N2LR

IN THE HIGH COURT OF NEW ZEALAND
WHANGAREI REGISTRY

26/7

C.P. NO. 25/91

1336

BETWEEN B.J. PETERS & G.P. PETERS

Plaintiffs

A N D L.C. MacDONALD & R.D. MacDONALD

Defendants

Hearing: July 5, 1991

Counsel: Mr. Bell for Plaintiffs
Mr. White for Defendants

Judgment: July 24th 1991

JUDGMENT OF MASTER ANNE GAMBRILL

I have before me an application for Summary Judgment. The Plaintiffs claim is to enforce the agreement for sale and purchase made in August 1990 for the transfer of a section which was to be subdivided off from the Defendants' farm at Riponui near Whangarei. Both the Town & Country Planning Act 1977 approval and Local Government Act 1974 approval for subdivision were given before the agreement was entered into. The origin of the agreement is in the friendship of the parties. The Plaintiffs undertook to pay a deposit of $1 and also to pay the costs of the subdivision. The

Plaintiffs say this is sufficient consideration for the offer and acceptance of the contract.

The Defendants oppose on the basis that (a) the agreement is not a fully formed contract because the essential element as to price was not agreed upon; (b) the Plaintiffs have failed to disclose the true nature of what was agreed between the parties, namely the Defendants would voluntarily and without consideration allow the Plaintiffs possession and use of approximately firstly, an acre of land and more latterly a quarter acre of land on which to build a house; (c) if the Court finds the alleged agreement is certain as to price, which is denied, then the Defendants were induced to enter into the agreement by misrepresentation made to them by the Plaintiffs as to the area of land which was the subject property of the agreement; (d) in the event the Court finds the alleged agreement is sufficiently certain as to price, the Defendants were influenced in their decision to enter into the agreement by a mistake that was material to them, namely the area of land which was the subject property of the agreement; (e) the Plaintiffs and the Defendants were influenced in their respective decisions to enter into the agreement by the same mistake, namely a mistake as to the area of land; (f) alternatively, the Plaintiffs and the Defendants were influenced in their respect decisions to enter into an agreement by a different mistake, namely as to the area of land, and the mistake or mistakes, as the

case may be, resulted at the time of the agreement and in a substantially unequal exchange of values or the concern of a benefit which was in the circumstances a benefit or obligation substantially disproportionate to the consideration; (g) in the alternative, the Defendants say the contract is unconscionable, that Special Condition 15 of the agreement has not been satisfied and the agreement remains conditional; (h) in the alternative, damages is a sufficient remedy for the Plaintiffs; and (i) the Defendants have arguable counterclaims.

Clause 15 says the agreement is subject to and conditional upon the District Council's consent in respect of the subdivision to be effected by the Scheme Plan (this contention relates to the area). The Plaintiffs say they have a contract to which the Defendants agreed, they have had Town Planning permission to which the Defendants consented in support of the planning application and they have a plan of subdivision which is lodged in the Land Transfer Office and which the Defendants signed as registered owners of the land.

The reasons for the Defendants not wishing now to proceed are difficult to ascertain in the face of them signing the contractual arrangements, but explanations for their signatures are tendered in the affidavit evidence. There appears to be no dispute that originally the Plaintiffs and Defendants agreed and the Defendants offered, a piece of

land of an acre in size to the Plaintiffs for them to use for housing and for the situation of a mobile garage. Prior to the signing of the contract and the Town Planning hearing, Mr. MacDonald alleges he was informed incorrectly about the size of subdivision of a section by Mr. Webster and whether a house site of a quarter of an acre could have been subdivided off. The Plaintiffs were to pay all the legal costs and costs of subdivision. These have amounted to $5,773.62 to date for surveying, reserve fund contribution and legal costs. There are further expenses in respect of the subdivision and the accounts annexed to the affidavits.

Mr. Peters says that he agreed to purchase a section out of the farm. For a period it was an oral agreement prior to the MacDonalds completing their purchase and taking possession of the farm following the purchase. The proposal was subject to a planning application and Mr. Webster the planner and surveyor, advises he briefed Mr. MacDonald's evidence prior to the hearing as well as Mr. Peters. Mr. MacDonald consented to the application. At that stage the application before the Council was in respect of approximately 4,500 hectares (just over an acre in size). This is apparently one of the bones of contention between the parties as following the obtaining of a planning consent, which was only for an area of land of 4,500 hectares, the Council has subsequently approved a plan of subdivision of 5,615 sq. metres and the Defendants

say they were not aware that this well exceeded an acre but signed the subdivisional plan, and is a section over an acre and a quarter in size.

