IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

2/10

CP No. 705/88

BETWEEN KEVIN ROBET HOWE AND DENISE ANN HOWE

Plaintiffs

1962

AND NAUNIT LAL

First Defendant

AND WILLIAM MICHAEL LYONS

Second Defendant

Dates of Hearing: 20 & 21 September 1990
Date of Decision: 21 September 1990

Counsel:

D G Dewar with L Scott for Plaintiffs
D L Stevens for First Defendant
D G Becker for Second Defendant

ORAL DECISION OF McGECHAN J

This is a claim for some $16,000 in proceedings for breach of contract, which I will outline in a moment. The hearing has taken the full two days to the point where at a quarter past six on a Friday night I start to deliver judgment. I am going to do that because I have a clear view at this point. It appears likely that if I reserve the matter I will not be able to come to it again for some weeks at which point there may be greater difficulty. I do so conscious of the fact that despite the relatively small amount involved it is of

importance to the first defendant as a solicitor, his reputation being involved, and it is important to the second defendant not only because to him $16,000 is probably not a small amount, but also because he is making endeavours to retrieve himself from previous personal difficulties in a way which this Court naturally hesitates to interfer with unless that must be done. With that introduction I turn to the issues.

The claim as ultimately formulated is one by a plaintiff who alleges a written agreement with the second defendant, Mr Lyons, to sell to him a freehold property at 212 Rintoul Street, Wellington for $92,500 on a deposit of $5,000 with the balance in cash on settlement which was due under the document on 27 November 1987. That agreement was entered into it is alleged on 13 October 1987. The allegation is that the agreement was signed by the first defendant Mr Lal as solicitor and duly authorised agent of the second defendant and that the first defendant was indeed acting in that capacity for the purpose. Failure to settle on 27 November 1987 and failure to settle on a later date are alleged as are subsequent cancellations and resale of the property by contract datd 29 January 1988 for a price of $80,000 with settlement on 12 February 1988. A further purchase made allegedly in reliance upon the unconditional sale is also alleged with consequent difficulties and losses arising in respect of bridging finance. The claim as ultimately pleaded was for loss on resale of the property $12,500; additional legal costs and disbursements $850; additional rates $96.00 and the bridging finance expenses $2,766.44. A land agents commission of $3,382.50 was abandoned, resulting in the figure of $16,212.44. An agreed statement of facts was filed at commencement of hearing which largely establishes the formal matters pleaded for the plaintiff. That, and the statements of defence which were filed, leave as the live issue a question whether the first defendant, Mr Lal, did indeed have the authority to sign the contract stated and if not, questions of liability in respect

of breach of warranty of authority and alternatively questions of deceit and negligence as agent or solicitor.

The second defendant, Mr Lyons, further to those questions filed a cross claim by cross notice against the first defendant, Mr Lal, alleging specifically that he, Mr Lal, was instructed to enter into an agreement to purchase as the second defendant's agent if, he, the first defendant could arrange finance and the purchase price was $92,500. It alleges that he, the first defendant, exceeded that authority given by entering into the agreement without finance having been arranged and in a form which was not conditional upon the second defendant arranging finance. In addition the cross notice alleges that first defendant owed second defendant a duty of care as agent to act with due care, skill and diligence. It is alleged that was breached through the first defendant executing an unconditional contract as stated in circumstances where it was possible there would be some confusion over precise extent of instructions and where those instructions were not written; also by executing the agreement when not conditional upon arranging finance; and by failing to arrange finance prior to signing; and by failing to ascertain and advise the secnd defendant in regard to the proposed purchase, particularly whether the second defendant would be in a financial position to service a mortgage; whether there was adequate security available for a mortgage; and as to the likelihood of the second defendant obtaining an offer of finance. There are also common form allegations of failure to take reasonable precautions to protect interest, and to take due care in the circumstances. There is a further cause of action in similar terms but this time alleging duty of care as a solicitor as distinct from merely as agent.

Those are the issues. The case is one which must turn very much on its facts; and in relation to those facts, they in turn depend very much upon credibility as between the first defendant, Mr Lal and the second defendant, Mr Lyons. I must

necessarily spend a few moments noting the salient points of the evidence given by each as to what occurred in relation to the issue of authority and related matters.

