NZCR

IN THE HIGH COURT OF NEW ZEALAND 13/9 CP 1363/87
AUCKLAND REGISTRY

NOT RECOMMENDED

1684

BETWEEN PETER KEIR BRIGHT of Auckland, General Manager

TERRIE BROWN of Auckland, Marketing Representative

Plaintiffs

A N D D.L. GUTHRIE & SONS LIMITED (In Liquidation) a duly incorporated company having its registered office at Auckland and carrying on business as a commodity futures broker

A N D DESMOND LINDSAY GUTHRIE of Auckland, Company Director

A N D KINETIC INVESTMENT SERVICES (NEW ZEALAND) LIMITED (In Liquidation) a duly incorporated company having its registered office at Auckland and carrying on business as a commodity futures broker

A N D JOHN PEACH of Auckland Company Director

Defendants

Hearing: 12 & 13 August 1991

Counsel: Mr Chambers for Plaintiffs
Mrs Riddell for Fourth Defendant
No appearance for First, Second and Third Defendants

Judgment: 14 August 1991

ORAL JUDGMENT OF TEMM J.

This is a claim for damages by a young man and his

former girlfriend, who put some money in the hands of people who did not deserve their confidence. Of the four defendants the two companies are now in liquidation and one of the two individuals, Desmond Lindsay Guthrie, is now in durance vile. He has been convicted of dishonesty and sentenced to imprisonment, as has a man named Eaton, leading character in the other company, Kinetic Investment Services (New Zealand) Limited. These facts are matters of public record and both these men engaged in the same kind of activity, which was to encourage people like the plaintiffs to put money in their hands and then, through their companies, they wasted it. The fourth defendant, Mr Peach, was a director and equal shareholder with Eaton in Kinetic Investments but has not himself been prosecuted. The real question in the case, as it turned out, was whether Mr Peach gave negligent advice.

I deal with the first two defendants first. In respect of them the matter came down to one of formal proof. No appearance was made by either of them and I am satisfied, on the evidence which I need not recapitulate, that Mr Bright deposited with Mr Guthrie and his company $35,000 which he has lost completely.

He made one investment in August 1985 of $3,000 which was something of a trial for him. He lost $1,200 of that amount almost immediately, after which he withdrew the rest; but, as a result of further blandishments from Mr Guthrie, the second defendant, and others in his company, Mr Bright invested $15,000 on 11 November 1985 and a further $20,000 six

months later. It is simply a matter of record that, although he put that second investment in during May 1986, by the middle of June all his funds in Guthries had gone.

My finding, in respect of the liability of the first and second defendants, is that there was clear negligent misrepresentation by Desmond Lindsay Guthrie along the lines of the evidence given by Mr Bright, which I accept. I will return to the question of damages later.

The third defendant is in liquidation and there seems no point in treating it separately from the fourth defendant Mr Peach, whose position requires to be examined. Mr Peach was the only defendant to take part in the case. As a director of the third defendant, he was its agent, and if there be liability it falls on both parties jointly and severally.

The essential facts can be canvassed quite simply. Mr Bright was a youngish man, then about 30 years of age, who six years ago was expecting to have in his hands about $60,000 as a result of the sale of his home. He was, at the time, living in accommodation with the other plaintiff Mrs Brown, then Miss Wadham, who had herself about $3,000 in savings. I suppose it is important to remember that these events were occurring in that period between 1984 and 1987 when the economic circumstances of New Zealand were extraordinary.

Mr Bright wanted to invest his money and, as he puts the matter, he was looking for a safe and secure investment. To

the experienced eye it is hard to credit that anybody of mature years, even though youthful, would have thought the futures market was a place in which to put funds for that purpose, but I bear in mind that Mr Bright is not accused of contributory negligence and I put any question of foolishness on his part to one side. Rather do I refer to a passage in his evidence where he explains how it came about. This is from his cross-examination and it seems to me to go to the heart of the case. Speaking of the way in which he had been introduced to Mr Peach, the record shows this at p.8:

> "So you chose to go to Kinetic?.....Yes, I felt of all the people I spoke to John Peach was the person I could trust in managing my financial affairs.
>
> But you did not know him before going to Kinetic?.....No I didn't, but he impressed me. In some ways I likened him to my father, I thought he was a person I could trust absolutely. I put myself entirely in his hands as some of us would put ourselves in the hands of a doctor or a lawyer."

Then a little further down the same page:

> "In that five minutes what did he tell you about Kinetic?.....He told me they were a rapidly expanding investment company running seminars promoting their investment services to people, and they were well equipped to provide investment services to me and to manage my funds.
>
> So you felt quite happy with that assurance?.....I did not feel entirely satisfied with Mr Eaton but after meeting John Peach I felt satisfied I could trust him to manage my funds."