Submissions about this dispute were placed before the Court but as the figure of 5,612 appears both on the plan which was signed by the Defendants and the signed contract for sale, I do not believe that I can go behind the contract despite Mr. White's submission on the Defendants' behalf that they were not aware or knowledgeable of metrics and consequently did not realize they had agreed to sell as much land until they saw the site pegged out. There seems to be some further conflict between the parties that the site was not only sold to the Plaintiffs but that there was some intention that Mr. and Mrs. MacDonald could graze the land as sold but this provision has not been either stipulated in the agreement or agreed to inter partes. Mr. MacDonald also says in his affidavit that:

> "My wife and I agreed that Barry Peters could have an acre of land. We did so because he said he would fence off only round his house site so we could graze the rest as he did not need the full acre for himself or his house."

In Mr. Peters' evidence there is no real evidence of conflict with Mr. and Mrs. MacDonald. There is an evidential dispute as to where the survey plan was signed, Mr. and Mrs. MacDonald saying it was signed in their home. The surveyor's deposition is that it would normally be

signed in surveyor's office. Be that as it may, there is no obligation that appears to arise for the surveyor to have the plan signed before him or for him to identify the actual area of the plan to Mr. and Mrs. MacDonald. The surveyor Mr. Webster, went on site in April 1990. Mr. and Mrs. MacDonald say they were too busy building their herringbone shed on the property to look at the plan of his work. They also attempt to explain their reasons for signing the Town Planning application. They say they did not read the plan but took Mr. Peters' word for it. They say they were busy with the cows and calves at that time.

It is clear that they are disappointed in the relationship they had with their solicitor, the conveyancing aspect herein being handled by a legal executive in that firm. The contract was drawn up and they went to town to sign it. The legal executive asked if the MacDonalds were related to Mr. and Mrs. Peters and they said they were not. Mr. MacDonald said:

> "He, Mr. Barnes, told us we would have to go away and get together with the Peters and decide on a price for the section as they had to pay something for it.....There was no price or date on the agreement when we signed it and it had been signed by the Peters at the time. We signed the one copy and left it there. We did not get a copy to take home."

Mr. MacDonald says he was not advised they needed to get a partial discharge of mortgage from the Bank who holds the

mortgage over the property.

> "We did not know what was the area of land in the agreement we signed. We assumed it was the acre."

Mr. Peters did not visit Mr. and Mrs. MacDonald for 3 weeks after that. They said that they thought he would have discussed the price with them. Mr. Peters told them he had put a price in of $1 and the agreement had been dated 15th August 1990. Mr. MacDonald then goes back to the time before the agreement was signed and says that he told Mr. Peters he was not selling land, he would give it to him. Mr. MacDonald deposes to various difficulties and describes how he and Mrs. MacDonald tried to ascertain what the area was that they had sold but only subsequent to the signing of the contract. Mr. MacDonald checked up with the surveyor but there is no evidence whether he queried the area prior to either the commencement or completion of the subdivision and it is clear to see that he, Mr. MacDonald, has now become distressed about the effects of the contract and the area Mr. and Mrs. MacDonald can use. Their Counsel made it very clear to me they would pay such damages as the Court assessed if they were found liable to avoid having Mr. and Mrs. Peters as neighbours. The situation is distressing for all parties.

Mr. Webster the surveyor, swore an affidavit. He acknowledges he acted for Mr. and Mrs. Peters. He

describes the planning requirements and he describes the need to alter the boundaries after obtaining planning approval to obtain a decent building site. There seems to be some contention as to where the building site is but I think it is irrelevant as the surveyor must put in pegs when he is on site and preparing a subdivisional plan. He deposes he believed that Mr. MacDonald understood the nature of the subdivision on the occasion he came to his office for the briefing part of the Town Planning hearing. He said no-one appeared concerned after the Town Planning hearing in the alterations and change in size of the site. He describes the difficulties he now faces because the Council will not issue the s.306 certificate which is necessary to enable the plan to deposit because of the instructions received by the Council from Mr. and Mrs. MacDonald. Mr. and Mrs. MacDonald's then solicitors in October 1990, instructed the surveyor to prepare a Scheme Plan to survey a small section. This work has been completed but the fees remain unpaid and Mr. and Mrs. MacDonald like Mr. Peters, have both changed solicitors as there could be a conflict of interest in the firm that the two respective parties were represented by two different members of the firm.

