N2LR

LOW PRIORITY

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

2013

C.P. NO. 1457/91

BETWEEN FAY RICHWHITE AND COMPANY LIMITED

2344

Plaintiff

A N D CONDOR PROPERTIES LIMITED

Defendant

Hearing: November 29, 1991 & February 2, 1992

Counsel: Mr. Power for Plaintiff
Miss McPhail for Defendant

Judgment: 2nd March 1992.

JUDGMENT OF MASTER ANNE GAMBRILL

I have before me an application for Summary Judgment. In December 1989 the Plaintiff made an oral offer to the Defendant which it is pleaded the Defendant accepted. The terms of the contract were that the Plaintiff was to arrange a credit facility, the Plaintifff was to charge $50,000 and the fee was to be payable following provision of the facility to the Defendant. The

Defendant required the facility for a development project. On 30th March 1990 the Plaintiff sent an account for $50,000 together with a statement set out in a letter dated 30th March 1990. The Defendant altered the contract to an initial payment one month after the initial drawdown. Mr. Liggins then signed the document on behalf of the Defendant. The Defendant paid $10,000 on 3rd May 1991 and has made no further payments. The Plaintiff has sought to charge interest from 30th September 1990 at 22%.

On 14th September 1990, as the loan had been drawndown, the Plaintiff wrote and asked for the initial $15,000 due on 26th August 1990. The Defendant did not pay the sum. The letter stipulates interest will be charged and the absolute last date for payment is 15th March 1991. The Defendant's Director Mr. Liggins, signed and accepted on behalf of Condor Properties Limited the terms of this letter. The Plaintiff wrote asking for payment on 3rd May 1991, including interest calculations, the total then owing being $48,176, $10,000 being paid on 10th May 1991. The Defendant wrote on 12th June 1991 outlining the fact that the company had had a substantial loss on the project and making a proposition for settlement. It asked the Plaintiff to consider the fact that the Bank fee was $10,000 higher and the underwriting $20,000 higher and a partner was required. The letter continues:

> "Although we knew Bank fee was to be higher it was not until the end that we were made aware the underwrite was going to be any larger.
>
> Had the project been profitable then we could have afforded the full amount. We are obviously developers of the future and look

> forward to doing further business and hope you can take this into account when considering above."

The letter is signed by Mr. Liggins. There is no further evidence of communications.

The Defendant defends the claim on the following basis:

(a) The proceedings are an abuse of process;

(b) Misrepresentation in respect of which a set-off or counterclaim exists;

(c) Inducement by the Plaintiff in breach of the Fair Trading Act 1986 on the basis of the Plaintiff's misleading or deceptive conduct and/or false or misleading representations;

(d) Coercion, harrassment, economic duress.

Initially a substantial dispute appeared to be have arisen between the parties as the Plaintiff commenced proceedings in the District Court issuing a summons in July 1991 to which a notice of intention to defend was filed. The High Court proceedings were filed on 11th September 1991 when the District Court proceedings were still extant. The Defendant said this ousted the jurisdiction of this Court to deal with the matter. This is not correct as the High Court has the jurisdiction. However, the Plaintiff is not entitled to be heard in both jurisdictions. The Plaintiff subsequently discontinued. The Defendant has not been prejudiced by a substantial amount of work. It is a

practice that should be deplored and I informed Counsel that the Court could show its displeasure by taking this into account if costs were awarded in the Plaintiff's favour. The Plaintiff said that it had no knowledge of the Defendant's defence, which is correct. I accept the issue of duplicate proceedings is both vexatious and oppressive but the case does not warrant the striking out of the Plaintiff's claim, the Defendant having not been prejudiced by the Court adjourning this matter and giving the Defendant additional time after the proceedings were dismissed in the District Court.

Grounds of Opposition - Misrepresentation under the Contractual Remedies Act 1979

The Defendant alleges there were oral representations. These are that the Bank fee on the loan would be $19,000 and the underwriting fee would be $30,000. The Defendant says because it was induced into the contract by misrepresentation it has a set-off or counterclaim for damages pursuant to the provisions of the Contractual Remedies Act 1979.

The Plaintiff says that the statements concerning the Bank fee and the underwriting fee were statements as to events to happen in the future. The Act itself does not define misrepresentation but in terms of Ware v. Johnson [1984] 2 NZLR, 518 and New Zealand Motor Bodies Limited v. Emslie [1985] 2 NZLR 569, a representation must relate to some existing fact or past event. Counsel says the statements are expressions of opinion, therefore they were not a representation of fact, there is no evidence of fraud and they do not afford a title to relief. There were no existing facts or past events about which the Plaintiff made representations.

Mr. Liggins on behalf of the Defendant, in a letter dated 12th June 1991 acknowledges he knew the Bank fee would be higher and there is no evidence that the company was induced into entering into the contract. The Defendant says that the third statement that if the underwriting and Bank fees were higher than the parameters of the sums referred to, then the Plaintiff would reduced its own fee to reflect the difference. This is not a representation, it is a factual matter and is the promise the Defendant says exists and which is denied by the Plaintiff. The Plaintiff says that such promise is in conflict with the contemporaneous documents which made no reference to any of these representations.

