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LOW PRIORITY

IN THE HIGH COURT OF NEW ZEALAND 12/6
AUCKLAND REGISTRY

C.P. NO. 1230/91

871

BETWEEN B.R. HUNT

Plaintiff

A N D KENSINGTON SWAN

Defendant

Hearing: April 9, 1992

Counsel: Mr. D.P. H. Jones for Plaintiff
Mr. P. J. Davison for Defendant

Judgment: 1st May 1992

JUDGMENT OF MASTER ANNE GAMBRILL

I have before me an application under Rule 186 of the High Court Rules and the inherent jurisdiction of the Court to strike out the whole of the pleading contained in the Plaintiff's Statement of Claim. The Defendant makes the application on the grounds that the Plaintiff's Statement of Claim discloses no reasonable cause of action, is frivolous and vexatious and is likely to cause prejudice and/or delay. In support of the application the Defendant has filed affidavits by Messrs. Louis McElwee and Miles Agmen-Smith, former partners

of the Defendant. The Defendant has filed a Statement of Defence. The Plaintiff has filed an affidavit by Mr. Hunt, much of the material is uncontested and it is accepted by all parties that if a pleading or the affidavit evidence is contested, then the Court cannot consider such material. The Plaintiff relies on the well-known authorities starting with Peerless Bakery Ltd. v. Watts [1955] NZLR, 339, accepting that:

> "The jurisdiction should not be exercised except with great circumspection and unless it is perfectly clear that the plea cannot succeed."

I rely on the statements commencing at page 339 of Barrowclough, C.J. in that case, accepting in that case:

> ".....that the jurisdiction summarily to terminate an action is to be sparingly employed and is not to be used except in a clear case where the Court is satisfied it has the requisite material, the necessary assistance from the parties to reach a definite and certain conclusion".

Counsel also accepted that the Court should set aside the portions of the affidavits which are in dispute and place upon every portion taken into account the most favourable construction to the pleading, i.e. to the Plaintiff, which is the subject of the application to strike out.

The factual background which is basically undisputed is as follows. The Plaintiff was a client of the Defendant firm of solicitors. In about April 1987

the Plaintiff purchased a leasehold interest in the third floor of Harbour View, Quay Street, Auckland. It was purchased in his name but a deed of trust was executed between him, his wife and Mr. and Mrs. John Victor Evans. Various improvements were carried out and in October 1987, the property was offered for sale at $1.150 million. In April 1988 it is pleaded the property was sold to Capital Investments Limited for $950,000. The contract for sale is with Inspiration Investments Limited or nominee. The purchase price was made up as follows. The sum of $520,000 was paid to Registered Securities Limited to reduce the mortgage on the property and an exchange in satisfaction of the balance was effected by the execution of a fourth mortgage over a property at Wanganui, namely Hurleys Grand Hotel securing $430,000 which was the balance of the moneys to be received for the purchase price.

It is pleaded the Defendant acted for all parties to the transaction, namely the Plaintiff, his co-owner through the deed of trust John Victor Evans, Inspiration Investments Limited on whose behalf Mr. Liguori conducted negotiations, and the purchaser (who on the contract is Inspiration Investments Limited or its nominee). It is pleaded the Defendant had in its possession a valuation of Hurleys Grand Hotel dated 23rd March 1987 which valued the hotel as a going concern at $4.314000 million. Due to the changed economic circumstances the mortgage for $430,000 delivered on settlement has become effectively worthless. It is pleaded the purchaser has defaulted under the agreement and failed to pay the purchase price of $430,000. The Plaintiff further pleads the valuation is inaccurate and could not be relied upon. The first mortgagee is in possession of the hotel. The

Plaintiff says it relied on the Defendant's advice and advice on this transaction. The Plaintiff thereafter pleads four causes of action:

(i) Breach of contract, the breach being alleged to be the failure to give sufficient legal advice concerning the merits of the fourth mortgage, the value or worth of security, failure to give independent advice and a failure to obtain a valuation. A failure to inquire into the purchaser's ability to service the fourth mortgage and the financial situation thereof;