Mr. Peters has arranged for a Housing Corporation loan which is now expired and he had obtained a contract to build a house. He believes he could get work if he was in the district instead of renting a property out. It is

clear Mr. and Mrs. MacDonald do not wish to live next to Mr. and Mrs. Peters. There is obviously unhappiness and dissension which has arisen after the initial negotiations between the parties. Mr. and Mrs. MacDonald do not make it clear in any way the price they expect but it is clear from the contract Mr. Peters will be obliged, if called upon, to fence the property.

Counsel for the Plaintiffs says the parties have initialled the contract to purchase where the purchase price of $1 was written. The Plaintiffs' evidence is sufficient on this point. Although I heard Counsel for the Defendants with evidence from the Bar hereon that the agreement did not have any consideration expressed where signed by the Plainitiffs, it is of minor importance if one regards the consideration for the contract as the bearing of all expenses by Mr. and Mrs. Peters. Secondly, the alleged failure to disclose the nature of the transaction. Counsel for the Plaintiffs says that I cannot consider or should not be swayed by the elaboration of pre-contractual discussions. The contract shows an area of 5,615 sq. metres for the land. Now the Defendants say they will give a quarter acre of land although there is even evidence from Mr. MacDonald that he was originally prepared to give an acre of land. The area has been settled I believe on two occasions on which Mr. and Mrs. MacDonald have signed documents specifying the area to be transferred as 5,612 metres.

Misrepresentation

The Plaintiffs say the Defendants knew the area of land to be sold and signed documents showing the areas. The claim as to ignorance of the size is not plausible and impractical and Mr. and Mrs. MacDonald, as they were living on the property, had the opportunity to ascertain where it had been marked out for survey. With that view I concur.

Mistake

There is clearly no mistake that is mutual and the mistake, if it arises, is on behalf of Mr. and Mrs. MacDonald. Counsel for the Plaintiffs says that is covered by Paulgar v. Butland Industries Ltd. [1989] 3 NZLR 549 and with that view I would agree:

> "By providing in s.6(2)(a) of the Contractual Mistakes Act that, for the purposes of an application for relief under that Act, a mistake does not include a mistake in the interpretation of the contract, Parliament plainly intended to maintain the well-established principle that contracts are to be construed objectively, and to avoid the great uncertainty that would arise were a party to be permitted to plead as a mistake that he understood the contract to mean something different from its plain and ordinary meaning.....".

Unconscionable Transaction

The Plaintiffs and Defendants knew the land involved. There was a period when the Defendants were prepared to give the land. There is no real evidence of

unconscionability.

The Plaintiffs say usually agreements are enforced by specific performance and there are advantages to which the Plaintiffs is entitled. Counsel referred to Hawker v. Vickers CP. 37/89 (Whangarei Registry) dated 19th December 1989. The Defendant relied on Dell v. Beasley [1959] NZLR 89 to persuade me to refuse specific performance and send the proceedings for a quantum hearing as to damages - the only misconception herein that was raised at a late stage of the parties' relationship was as to the area of a quarter of an acre of land (about 1,000sq. metres).

Counsel for the Defendants relied on the evidence, urged upon me the potential conflict in evidence and said it was inherently impossible or improbable someone would have sold a section without a settlement of price. Be that as it may, the Plaintiffs are entitled to the bargain they have made because of the signatures on the documents. A substantial part of the evidence of Mr. MacDonald relates to periods outside the periods relevant to the contract and are general submissions about Mr. Peters former employment and the fact that he is on the dole and I do not consider them particularly relevant in this context.

For these reasons I believe the Plaintiffs are entitled to their decree for specific performance as sought in the Statement of Claim. The issue of whether damages are

payable for delay in specifically reserved. If further orders are required as to the completion of the transaction, leave is reserved to apply for further directions. Bearing in mind the nature of the dispute and the complaint over the area of land herein costs are awarded to the Plaintiff of $1,000 plus disbursements as fixed by the Registrar.

Anne Gambrill

MASTER ANNE GAMBRILL

Solicitors:

Webb Ross Johnson, Whangarei, for Plaintiffs
D.M. Roughan Esq., Whangarei, for Defendants