Mr Lal gave evidence in these general terms. He had been qualified as a solicitor working in the conveyancing and commercial fields since 1983. On a previous occasion in 1987 when associated with a different firm he had been introduced to Mr Lyons, the second defendant, and knew him as a man engaged in buying and selling and renovations of properties. On 2 October 1987 a company, Radio Active Limited, in which he and another solicitor, Mr Brierley, were interested had signed conditionally to purchase the property concerned subject to confirmation of a valuation satisfactory to the purchasers within seven working days. A valuation of some $91,000 or a little over for the property, apart from chattels, had been obtained and was not regarded as satisfactory at least by Mr Brierley with the result that that contract did not proceed onward. The valuation recommended a first mortgage advance of $60,000, subject to completion of work which might have been substantial. A day or two before the date of the contract presently concerned, that is to say shortly before 13 October, Mr Cleghorn a real estate agent, on Mr Lal's evidence, brought Mr Lyons in to see him reintroducing Mr Lyons. The visit was due to an interest on Mr Lyons' part in purchasing this property at 212 Rintoul Street. The asking price at that stage is somewhat uncertain but appears to have been a little over $100,000. Mr Lal disclosed the previous offer at $94,500 to which I have just referred (on a conditional basis) and disclosed the existence of the valuation. Mr Lyons, Mr Lal says, thought $92,500 would be a good price if obtainable and instructed Mr Lal to make an unconditional offer at that sum. Given the risks of an unconditional offer, on which Mr Lal says he advised, Mr Lal decided to go through the financing options with Mr Lyons to see whether the proposed transaction would be viable or in the slang of the day 'stacked up'. He says he discussed finance with Mr Lyons in relation to security

margins, income and outgoings and also discussed the valuation to which I have referred. It appeared that on institutional practice of the day, some 80% of the valuation price may be obtainable. It also emerged Mr Lal says, that Mr Lyons was renovating a property at 61 Tannadyce Street, purchased for $122,000 which Mr Lyons said would be worth $140,000 giving therefore an equity after a mortgage of some $60,000 available on a collateral second mortgage to support the security of Rintoul Street. Mr Lal's evidence was that he told Mr Lyons Tannadyce Street should be valued also for use as collateral but Mr Lyons said that was not necessary. It would value up sufficiently. The ability to service proposed borrowing in the light of probable rentals was discussed, as was Mr Lyons other income as self-employed builder. The conclusion Mr Lal says he reached was that on Mr Lyons figures he would have a monthly income of some $5,500 with a mortgage outgoing of some $2,400, that Mr Lal thought was on the high side, but Mr Lyons was confident he could service the borrowings. On Mr Lal's evidence, Mr Lyons was to get an accountant's certificate as to income, which is a common institutional requirement, and less certainly perhaps a valuation of Tannadyce Street. Mr Lal's evidence on that latter is not entirely consistent. Mr Lal would make available the valuation already held on Rintoul Street. Mr Lal's evidence was that Mr Lyons presented as an experienced businessman, with a knowledge of property dealing and development, and appeared to understand the discussion and what was going on. Mr Lal at that stage was not a note taker. He took merely a brief note with some details. He did state in evidence that that was partly as by way of back-up his firm would make, or was considering making, an application to National Australia Finance (as it was described) seemingly an associate of the National Australia Bank. I will return to that point.

Mr Lal says that in Mr Lyons presence he telephoned the vendor's agent, a Mr Palamidis, who often as is the case with real estate agents was not in. If Mr Palamidis had been in,