(ii) Breach of fiduciary duty;

(iii) Negligence, i.e. breach of the tortious duty; and

(iv) Breach of the Fair Trading Act 1985, i.e. the Defendant has in trade engaged in a conduct that is misleading, defective and is likely to mislead to deceive in the manner it attended the valuation so that the Plaintiff could rely on it and the combined acts and omission of advice extended over the course of negotiations which led the Plaintiff to believe the hotel sale was a viable commercial proposition with the fourth mortgage securing the balance of the purchase price at $430,000 when it fact it was not.

A number of property dealers and speculators who had dealt extensively in Auckland prior to the stock market crash in October 1987 became involved in this series of transactions, namely Mr. Alfonso Liguori as a shareholder and Director of the company Inspiration Investments Limited, Houston Enterprises Limited, Mr. J. Houston and Capital Investments Limited which Mr. J.B. Samuel represented. Mr. Hunt deposes he had his early dealings with Mr. Louis McElwee of Kensington Swan and Mr. Michael Thompson under his supervision. He then deposes the file was suddenly passed over Mr. Miles Agmen-Smith a then principal of the Defendant firm. He acknowledges there

were meetings with Mr. Agmen-Smith and makes comments about the way Mr. Agmen-Smith said "it would be technically difficult, protracted, expensive and time-consuming" but that he could "make the equation work". There is a letter from Kensington Swan, written by Mr. McElwee, on 10th March 1988 which I will refer to hereinafter. Mr. Hunt deposes that to the best of his knowledge he did not receive it. He acknowledges his signature on the letter of Kensington Swan dated 24th March and written by Mr. Agmen-Smith, of which he says he was given a copy. He deposes further that to the best of his recollection:

> "I was never advised to seek independent legal advice verbally by any person at Kensington Swan."

He deposes as to his belief in the abilities and status of the firm. He deposes further that when he met Mr. Agmen-Smith on 24th March he was told that Kensington Swan would act only on the mechanics of the transaction which involved the sale of the Harbour View property and arranging for the mortgage. He acknowledges then that Mr. Agmen-Smith said in respect of the mortgage over Hurleys Grand Hotel, Wanganui, he would be "tail-end Charlie". He says that he questioned the valuation given to him on that date by Mr. Agmen-Smith and wondered why there was not an up to date valuation. He says that he has lost a considerable sum of money. It is clear that the purchase of the Harbour View units was totally financed through Registered Securities Limited in March 1987, he purchased it at round $500,000, improvements were effected, the total borrowing exceeded $600,000 and when the property was on-sold the Plaintiff received the sum

of $520,000 in cash, repaid in part the Registered Securities Limited mortgage ($500,000) and refinanced his borrowings against other properties.

The Plaintiff had initially entered into an agreement for sale with Anville Developments Limited or nominee, a company in which Mr. Liguori was the principal shareholder. That agreement did not come to fruition. The Defendant says it advised the Plaintiff, the other parties involved were Mr. John Victor Evans and his trust, Industry Holdings Limited and its trust, Mr. Liguori, Anville Developments Limited and Mr. Hunt to take independent advice. A letter of 24th March, which shall be referred to hereinafter, had not been located when the pleadings were initially drawn but is now in the hands of the Plaintiff, and it is not disputed that he called at Mr. Agmen-Smith's office and signed that letter. The Defendant says it acted on the basis of the letter, completed the settlement and relies on the letter. The letter of 10th March sent by Mr. McElwee comments on Mr. Hunt's wish to withdraw from business associations with the Houston Group. Reference is made therein to negotiations over properties at Haast Street, Dilworth Avenue and Parnell Road. A fair amount of conveyancing was being handled in which Mr. Hunt was involved. Mr. McElwee gives reasons why he should be independently advised and concludes the letter "In brief, you must be independently advised". Mr. Hunt says to the best of his knowledge he did not receive that letter. It is therefore a situation where his evidence must be accepted along with the letter of 24th March signed by Mr. Hunt in Mr. Agmen-Smith's office. That letter states:

> "Because of the conflict of interest we could not act, and we referred the various parties to independent solicitors and there were a complex series of contracts entered into. Subsequently there were revision/variations of some of these contracts. Settlement of the arrangements are now imminent although we cannot say whether or not there are binding contracts. There is pressure in relation to Unit C, Harbour View to repay the mortgages which are now overdue." (which were Mr. Hunt's responsibility).
>
> "Obviously as indicated previously we cannot advise you independently on the transaction or its merits. All we can act on is the implementation. The details we now set out and on the basis that you now require us to do so on your behalf we will proceed with the implementation."

There is reference thereafter to the mortgage of $430,000 which Mr. Agmen-Smith says "we will need to settle the terms you have in mind". He continues:

> "The value of that mortgage will depend upon its terms, the details of mortgages ranking in priority to it, the value of the personal covenant of the mortgagor and the lessees and the value of the property. As to the last item we attach a copy of a registered valuer's report supplied to us in relation to the hotel."

The evidence is not refuted that that valuation was delivered by the Director of the purchasing company, Mr. Liguori, and was a valuation he had uplifted from Mr. Samuel. A copy of the proposed sale and purchase agreement was handed over and Mr. Hunt signed the letter on which was stated:

> "I confirm my instructions for you to proceed on my behalf on the basis set out.
>
> Dated 24th March 88 'B.R. Hunt'"

The contract had a typed page of special conditions relating to the mortgage setting out much more specific details and insereted after the meeting on 24th March. On the face of this letter the Plaintiff maintains that there is a breach of the various duties owed to the Plaintiff, pleading that the Defendant would act as the Plaintiff's professional legal adviser and give him such advice in relation to the sale of the property as may be required. The Defendant says the contractual relations were limited by the terms of the letter of 24th March 1988. The Defendant has drawn the Plaintiff's attention to the conflict of interest, that it would not give independent legal advice and that it was prepared to act only on the implementation of the transaction. The Plaintiff acknowledges the Defendant would only act on the mechanics of the transaction. There is no allegation that the Defendant failed to implement the transaction.

Breach of Fiduciary Duty

The Plaintiff alleges the fiduciary duty existed during the course of negotiations of the sale when giving advice to the Plaintiff and when communicating them concerning the sale. The Defendant says the fiduciary duty was avoided by the contractual agreement and by the Defendant's disclosure of relevant facts. Any fiduciary duty, if it existed, was excluded by the contract made on 24th March.

Negligence

The Defendant says the relationship between the Plaintiff and Defendant is based upon a contract of retainer and refers me to McLaren Maycroft & Co. v. Fletcher Development Co. Ltd. [1973] 2 NZLR, 100 and Day v. Mead [1987] 2 NZLR, 443. The Defendant says the relationship was contractual, its duties were limited and that on the state of the law in New Zealand the Plaintiff's pleading in negligence could not in any circumstances succeed. In addition the contract, as exists, excludes liability for negligence by the Defendant in respect of those matters pleaded by the Plaintiff. See Bowen v. Paramount Building Ltd. [1977] 1 NZLR, 394. I note also the recent Court of Appeal decisions South Pacific Manufacturing v. NZ Security Consultants and Mortensen v. S.A. and R.J.A. Laing CA.14/90 and 172/90 dated 29th November 1991, and the statement of Richardson, J. at page 13:

> "Those were the respective bargains the present parties made. Tort theory should remain consistent with contract policies. In public terms I consider that where, as here, contracts cover the two relationships, those contracts should ordinarily control the allocation of risk unless special reasons are established to warrant a direct suit in tort."

