NZLR

LOW PRIORITY

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

5/7

CP No. 154/91

1177

BETWEEN D B BELL and L G BELL

Plaintiffs

A N D ROCK PROPERTIES LIMITED

First Defendant

A N D M G HARTSTONE and J L HARTSTONE

Second Defendants

A N D PETER MOULE REAL ESTATE LIMITED

Third Defendant

Hearing: June 17th, 1991

Counsel: Mr Ahern for the Plaintiffs
Mr Sinclair for First and Second Defendants
No appearance by the Third Defendant

(ORAL) JUDGMENT OF MASTER TOWLE

This application for summary judgment was brought by the plaintiffs as purchasers for the return of a deposit of $20,000 paid by them in relation to an intended purchase of a townhouse situated at No.2/77 Long Drive, St Heliers. The first defendant was a firm engaged in what might be described as a speculative building development of two units on the property and the two second

defendants were directors of the first defendant company. The third defendant was a real estate agent instructed by the first defendant over the sale who had received and still holds the $20,000 deposit after an agreement for sale and purchase had been signed. It has agreed to abide by the decision of the Court. In that context reference may be made to Clause 2.3 of the agreement which required the person to whom the deposit was paid to hold it as a stakeholder until the contract became unconditional or was avoided or cancelled in accordance with the provisions of the agreement.

The basis of the plaintiffs' claim is that they were entitled to cancel the agreement in accordance with its terms and they now seek an order that the deposit be returned to them.

The background is that the plaintiffs (who are a solicitor and his wife) first became interested in the property about August last year and after some meetings on the spot with the builder eventually signed an agreement for its purchase on the 30th August 1990 at a purchase price of $415,000 subject to a great host of special conditions. $20,000 was to be paid on execution to the real estate agent followed by $80,000 on a date specified and the balance of the purchase price was to be paid less appropriate retentions within five working days

after the formal plan approving the cross-leasing had been deposited in the Land Transfer Office in Auckland.

The agreement itself was on the ordinary form used by solicitors in practice in Auckland and included in the conditions were two to which specific reference should be made:

> "This agreement is conditional upon:-
>
> 14.1 (a) ....
>
> 14.1 (b) Approval of the electrical and lighting plan, fittings and fixtures and the landscaping plan for the dwelling.
>
> ....
>
> 14.2 (a) The approvals under clause 14.1(a) and (b) shall be approvals of the purchaser in the absolute and unfettered discretion of the purchaser."

When the purchasers first signed up the agreement construction was in a fairly advanced stage but there still remained to be completed various electrical and lighting work and there still remained for preparation and presentation to the purchasers a landscaping plan for the dwelling. There is evidence that the vendor first produced landscaping plans to the plaintiff for consideration about the 10th September. This was followed by a second plan produced after drawings had been prepared by a Mr Machray which was presented to the

purchasers some time prior to the 27th September. The purchasers thereupon made a large number of alterations to the proposed landscaping specifications and these were in the handwriting of Mr Bell and the parties proceeded to the point where there was a third landscaping plan produced sometime during the week beginning the first of October.

For the plaintiff, the claim for the return of the deposit is essentially based upon an assertion that he and his wife never approved the landscaping plans. As against this I have read an affidavit in opposition by Mr Hartstone who deposed that after the third plan had been presented at a site meeting on the 8th October Mr Bell had verbally agreed to the landscaping plan but had requested an extra quote on an irrigation system and an outdoor light. He stated that between that date and the 22nd October he requested written confirmation of the purchasers' approval to the landscaping plan on a number of occasions.

On Labour Day which fell on the 22nd October, Mr Bell came to see Mr Hartstone at his house. At that stage the dwelling had been virtually completed and there was a discussion between them in the light of a completely new development. Mr Bell advised Mr Hartstone that he and his wife were about to separate and no longer required

the house. The evidence is, and it is not challenged, that he enquired what costs the defendants would suffer as a result of the cancellation.

On the 23rd October, the following day, the defendants' solicitors received a letter from Mr Bell's law firm (of which he is a partner) which confirmed that Mr Bell and his wife wished to be released from the agreement. The matter was not resolved and the defendants took the stance that the agreement was still binding, although clearly there must have been sympathy with Mr Bell in his predicament. Correspondence continued between the parties in the course of which there was still further reference to the absence of any formal agreement to the landscaping plans but it is plain that Mr Bell took the step of listing the property for resale through the same third defendant which may be taken as some indication that at that stage at least he still regarded himself as having contractual obligations to the plaintiff.

Mr Bell has now separated from his wife and although the affidavit which he filed is stated as being on behalf of them both, Mrs Bell has not sworn any affidavit and it is not clear how far, if at all, she participated in any of the discussions between the parties over the preparation, approval or non approval of any landscaping plans. It is apparent and again not seriously disputed by the

plaintiff that he was determined that one way or the other they should not be obliged to continue with the agreement and the next development was that a letter was sent on his behalf to the vendor's solicitors on the 26th November in these brief terms:

> "Re Rock Properties to Bell
>
> This letter is to advise that the purchasers do not approve the landscaping plan and new specifications delivered on the 21st November. Would you please pass this information on to Mr Hartstone."