Mr Lal says Mr Lyons would have signed the $92,500 offer intended. As it was, Mr Lyons left. He also left instructions, of a verbal nature only, to Mr Lal to put in an offer on his, Lyons', behalf at $92,500 unconditionally so as to make that offer attractive. Further, Mr Lal says, Mr Lyons was to arrange his own finance. Mr Lal was telephoned back by Mr Palamidis. Mr Palamidis drew the offer envisaged. Mr Lal signed it as pleaded as Mr Lyons' agent. It was accepted that day. It is dated 13 October 1987. Mr Palamidis is reported as making some remarks about what a good buy it was. Any real estate agent worth his salt makes such remarks and I place little credit upon them; but the consensus appears to be that it was a reasonable buy at that price. A deposit of $5,000 was due. It was not paid. That also is common enough, at least in the early stages. Mr Lal says that he contacted Mr Lyons by telephone a couple of days later. Mr Lal's evidence was he informed Mr Lyons that the offer had been accepted and checked with Mr Lyons how he was getting on with confirmation of his income so as to apply for finance. Mr Lal told Mr Lyons to contact him, Lal, as soon as he could confirm finance. On Mr Lal's evidence Mr Lyons said he would get back to him.

I note for sequence and because in the end it probably had bearing, perhaps considerable bearing, that over 19 and 20 October 1987 what is known as the sharemarket crash occurred (in New Zealand on 20 October 1987) and that of course had later wellknown financial repercussions.

Settlement, however, was not due until 27 November 1987. Mr Lal's evidence was he made efforts repeatedly to contact Mr Lyons as to progress. He did not succeed. He left messages for Mr Lyons to call back. He, Mr Lal, did not write. No contact was made. Mr Lyons did not return the calls. Mr Lal gave evidence that he negotiated an extension of the settlement date from 27 November onwards to a date later in December. Whether that was done independently of instructions or following instructions is less than clear in

my view, but what is clear is that following failure to settle on 27 November the vendor plaintiffs through their solicitor issued a settlement notice dated 1 December. It was physically handed to Mr Lyons by the real estate agent Palamidis on or close to 6 December 1987. Mr Lyons then contacted Mr Lal. On Mr Lal's evidence Mr Lyons said there was difficulty in getting income figures from his accountant. Mr Lal said he would try to obtain finance from National Australia Finance as it was called (or Bank). An application was put in. A valuation of Tannadyce Street needed for collateral was ordered. When received on 10 December it was at only $119,000 and was insufficient it was said for the National Australia Finance appliation to proceed. Again Mr Lal says Mr Lyons would not answer messages and eventually he was forced to inform plaintiff vendor's solicitors that the matter would not proceed. He said for what it may be worth, that he had a message from Mr Cleghorn that Mr Lyons did not wish to proceed with the property as he could not afford it.

Mr Cleghorn also gave evidence. Its thrust was two-fold. Firstly, Mr Lyons was an experienced and independent dealer. Secondly, that at the meeting concerned the position was in many respects as Mr Lal stated in evidence. I must say that I treat Mr Cleghorn's evidence with considerable reservations. I think he was anxious to minimise his own involvement in this matter and minimise to obliteration questions of his own influence over Mr Lyons. I have no doubt on the basis not only of his evidence, so far as I can accept it, but also other evidence, that Mr Lyons did have some experience in business and property dealings previously and that experience was not altogether small, but I have difficulty in accepting the image of a hardened astute and self-sufficient property dealer to the degree which Mr Cleghorn sought to promote. I prefer to view the situation as one where Mr Lyons and Mr Cleghorn were working very much in tandem, with Mr Cleghorn having a good deal of influence as to Mr Lyons' property dealings. I must say that

the question of what was done at the meeting to which I have referred must stand or fall very much upon the evidence of Mr Lal and Mr Lyons in itself.