Fair Trading Act 1986

The alleged or misleading or deceptive conduct relied upon by the Plaintiff the Defendant says cannot succeed against the Defendant in the face of the limited obligations which the Defendant undertook as set out in the letter of 24th March 1988. The Defendant says there is no tenable cause of action, the pleading is an abuse, it puts the Defendant at risk and there will be long

and costly litigation if the claim proceeds to a hearing. The Plaintiff did not alert me to any specific representation and I accept that proof of uncertainty will not suffice and I must consider whether the conduct has, as a matter of fact, been misleading against the background of surrounding circumstances. Generally applicable to the public at large the Courts have applied an objective test so that even if some consumers are mislead, it is not conclusive - it is necessary also to look at the market reasonably likely to be affected. It is the conduct of the party in question which must have been misleading. There is no evidence of misleading conduct, merely an allegation of failure to advise that the Defendant should obtain further valuations. The test the Courts appear to have applied is that there is conduct that was likely to mislead and proof of uncertainty will not suffice. There must also be proof of causation or nexus between the conduct and the loss or damage suffered. The alleged failure to obtain a valuation cannot be deceptive conduct - at best it is a breach of the Plaintiff's obligation, if this exists, to the Defendant and the remedy lies in contract. The Plaintiff has failed to plead any basis or specify any conduct which would support the claim and I have the view this cause of action is untenable.

The Plaintiff opposes on the grounds the reasonable causes of action are disclosed, the claims are tenable, they do not cause embarrassment, prejudice or delay, the necessary evidence is not before the Court and it is in the interests of justice that the application to strike out should be refused. The Defendant says that its client has had a loss on his bargain, the Defendant prepared the agreement, whatever construction is placed on the letter of 24th March 1988, there was no need for the Defendant to advise the Plaintiff to

get a valuation. The Plaintiff's Counsel acknowledged his client had been carrying on independent negotiations and the parties had all been in negotiation over the contracts without the involvement of their solicitors and this is verified by the affidavit evidence (and had been negotiating for four months), and the terms of the letter. However, the Plaintiff says the Defendant cannot walk away from his obligations and the letter does not limit or relieve him from all his obligations. Counsel refers to the invoice of the fees charged and the substantial account but in view of the very brief notation thereon and the fact that no further details have been sought, I do not think much weight can be given to a submission relating thereto. The Plaintiff's Counsel says the Plaintiff was not advised to get proper independent advice and the Defendant has not shown that it has made full disclosure of all the extant facts to enable the Plaintiff to ascertain whether independent advice was necessary in respect of the mortgage given in part payment for the unit.

Counsel suggests that the advice was given on the basis of the first agreement made with Anville Developments Limited or nominee. It is interesting that even the backing sheet shows Italia Holdings Limited. Obviously who the purchaser was to be is not resolved. The Plaintiff urges that the advice, if it existed, in the Defendant's letter of 10th March and referred back to in the letter of 24th March, related to that particular agreement only which was foundering. It would have been necessary to advise or clarify with the Plaintiff that there were no obligations which the Plaintiff would want pursued as the agreement was an unconditional contract. The Plaintiff's argument is that the Defendant did not advise the reasons, and

these do not show in writing, why it had reached a conclusion the Plaintiff should seek independent advice and why the Defendant elected to limit its involvement to the 'mechanics' or 'implementation' of the transaction. The Defendant relied on Clark & Boyce v. Mouat [1991] I NZCVC, I90,917. The Plaintiff urges that the Defendant's letter does not go as far as the Defendant alleges. The document does give certain advice to the Plaintiff and that the letter is inadequate to protect the Defendant or relieve the Defendant of all its obligations either in contract or in tort to the Plaintiff. There is also a suggestion that the conduct and the relationship with the Plaintiff in the letter and the failure to advise on the valuation relates to misleading conduct under the Fair Trading Act 1986 extending back prior to the stock market crash.