The letter of 30th March 1990 contains an offer. This offer is inconsistent with the existence of any prior contractual obligation requiring payment of lesser amounts and there is no adequate explanation for the change. That letter was accepted by the Defendant without the recording of any additional arrangements or conditions. At the time of the offer of 30th March 1990, the Defendant knew the Bank fee would be $27,436 and the company had received a fax advising that the underwriting fee would be $36,720 on 26th March. With the knowledge of these additional fees the company still accepted and uplifted the loan facility and availed itself of the Plaintiff's services. The Defendant again signed the Plaintiff's letter of 14th September 1990 with no reference to these additional terms.

The second ground of opposition is that the Defendant says the actions of the Plaintiff amount to economic duress. There is no evidence there is any duress

in respect of the signed agreement of 30th March 1990 and the only defence this claim could relate to is the contract entered into in September 1990 where the Plaintiff gave time to pay the sought interest at 22% on the moneys outstanding. Counsel for the Plaintiff relied on the well-known statement in Pao On v. Lou Yiu Long [1980] AC, 614 where Lord Scarman said:

> "There was nothing contrary to principle in recognising economic duress as a factor which may render a contract voidable, provided always that the basis of such recognition is that it must amount to a coercion of will which vitiates consent."

Counsel says that the decision shows that for the principle to apply the pressure must be such that the victim's consent to the contract was not a voluntary act. The statements were adopted in New Zealand in Moyes & Groves Limited v. Radiation New Zealand Limited [1982] I NZLR, 368. To establish economic duress the responsibility lies on the Defendant to satisfy me that it is clearly arguable that such duress actually occurred. The company must satisfy me there is no realistic alternative but to submit to the demand made upon it, that the company entered into it unwillingly, that the consent was extracted by improper pressure and that it repudiated the transaction as soon as the pressure was relaxed. In terms of Shivas v. Bank of New Zealand CP 1/89 (Timaru Registry) unreported dated 14th November 1989:

> "Unless the party seeking to avoid the contract establishes that his will has been compelled to such an extent as to vitiate his consent, then the question of legitimacy or illegitimacy of the pressure will not arise. Assuming however that this first hurdle is jumped, the

> party seeking to avoid the contract must show that his will has been overborne by illegitimate commercial pressure."

The Defendant has not shown the Plaintiff says, it had no realistic alternative. Counsel for the Plaintiff submitted that the pressure could amount to compulsion of will of the victim and the illegitimacy of the pressure. The Plaintiff said that the absence of choice can be proven in various ways. But the Defendant on whom the obligation rested to show a tenable defence, has not shown there was no practical alternative to its signing the September agreement. In fact, as the acceptances of the contract were obtained on letters sent between the parties, there appears to be scant opportunity for pressure or duress.

The Defendant suggests that the Plaintiff intended to use its influence adversely in relation to the Defendant company's position as a developer and builders. The Plaintiff says this evidence lacks particulars and suggests the defence is hypothetical. Counsel says the Plaintiff could not adversely affect the underwriting and although the Bank could adversely affect the Defendant in the drawdown, the Bank had a contractual agreed interest rate which it provided for review. He says that the Plaintiff could not influence the amount of drawdown and the arrangement with Countrywide was contractual between the Defendant and the Bank, and the Defendant has not particularized how this matter could be influenced by the Plaintiff. The Defendant elected to accept and utilize the mortgage loan advance despite the alleged higher expenses. Although it is said the Plaintiff brought

pressure to bear on the Defendant, we are not told other than it existed and the fear the Defendant felt.

The Defendant's deponent Mr. Liggins, deposes in paragraphs 19 and 20 of his affidavit what the fear was and I set the paragraphs out hereunder:

> "19. AS regard exhibit 'B' of Mr. Reesby's affidavit, although I acknowledge counter-signing this, it was in the context of the Plaintiffs bringing pressure to bear on the Defendant (see further detail in paragraph 20 hereof). In addition the Defendant was acutely aware that if it 'rocked the boat' at this stage, that the Plaintiff would use its influence with the funding bank and underwriters in a way that was adverse to the Defendant.
>
> 20. THE fears of the Defendant as expressed in the preceding paragraph were justified as is borne out by subsequent events. As the issue of the payment of fees became increasingly contentious, the Plaintiff overtly threatened to use its weight and reputation in the financial community to make it difficult to obtain further or alternative funding for its needs. A typical example of the pressure being brought to bear is deposed to in the affidavit being sworn by Alan Paterson these proceedings."