Which brings me to Mr Lyons' account of the matter. He recalls attending Mr Lal's office and meeting Mr Lal along, of course, with Mr Cleghorn who took him there. He said Mr Cleghorn knew his financial situation; that they went to Lal to raise finance in Mr Lyons' view from a solicitor's nominee company; and went there because his then solicitor would not lend more through that solicitor's nominee company. He recalled that the property at 212 Rintoul Street was discussed with enthusiasm. He, Mr Lyons, was rather more conscious of a good deal of work to be done on the property. There was a discussion about reduction in price. On Mr Lyons' account that discussion and indeed most of the discussions were between Mr Lal and Mr Cleghorn and they, he said, decided that he, Mr Lyons should go ahead. The financial situation including the property returns and associated matters were discussed. A financing scheme by way of first mortgage on Rintoul Street and a collateral second on Tannadyce was, he said, their idea. He was not shown the valuation on his recollection, although it was mentioned. If it was mentioned no doubt it was a matter of figures. Mr Lyons in evidence said that after a period he became unhappy about the situation. He lost confidence in those he was with. He was suspicious that something was being masked. However, on his evidence he did not raise his concerns at that time. He felt he said in evidence, intimidated, and to use his word 'receded' from the situation. Despite that, on his evidence, the upshot was a situation in which he was not prepared to enter into an agreement at that stage. Rather, Mr Lal was to negotiate, and he recalls a telephone call to see if the property was obtainable at $92,500. Further, Mr Lal was to look into financing and to report back to him, Lyons. Mr Lyons would then decide whether to go ahead. As a corollary Mr Lal was not supposed so far as Mr Lyons was concerned to make an

unconditional offer for the property on Mr Lyons' behalf. Mr Lyons remembers it as a short meeting. His evidence was that he did not hear again from Mr Lal until the second meeting after the settlement notice received on or about 6 December, but somewhat inconsistently his evidence also was of recalling a couple of telephone conversations. He says he was not told there was a contract and could not now remember what was said. Those were conversations between himself and Mr Lal.

Well what happened at this meeting? What arrangements, if any, were reached? For the most part I am satisfied both Mr Lal and Mr Lyons gave evidence honestly in the sense of giving me their present recollection. In relation to both I make some allowance as to the unconscious influences which always work in these matters, but I can nevertheless say that for the most part I accept in its essential framework, subject to certain adjustments which I will mention in a moment, the evidence of Mr Lal. I say that notwithstanding some concern I have that there was a good deal more discussion between Mr Lal and Mr Cleghorn than either now remembers, or cares to remember, and correspondingly probably rather less with Mr Cleghorn; although I am satisfied he was more involved, and much more involved than he himself now remembers, at least at the early stages of the meeting. I express that preference notwithstanding some concern I also feel as to the possibilities of misunderstandings. Mr Lal speaks rapidly and softly with something of a background of Indian intonations. Mr Lyons has some deafness problem which seems to come and go and Mr Cleghorn at times has something of a lisp. I make allowances for the possibilities which arise, but having said that I must prefer in its essentials the evidence of Mr Lal. His recollection judged on the basis of present demeanour and past personal history is clearly the more reliable. He remembers better. The events and the sequence of which he speaks are essentially credible. They are the way things might well have happened in a solicitor's office immediately before the sharemarket crash and in the

atmosphere of the time. That was a somewhat giddy atmosphere of rising prices, money easily borrowed, high risks taken and succeeding. It was an atmosphere where a client might well be told, if seeming to be a businessman, to go and find his own finance and get the best of the deals which were available. Further, I accept that Mr Lyons at this meeting presented well to Mr Lal. Mr Lyons has had a business background, spoilt unfortuantely by some personal misfortunes but leaving him with attributes which are by no means insignificant. I consider he was not in fact such an accomplished dealer as those involved may have believed, certainly not as accomplished as probably Mr Lal believed; but nevertheless he would have looked the part of the self-contained and decisive operator anxious to obtain the lowest price by cash offer and confident in those pre-crash days of being able to fund finance.

I do not think the absence of notes or even confirming letter, given the atmosphere of those times, and I must say with regard to Mr Lal's relative inexperience and perhaps overconfidence, as being so very surprising. Many on those points only learn the hard way, and sometimes that lesson is not learned for many years. Accepting as I do the framework of Mr Lal's evidence there are nevertheless some adjustments which I consider must be made.

