NZLR

#43

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

M. 1622/96

NOT RECOMMENDED

IN THE MATTER of Land Transfer Act 1952, The Contractual Mistakes Act 1977 and an Agreement for Sale and Purchase of Real Estate dated 26 October 1995

BETWEEN BARRY SUTHERLAND WILSON and KEVIN NORMAN KITTO as Trustees of the KEVIN NORMAN KITTO FAMILY TRUST both of Auckland, Solicitor and Company Director respectively

Plaintiffs

A N D WICKHAM DEVELOPMENTS LIMITED a duly incorporated company having its registered office at Mission Bay, Auckland, Developer

Defendant

Hearing: 6 November 1997

Counsel: M.R. Winger for Plaintiffs
H.P. Holland for Defendant

Judgment: 21 NOV 1997

JUDGMENT OF LAURENSON J.

Solicitors: Holmden Horrocks, DX CP24047, Auckland

Knight Coldicutt, DX CP31034, Newmarket

INTRODUCTION

The plaintiffs are the trustees of a family trust which owned a 4.0721 ha property at Kyle Road, Greenhithe, near Auckland.

On 26 October 1995 they entered into an agreement for sale and purchase with the defendants, a charitable trust which is engaged in property development.

The sale was due to be settled on 30 October 1996.

On 28 May and 26 August 1996 caveats were registered against the title to the property to protect claims under the Matrimonial Property Act 1976 by the wife of the plaintiff, Mr Kitto.

By September 1996 it became apparent to Mr Kitto that there was a real prospect that the caveats would not be withdrawn, thereby placing the settlement with the defendant in jeopardy.

Faced with this problem Mr Kitto approached the defendant with a view to obtaining an extension of the settlement date.

The discussions culminated in the parties agreeing to a deferment of settlement. The terms were recorded on a piece of paper by one of the defendant's representatives which was given to Mr Kitto with the instruction that the terms of the proposed settlement must be referred to the respective solicitors and recorded by them.

Mr Kitto then discussed the matter and took advice from his solicitor and, importantly in my view, the co-trustee, Mr Wilson.

On 30 September 1996 Mr Wilson wrote to the defendant's solicitor. This letter contained the following:

> "Due to pending action by Mrs Denise Kitto we would like your client to agree to extend the date for settlement of the above purchase by twelve months to 30 October 1997 unless by prior agreement the parties, on six weeks' written notice by either to the other, decide to settle earlier."

On 4 October 1996 the defendant's solicitor replied accepting this proposal. On 29 October 1996 Mr Kitto found that he was able to obtain a withdrawal of Mrs Kitto's caveats. Therefore on 1 November 1996 he, through his solicitor, gave written notice in the following terms to the defendant:

> "Our clients wish to settle the sale and purchase as soon as possible, and give your client company notice in terms of the amended agreement that they would like to complete in six weeks from the first of November 1996.
>
> Your client company's Directors indicated when the extension was agreed that they would require six weeks to arrange finance for the settlement. ..."

The defendant's solicitor responded on 6 November 1996.

> "Our clients have discussed the matter amongst themselves but, as you will be aware as a result of the variation to the Agreement reached in our recent correspondence it is not possible for our client to instantly agree to now bring forward the settlement date..."

In the final result the transaction was not settled, but at the time of hearing I was advised that following receipt of a settlement notice given on or shortly after 20 October 1997, the defendant was intending to complete the settlement within a short time.

In factual terms the issue between the parties is very simple. It is -

(a) The plaintiff Mr Kitto, having originally required a deferment of settlement for about three months, had understood as a result of the negotiations prior to 30 September 1996 that there was to be a deferment to, at the latest, 30 October 1997, but in the meantime either party could require settlement at an earlier date by providing six weeks' notice to the other.

(b) The defendant, however, understood that the settlement was deferred until 30 September 1997, but this could be brought forward by agreement. If the matter was brought forward then the arrangement had to allow for the defendant to have six weeks to arrange for the necessary finance.