So far as I can see this was a clear case in which Mr Peach held himself out as an expert advisor in financial

affairs and gave explicit and clear assurances to Mr Bright that Mr Bright could safely leave his money in Mr Peach's hands.

When a young man goes into a financial advisor asking for a safe and sure investment and when that financial advisor recommends to that client that he should put his money in the pork belly market in America and in the live hog trade by way of futures investment, one can only express complete and strong criticism of such advice. The evidence of Mr Ross, an experienced accountant and financial advisor, is not overstating the matter when he describes such advice as irresponsible.

In order to make the position explicit, I am satisfied from the evidence of Mr Bright, that what he wanted was a safe and sure investment, that he asked Mr Peach to assist him to obtain it, that Mr Peach as an expert advisor gave Mr Bright advice which was wrong and that Mr Bright relied upon it and suffered damage.

I am not prepared to prolong this judgment with quotations from the evidence. There is throughout, in the evidence of the plaintiff Mr Bright, and in the evidence of Mr Peach, clear acknowledgement that Mr Peach put himself forward as an expert and that Mr Bright relied upon that fact. Mr Bright invested four amounts of money:

4 September 1985	$3,000.00
26 September 1985	$3,000.00
18 October 1985	$6,000.00
8 November 1985	18,000.00
	30,000.00

He withdrew $7,500 of this amount and the balance that he has lost is $22,500 to which I shall return in a moment. I am satisfied that Mr Bright is entitled to damages and I will fix the amount shortly.

Turning to the second plaintiff's claim, that of Mrs Brown (formerly Miss Wadham), the narrative is much the same. She was, at the time, a woman in her middle twenties and plainly completely inexperienced in business and financial management. Her whole savings were $3,000 and she put her trust in Mr Peach. Her evidence is a simple and straightforward narrative of events and again she explains, as did Mr Bright, that she had confidence in Mr Peach who gave her the advice she hoped to receive.

She relied upon the advice that she was given and, like Mr Bright, lost the whole of her money.

During the course of Mrs Brown's evidence I was perturbed at her statement that she expected to earn interest of 100 per cent to 200 per cent on her funds and I questioned her about it. My concern was obvious. How could anybody expect to make such money so quickly with so little effort. If that were possible everyone would be investing in the same

way and, if they were making such profits, the economy would be completely shattered. It seemed to me almost ridiculous but, when I asked Mrs Brown about it, she told me that her friends were having that kind of experience and she believed it was quite likely. I bear in mind, as I mentioned earlier, the financial circumstances that prevailed in 1985 and 1986 which was an extraordinary time in New Zealand's history and I have, as a consequence, come to the conclusion that Mrs Brown's complete naivety led her to believe that is what could happen.

Of more importance in this case, in a more direct way, is the fact that her belief was fostered by Mr Peach. He has admitted he showed her various charts and accounting records to which she has referred, and her evidence was that these reassured her that large profits could be made in quick time. For example, when Mr Peach was being questioned, the following passage of his evidence illustrates the point: (p.17)

> "If you had been told that Mr Bright required a safe investment what would you have advised him?.....Not to invest in the commodity market.
>
> Why not?.....The commodity market can show very quick profits very quickly, but also you have to take risks. It is not considered a safe investment.
>
> Did your clients have success in their investments?.....We had some success and some losses all the way through but I had some clients with very successful trades, as much as 200 per cent in two days on one contract, that is 200 per cent on his total account, and I can recall a client investing a deposit of between $4,000 and $6,000 and he withdrew $18,000 after just a matter of days, I believe it was seven or eight days trading."

I mention that passage in Mr Peach's evidence for three purposes. In the first place it tends to support Mrs Brown's evidence that he assured her that he could make substantial profits for her and that references to 100 per cent and 200 per cent which she gave in her evidence probably came from Mr Peach. The second point is that the passage illustrates how unsafe, how speculative and how insecure was this kind of investment of which Mr Peach was well aware; and the third point emerging from this snippet is that he knew it was not a safe investment which I am sure was what Mrs Brown was looking for. A young woman at that age, having saved $3,000, would not be wanting to gamble with it. That is exactly what Mr Peach led her to do.

I do not wish to speak strongly about Mr Peach's participation in this matter but I have no hesitation in saying that, if there be conflict between his evidence and that of the two plaintiffs, I prefer their version of events. It is sufficient for my purposes in this connection if I refer to the case of Jones v Borrin [1989] 3 NZLR 227, 230. This was a case of an entirely different kind from that before me, but Fisher J. has referred to a relevant factor which he has described with vivid precision that applies in this case and I can do no better than use his words in the following passage:

> "The three witnesses who gave oral evidence in these proceedings consisted of the wife, Mr Bungay and Mr Edwards... This meant that in minor respects their evidence conflicted with that of the wife. All three witnesses appeared to be telling the truth as they now perceive it. Nevertheless in vital matters of a non-technical nature, the wife appeared to me to have

> one advantage. She gave the strong impression that the Matrimonial Property Act hearing had been one of the major events in her life and that certain critical features of it had been irrevocably burned into her memory. That may be contrasted with the position of Mr Bungay and Mr Edwards. It is no reflection upon either to say that the occasion formed simply one of many routine matters encountered in the course of their professional work before and since."