The Defendant, however, made no protest at the time. The Defendant gives no evidence as to advice it sought and indeed, the contract was made by letter. However, 22% on an unpaid fee seems to be a relatively high rate and there is no evidence adduced before the Court as to how this sum was arranged and whether it could or should be excessive. It is clear the alternative for the Defendant was to comply with the payment as the company had agreed and the company was at this time in default. If it bought a time extension and a benefit as appears from the documentation, then the agreement to pay interest may have been realistic. However, there

is a conflict in this particular evidence but I do not think it can or should relate to the contract as agreed by the parties from the inception of the arrangement. It is the additional contract for interest that could be called into question. It is not the contract to pay the moneys owing, the time for which has been extended.

The Defendant has not repudiated the contract, it has not sought to have it set aside and the company has treated the settlement as signed and has made a payment of $10,000 on account of the fee.

The final ground of the Defendant raised is harrassment under the Fair Trading Act 1986. Counsel considered the cases and considered the evidence where the Defendant alleges the Plaintiff overtly threatened to use its weight and reputation to make it difficult for the Defendant to obtain alternative funding in the financial community. The factors affecting the degree of harrassment include the character of the target, the duration, the time, the language and the involvement. We have no information regarding the duration of the harrassment. The contract was made during business hours, it is suggested the Defendant has not been abused and the Plaintiff gives evidence that it has not contracted a third party. The evidence of one telephone conversation would not support a defence of harrassment.

Misrepresentation - Fair Trading Act 1986 - s.9

Counsel for the Plaintiff relied on Savill v. NZI Finance [1990] 3 NZLR, 137 at 146:

> "The test of what amounts to misleading or deceptive conduct under s.9 of the Fair Trading Act is an objective one, having regard to the circumstances in which the conduct occurred and the person or persons likely to be affected by it.....there must be proof of causation or nexus between that conduct and the loss or damage suffered."

The Plaintiff says, and I am satisfied, there is no proof of causation or nexus between the Defendant's substantial loss and the affidavit evidence that the fees charged by the underwriters and the Bank were higher than the Plaintiff represented they would be, except as to the quantum of fee, and the Plaintiff should be obliged to reduce its own fee accordingly. Counsel says that there must be pressure and illigitimacy of pressure together with an absence of choice. The Plaintiff says the Defendant has failed to show there was no practical alternative to its signing the September agreement to pay the fees and interest on the outstanding fees, putting the issue of interest aside the Defendant had for a period.

The Defendant's case relied on its evidence that there are further terms of the contract. These, the Defendant says, were agreed to at the time the oral agreement was made. The Defendant says that if the allegations are correct, then the Plaintiff is in breach of the said contract and the Defendant has grounds for a set-off. The Defendant says there is misrepresentation, there is a breach of the Fair Trading Act 1986, its conduct was misleading and deceptive, its goods and services were supplied with a false or misleading representation and there was coercion because of the alleged threats that were made to the Defendant company by the Plaintiff.

The Defendant then addressed me as to whether the document signed by the letters of 30th March 1990 and 14th September 1990 amounted to a waiver of the previous oral agreement it is alleged on reduction of the Plaintiff's fee. Mr. Liggins says that he signed the document on the understanding the adjustments would be made. He acknowledged the Defendant company was under financial pressure as the townhouses that had been built had not been sold in accordance with the accepted calculations and prices. There is no evidence of an "understanding" with the Plaintiff.

The Defendant, having raised this issue as to an abuse of process by the District Court proceedings which I am satisfied have been addressed, claimed a set-off, claimed the Plaintiff's conduct was misleading, claimed the Plaintiff had harrassed or coerced the Defendant and therefore it was entitled to relief.

Taking an overall view, I am satisfied that the Plaintiff and the Defendant entered into a professional relationship firstly oral, by which the Defendant agreed to pay certain fees. This was subsequently confirmed by various correspondence and I believe the Plaintiff is entitled to recover its fees. The only area where the Defendant can raise a credible defence is as to whether there were threats or coercion in signing the letter agreeing not only to pay the fees but to pay an additional imposed charge for failure to pay the fees of 22% interest. There is no evidence before the Court to show whether that was a fair rate. Within that context, therefore, there may be some arguable defence as to the quantum of interest. I am satisfied, however, the fees are due and owing, therefore there will be judgment for the sum of $40,000 plus disbursements as fixed by the Registrar. I am satisfied that from 30th

September 1990 the Plaintiff would be entitled to recover interest at the Judicature Act rate of 11%. If, however, the Plaintiff wishes to pursue its claim for interest at 22% as alleged, there will be a quantum trial to establish whether or not the alleged coercion was applied to the Defendant to ensure that it acknowledged its liability to the Plaintiff and acknowledged a realistic interest rate whilst the plan for payment was deferred. The Plaintiff has succeeded but I am cognizant of its failure to abuse the processes of the Court by having proceedings in both Courts at concurrent times. Accordingly there will be costs to the Plaintiff of $1000 plus disbursements as fixed by the Registrar, this being the sum to which the Plaintiff would be entitled after the withdrawal of the initial District Court proceedings.

Anne Gambrill

MASTER ANNE GAMBRILL

Solicitors:

Kevin Smith & Nigel Hughes, Auckland, for Plaintiff
Hesketh Henry, Auckland, for Defendant