The first is I do not accept that Mr Lal was to be totally out of the picture on the proposed obtaining of finance if the offer was accepted. I will accept the understanding was that the primary obligation rested on Mr Lyons. He was to get a certificate from accountants, and perhaps a valuation for Tannadyce Street if it was needed, and was to look for his own sources, but Mr Lal would apply to the National Australia Bank Finance Company in Mr Lal's own words as a "back stop", but it was clear that could not be done until the accountants materials were supplied as requested and until and unless a valaution on the collateral security of Tannadyce Street was supplied. There would have been no

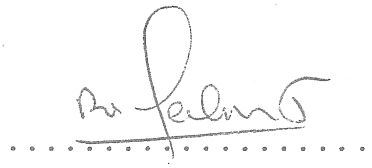
particular hurry by the standards of those times. Settlement was a good six weeks away. Secondly, I am satisfied that Mr Lal did not in fact show Mr Lyons the valuation. The essential details I accept were stated but the document itself was not supplied. Thirdly, and importantly, during the course of this meeting probably towards the latter part after it had been agreed that Mr Lal would make a $92,500 unconditional offer on Mr Lyons' behalf and after financial details had been discussed and it had been agreed Mr Lyons would make the primary search for finance and find the other documents needed, Mr Lyons I accept did become suspicious and I would accept inwardly, and I emphasise inwardly, withdrew from the proposal. He may have done so as a reflection of paranoia which can follow on from problems of his previous history or it may have been a simple business decision. Whatever the reason I will accept that occurred, but he did not state this change of heart. In his words he 'receded' from the matter. The arrangements which had been voiced and were understood were not countermanded by him. I rather suspect that Mr Lyons now believes what occurred was what he wanted to occur following that change of heart later in the meeting but which he did not direct. I must say in that connection that I accept Mr Lal's evidence as to the telephone contact between the pair a few days after 13 October. Mr Lyons' evidence was of recollecting one or two telephone conversaions which he says he did not mention a contract entered into but which he could not otherwise recall with any clarity. I record I do not accept that particular evidence.

When that view of the matter is taken, as I must, the consequences become clear. First, I am satisfied that Mr Lal was expressly authorised at this meeting to sign the offer as he stated in evidence. Second, the contract being authorised by the second defendant, Mr Lyons, in that fashion, it follows that the plaintiff must have judgment against the second defendant, Mr Lyons, on the first cause of action relating to contract. It follows also that the first

defendant Mr Lal succeeds in the sense of successfully defending the plaintiffs' second, third and fourth causes of action based on absence of authority. It follows that the second defendant Mr Lyons does not succeed in his cross claim against the first defendant Mr Lal on the first cause of action asserting breach of authority. On the second defendant's, Mr Lyons, second cause of action, negligence as an agent and third cause of action, negligence as a solicitor, I do not consider the particulars of negligence alleged against Mr Lal have been made out. It was not a case in my view where there was such possibility of confusion over the instructions (even allowing for possible communication difficulties) where something particular and further was needed. The offer to be made specifically was not to be conditional. The solicitor or agent was not obliged to arrange finance before the offer was signed. I accept Mr Lal did make inquiries as to the second defendant's financing prospects and that they were sufficient given the second defendant's ostensible business abilities and background in that atmosphere prior to the sharemarket crash only a week later. All that was reasonably to be expected given the ease of financing and of property selling which was done. I do not accept the second defendant's allegation of negligence against the first defendant.

Accordingly there will be judgment to the plaintiff against the second defendant in the sume of, as reduced, $16,212.44 plus interest. I am not prepared to award interest running from a period as early as that claimed. The principle is that interest should not run before a proceeding issues and in thise case I am not prepared for it to run until after the summary judgment application, which was not pursued and which delayed matters to a certain extent, was disposed of. Accordingly interest will run at 11% per annum simple on $16,212.44 from, but not before, 9 November 1988 down to date of judgment.

The question of costs is one I intend to dispose of now. This is a matter which should not be allowed to fester any longer. The plaintiff in this case has had a remarkably easy ride compared to that of many. It has been a matter of preparing the case and bringing it into a Courtroom without much more involved. It has also involved a summary judgment application which in the end was not pursued. The plaintiff is entitled to some costs but they will be small. The plaintiff will have costs of $1,000 plus disbursements against the second defendant. That covers costs in relation to the summary judgment application also. Other claims by plaintiff against first defendant and the claim by the second defendant against first defendant are dismissed. I do not allow costs to the first defendant Mr Lal. Some file notes, certainly a confirming letter, could have avoided this litigation. One hopes the lesson is learnt.



R A McGechan J

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