No indication was given in that letter, nor indeed in any other subsequent correspondence that I have been directed, why the particular last version of the landscaping plan was not approved. It is quite apparent that during the course of these dealings which I have outlined there were a number of substantial changes to the original landscaping proposals introduced to try and meet the requests by Mr Bell. Two questions really arise before me and they are whether the Bells were entitled to cancel the agreement when they did in reliance upon the condition not having been approved in terms of the contract, and in addition if it be established that the plan was not approved, had the Bells been under a duty to act reasonably over giving proper consideration to the landscaping plan. In that latter context they are of course closely relying upon clause 14.2 (a) which I have cited which recorded that the approval for the

landscaping plans was to be in the absolute and unfettered discretion of the purchaser.

I should mention also that after receipt of the notification by the vendors that the Bells intended not to proceed because the landscaping plan had not been approved, they decided to press on with the completion and eventually put the property back on the market. A late affidavit was filed deposing as to what had happened since the summary judgment proceedings were listed and it is now established that the vendors have negotiated a separate sale at $395,000 to another purchaser. A statement of defence and counter claim have been filed in which damages are sought against the Bells for the shortfall on its sale. A claim is also made that the vendors are entitled to retain the deposit. It seems quite clear that the purchasers' right to receive back the deposit and the vendors' right to pursue them for any loss on resale must both be determined on the same basic issue of whether or not the plaintiffs were entitled to repudiate the contract when they did.

In a summary judgment context the onus is always on the plaintiff to satisfy me that there is no reasonably arguable defence and I must always recognise that the summary judgment procedure is designed to allow a plaintiff who can come to Court to cut through what is

often raised as a quite specious ground to try and defeat his reasonable claim. Here there are two difficulties confronting the plaintiff. The first is that there is some conflict of evidence in a vital area as to whether and if so, how far, Mr Bell expressed himself as approving the plans that had been prepared at a site meeting on the 8th October. By then there had already been three sets of plans approved and quite substantial changes requested by Mr Bell had apparently been achieved. Mr Bell denies that he gave approval and certainly there is nothing to show that he gave that approval in writing. The second question is whether it is reasonably arguable in the light of the special circumstances which confronted the Bells when their marriage turned sour that they should be seen to have exercised the undoubtedly very wide discretion given to them in a way which was reasonable when it was clear that their real object was to escape further liability under the agreement.

Counsel for the plaintiff acknowledged that clause 14.2 (a) was extremely wide in scope and one which had been included in the agreement after careful consideration. He submitted that the vendors had known of its existence at the outset and that the wording should not be watered down in any way to take away the purchasers' rights to exercise their discretion without being fettered at all.

In a summary judgment context however I must always remind myself that the procedure should not be allowed to become an instrument of oppression. Here we have a clear situation that the purchasers suddenly found themselves in a completely changed situation when they no longer wished to complete and were clearly looking for a way out of their obligations if one could legitimately be found. I believe it would be wrong for me to make a finding today that the Bells had acted reasonably and that they could simply take a stand on not having formally approved the agreement in the light of the evidence which I have outlined. I believe it would be essential to have both Mr Hartstone and Mr Bell and possibly Mrs Bell available to have their evidence given, tested by cross-examination and their explanation given as to the reasons why the various landscaping plans put to them were not approved. I do not believe I can reach the state of sureness or satisfaction that the defendants do not have a reasonably arguable case for the return of the deposit until that evidence has been given and tested in the usual way. I am also mindful that if I were to give a decision for the return of the deposit this would of itself probably extinguish any counter claim for damages arising from any wrongful repudiation by the Bells. I believe it is open to the defendants to bring such a claim in pursuance of s.7 of the Contractual Remedies Act 1979 and that both parties should have the right to be heard when those two

issues are determined.

The application for summary judgment accordingly is declined.

As to the ongoing conduct of these proceedings the statement of claim and counterclaim are already before the Court but the plaintiffs must be given the opportunity of filing their statement of defence to the counterclaim. That should be done by the 1st July. To assist the matter towards an early disposal I direct that each party give discovery to the other by verified lists of documents by the 15th July and that inspection be completed by the 29th July so that a fixture can be sought as soon as possible at the beginning of August. I have canvassed with Counsel the question of whether this matter should remain in this Court since the amount of the claim and the counterclaim both appear to be less than $50,000 and it would appear to be advantageous that the matter should be dealt with in the Auckland District Court. Accordingly I would be prepared to make a formal order remitting the proceedings to that Court after the end of July on the application of either party.

There is one last matter relating to the deposit. The third defendant in accordance with his obligations under the agreement has simply retained the $20,000 since it

was paid to him in August last year but I am not clear whether it has been put on any interest-bearing deposit. I cannot make an order directing that sum be paid into Court but I believe it would be proper for the agent to at least place it on a deposit where it will earn some interest until the question of who is entitled to receive it has been finally determined.

As to costs on today's hearing, I fix these at an amount of $1250 but they are to become costs in the cause once the eventual outcome of proceedings has been determined.

MASTER R P TOWLE

Solicitors

Morrison Morpeth, Auckland, for the Plaintiffs
Sinclairs, Takapuna, for the First and Second Defendants

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