had agreed with the Defendant as to the time for payment of the deposit.

I refer to Hinde McMorland & Sim, Land Law Vol. 2, paragraph 10.042:

> "A deposit paid to an agent of the vendor who has authority to receive it must be treated, after a binding contract is made, as if it had been received by the vendor. Thus any action by the purchaser for repayment lies against the vendor whether or not the agent has accounted to his principal. The vendor's solicitor or real estate agent receives the deposit as agent for the vendor unless otherwise agreed."

Prima facie I have no evidence of any instruction to the Defendant as to whom to pay the deposit until several days after the vendors' agent had received it. The Plaintiff/vendors do not go on oath to refute the Defendant's evidence. I have little reason to believe the Defendant did not act in accordance with the written document he held and his belief of his obligation which was also the belief of the vendors' agent.

If my assumption is correct, then interest is not due on the deposit. If, however, the interest was due, which I doubt, then the second matter for determination at a trial arises therefrom, that is, whether the Plaintiffs (the conveyance of land being an equitable transaction) were entitled to refuse settlement in the circumstances when they could be assured of the existence and availability of

the $54.20 as interest. I myself have grave doubts, but there is always legal argument as to the interpretation of whether the Plaintiff/vendors were entitled to refuse to settle.

The Plaintiffs say that they rely on paragraph 2 of the Agreement for Sale & Purchase. Paragraph 2.2 says:

> "The deposit shall be in part payment of the purchase price."

Paragraph 3.3:

> "If from any cause whatever save the default of the vendor any portion of the purchase price is not paid upon the due date for payment the purchaser shall pay to the vendor interest at the interest rate for late settlement on the portion of the purchase price so unpaid from due date for payment until payment;....".

The matter then arises whether the Defendant, having elected not to pay the $54.20 but pay it to the Law Society which is said by the Plaintiffs to be portion of the interest and purchase price, would entitle the vendors to refuse or default in the settlement, noting that the vendors have not elected to exercise any other remedies.

As I read the contract, the deposit formally becomes part of the purchase price but I have not read that the interest thereon is appropriated to and becomes part of the purchase price. My understanding is that interest remains a separate sum to be dealt with and sued for under the contract. It is clear that the contract regards purchase price and interest as separate sums. See paragraph 3.5:

> "Upon the balance of the purchase price interest and other moneys if any due hereunder being paid or satisfied.....the vendor shall concurrently hand to the purchaser a registrable memorandum of transfer.....".

The vendor/Palintiffs say as the interest on the deposit was not tendered, they are not bound to settle.

In this case, on the evidence, it is doubtful whether the interest would or would not accrue on the deposit. Whether thereafter the refusal of the vendors constitutes default by the vendors of sufficient gravity to render the right of the vendors to receive interest nugatory, I also cannot ascertain. There are disputed factual matters and without determining the due date of payment of deposit, I cannot apply the law. This is why I propose to order specific performance of the contract and the balance of interest to be paid into Court so that the matter can be

litigated between the parties.

I will refuse Summary Judgment for any interest sums. I am not satisfied they are due and owing. I am informed from the Bar, the Defendant is willing to pay all accrued interest on the settlement moneys to the Plaintiffs which, in equity, may satisfy the Plaintiffs' demand if the Plaintiffs' refusal to settle is not upheld.

Accordingly there will be an order for specific performance of the contract within 7 days of delivery of this judgment in terms of the Statement of Claim $77,439.33 less interest of $54.20, net $77,385.13. Settlement to be effected at Hamilton at the offices of Messrs. Harkness Henry & Co. The sum of $54.20 and interest accrued on the deposit are to be paid into Court, to be held on an interest bearing deposit. The costs are presently reserved. Leave is reserved to apply for any further directions and for time for the parties to argue as to whom should bear the liability for costs.

Anne Gambrill

MASTER ANNE GAMBRILL

Solicitors:

Osmond Till & Co., Cambridge, for Plaintiffs
Foy & Halse, Auckland, for Defendant