The Defendant says the Plaintiff's submissions fly in the face of the terms of the letter. It is clear from the affidavit evidence and not refuted, that conflicts had arisen. It is not refuted that Mr. Hunt wished to extricate himself from an involvement with Houston Enterprises Limited and John Victor Evans and the property dealings. It is acknowledged that the price of property had dropped and was continuing to drop and it is evident that Mr. Hunt was involved personally in the dealings to dispose of the Harbour View unit. It is also clear that little or no cash appears to have changed hands and the parties were involved in elaborate schemes for the exchange of properties often funded by Registered Securities Limited mortgages which, in hindsight, have been proven to be in excess of the recognized lending criteria. The Defendant urges that I give the letter as such its ordinary meaning, a clear limitation of a basis on which the Defendant would act which was accepted by the Plaintiff, creating the contract and the Defendant continued to so act.

In terms of the contract, which were prepared after the meeting on 24th March 1988, then the letter acknowledging the conditions on which the Defendant would act was signed, show the substantial sums that were to be involved in the mortgaging of the Grand Hotel. The valuation is not addressed to Kensington Swan, it has not been sought at the cost of the client and the Plaintiff accepted the mortgage, as he describes it, a "tail-end Charlie". By that contract he recovered, on the face of the record, the price paid for the unit ending up with a small debit owing to the Defendant.

In the whole of this complex transaction with an overlay of insufficient funds to complete any of the dealings, the complex exchanging of properties without payment of cash and the funding of the same by drawing down substantial mortgages with Registered Securities Limited, the only matter the Plaintiff is able to found any pleading upon is the alleged failure of the Defendant to have given advice in the face of a limiting agreement on 24th March to obtain a separate independent and a more realistic valuation when taking a fourth mortgage as a "tail-end Charlie". The Plaintiff received no cash as shown by the settlement statement. Mr. Hunt was indebted to Registered Securities Limited for over $I million. He had to re-borrow $523,000 on his existing property and the account in debit to the tune of $6,409. No deposits were paid, no funds were available and the letter was signed on 24th March 1988, the contract is undated but completed after that date and the transaction was settled on 31st March.

There is evidence of the need for urgency because of the interest rate on the mortgage. The best Mr. Hunt can say is he recalls questioning the accuracy and date of the valuation. He says he obtained the impression that if anyone could successfully conclude the sale of Harbour View he could and "having the name Kensington Swan behind me there was not a great deal to worry about". He says he believed the Defendant was acting in his best interest. In the face of the letter, of which he had a copy, and the contract showing extensive borrowing and his agreement that Kensington Swan should be involved in the 'mechanics' of the implementation of the transaction, I do not see how an obligation to advise upon and to procure a valuation to substantiate the value of a "tail-end Charlie" fourth mortgage could fall within the 'mechanics' of a transaction. All the parties made an agreement on the basis the solicitors would act - this meant the settlements could be effected with minimal delay - this was in everyone's interest.

I am minded to accept the submissions made by the Defendant. The Plaintiff entered into a contract as to a basis on which the Defendant would continue to act. There was an advantage to the Plaintiff in this regard as he was not involved in further legal expenses of instructing new and separate solicitors. He had for some months been involved in what appeared to be a complex conveyancing transaction and attempts to dispose of the property. His mortgage was overdue (that was repaid on settlement) and he does not deny he made private negotiations with the prospective purchasers. How he can expect a solicitor who has limited his obligations to facilitating the mechanics of a transaction, i.e., preparing documents, arranging execution of the same, drawing funds and attending on settlement, to give legal advice on valuations

in view of the specific terms of the letter I do not understand. I do not believe on the face of the contract the parties made, the Plaintiff has a tenable cause of action. There is no suggestion of pressure on him to sign the letter, he had the opportunity to consider it before entering into the contract as the terms were clearly drawn up relating to the mortgage after the letter was signed. It is for these reasons I would allow the striking out of the Statement of Claim in terms of the application filed.

Costs

Counsel may file a memorandum as to costs and if there is no agreement, I will hear Counsel further. It may be an academic question as the Plaintiff is legally aided.

MASTER ANNE GAMBRILL

Solicitors:

Wright Wiseman & Co., Auckland, for Plaintiff
Bell Gully Buddle Weir, Auckland, for Defendant