I mention that splendid exposition of the human factor because in this particular case it seems to me unchallenged that Mr Peach's recollection of his meetings with the two plaintiffs is very sketchy indeed. He deposed to the hundreds of clients which his company had and for whose affairs he was the expert futures investor and his knowledge of what happened in conversations with the plaintiffs is, I am sure, quite vague.

The plaintiffs, on the other hand, were embarking upon a most serious financial investment and I am sure their recollection is not only vivid but accurate.

The last observation I make as to credibility is that there were times when Mr Peach was giving evidence where, I put the matter mildly, it seemed to me he was extremely tentative in his denials. I need not say any more as to credibility. I prefer the evidence of the plaintiffs.

The question now is one of damages. I am prepared to find in favour of the plaintiffs on the basis of negligent misstatement. The claims brought by them both were launched on a very wide front for reasons that are entirely understandable. As is not uncommon in cases of this kind, the

legal bases upon which the case was set from the plaintiffs' point of view, range from the negligent misrepresentation that I have found, through to breach of fiduciary duty, breach of contract, breach of a collateral agreement, misrepresentation in contract and otherwise.

My view of judgments at first instance is they should be as short as possible and deal only with the essential matters. There are other places where there is more time to reflect whereas our concern here is to let the parties know where they stand as quickly as we can. I set to one side all the other legal grounds and concentrate solely upon negligent misrepresentation, not because the other grounds are unjustified but because I see no reason to canvass them. The question therefore is what damages should be awarded in these circumstances.

I think it is quite impossible to make an assessment of what the plaintiffs might have earned with their money if they had not been given such negligent advice. The alternatives for investment are so wide that it is impossible for the Court to make any precise decision. This is one of those cases where I think the Court can do no more than return to the plaintiffs the money they invested with the interest that the Judicature Act allows the Court to award. This does not adequately recompense them but I can see no other alternative. As has been put by the learned editor of McGregor on Damages 15th Edition, para 49:

> "The plaintiff may also be compelled by circumstances to proceed for his out of pocket expenses instead of his loss of bargain by reason of the difficulty and uncertainty in proving the amount of benefit that would have accrued to him from the bargain."

Applying that principle I make the following awards. In respect of the first plaintiff Mr Bright, I award damages against the first and second defendants jointly and severally of $35,000, plus interest on $15,000 at 11 per cent from 11 November 1985 to 11 August 1991 - $9,487.00, and interest on $20,000 from 13 May 1986 to 13 August 1991 at 11 per cent - $13,650, a total of $58,137.00.

I award the first plaintiff, Mr Bright, damages against the third and fourth defendants jointly and severally in the sum of $22,500 with interest on the various payments made by him as follows:

(a) On $3,000 from 4 September 1985 to 4 August 1991 at 11 per cent - $1,952.

(b) On $3,000 from 26 September 1985 to 26 July 1991 - $1,925.

(c) On $6,000 from 18 October 1985 to 18 July 1991 - $3,795.

(d) $10,500 from 8 November 1985 to 8 August 1991 - $6,641.00.

Total: $36,813

In respect of Mrs Brown I give judgment against the third and fourth defendants, jointly and severally. I make an award of $3,000 reduced by the amount which she withdrew, leaving a net amount of $2,717 with interest calculated on that amount at 11

per cent from 26 September 1985 to 26 July 1991, a total of $1,743 making a combined total of $4,460.

The question of costs is troubling me and I propose to reserve the matter. The facts are that, on the morning this case was to begin on Monday last, the Court was informed that a grant of legal aid had been made to Mr Peach just before the Court convened. Section 17 of the Legal Aid Act 1969 limits the Court's power to award costs unless there are exceptional circumstances. The Court is also required to have regard to the means of the parties and other matters and I am not informed adequately on the position of Mr Peach.

I am not therefore able to make a ruling in respect of the provisions of s.17 of that Act and the only thing I can do for the time being is to reserve the question of costs. I propose to offer counsel 14 days within which to make written submissions to me on the point, bearing in mind that I am satisfied there are exceptional circumstances to which I shall make reference if need be but that I cannot decide whether to order costs until I know the particulars that the Act enjoins me to consider.

In the result there will be judgment for the plaintiffs as already found but the question of costs will be reserved.

Solicitors: Burns Hart & Sara, Auckland for Plaintiffs
Dyer, Whitechurch & Bhanabhai, Auckland for Fourth Defendant

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RULING OF TEMM J.