The issue between the parties therefore falls to be determined by reference to the exchange of correspondence which resulted in the deferral of the settlement originally due on 30 October 1996.

Given that it appears that a settlement will take place, the question is whether or not the plaintiffs are entitled to recover losses incurred by them in the intervening period and arising from the expenditure of interest in relation to the property in question and another property purchased by the plaintiffs in anticipation of the sale to the defendant.

Before going on to consider the legal issues raised, there is one other factual matter which stands out as being, in my view, particularly important. It is this. When Mr Kitto approached the defendant for a deferral he did so on the basis that he was seeking an indulgence. There was, to his knowledge, no reason why the defendant should agree to a deferral, other than by accepting that the circumstances brought about by the registration of Mrs Kitto's caveats meant that he simply could not settle on the due date of 30 October

1996. Unbeknown to him, however, a deferral suited the defendant very well indeed because the defendant had become aware that there was every prospect that local authority consents required by them before they could proceed with the development of the property, would probably not be available until September 1997. A deferral therefore meant that the defendant would be, and was, saved substantial holding costs in relation to the property which would otherwise have been incurred if it had settled on 30 October 1996.

Against this background the plaintiffs rely on the following causes of action:

1. Breach of the variation agreement.
2. That the variation agreement was void for uncertainty.
3. Misrepresentation by the defendant's representatives.
4. Misrepresentation by the defendant's representatives in terms of the Fair Trading Act 1986.
5. Mistake.
6. Non est factum

THE FIRST CAUSE OF ACTION - BREACH OF THE VARIATION AGREEMENT

Under this head the plaintiffs submit that the terms of the variation agreement are such that there can be no doubt that the defendant was required to settle on 16 December 1996, i.e. six weeks after the notice to settle was given on 1 November 1996.

The Court is therefore required to consider the written record of that agreement. Essentially this involves a consideration of the first paragraph of the plaintiffs' solicitor's letter to the defendant's solicitor dated 30 September 1997. As previously noted this said:

> "Due to pending action by Mrs Denise Kitto we would like your client to agree to extend the date for settlement of the above purchase by twelve months to 30 October 1997 unless by prior agreement the parties, on six weeks' written notice by either to the other, decide to settle earlier."

If the words "on six weeks' written notice by either to the other" are excised then there is, in my view, no doubt at all that -

(a) The date for settlement was to be extended by twelve months to 30 October 1997; unless

(b) by prior agreement the parties decided to settle earlier.

That is precisely how the defendant viewed the matter. It is therefore incumbent on the plaintiffs to satisfy the Court on the balance of probabilities that the addition of the words "on six weeks' written notice by either to the other" somehow qualify the surrounding words to justify the plaintiffs' submission that the prior agreement could be required by one party giving the other six weeks written notice.

In my view it is quite impossible to view the written record in this way. To suggest that one party can by notice require the other to agree is a contradiction in terms.

In his closing submission counsel for the plaintiff appeared to have accepted the inevitability of this proposition and thereafter relied on the alternative, second cause of action.

SECOND CAUSE OF ACTION - UNCERTAINTY

The plaintiffs' submission here was that the record is ambiguous and unclear, but nevertheless the reference to the six weeks' notice is included and must be interpreted.

Any such interpretation can only proceed if the circumstances of the meetings prior to 30 September 1996 are considered.

If those circumstances did provide a basis for the plaintiffs' view of what was intended to be later recorded by the solicitors, then the Court was invited to rectify the agreement accordingly.

Reference was made to an extensive discussion of the doctrine of rectification in ***Westland Savings Bank v Hancock*** [1987] 2 NZLR 21 where, at p.30, Tipping J. held that there are four conditions which are required before rectification can be ordered by the Court. The first of these is that, whether there is an antecedent agreement or not, the parties formed and continued to hold a single corresponding intention on the point in question.

In the present case the point in question is, as the plaintiffs submitted, whether one party could require the other to settle on six weeks' notice or, as submitted by the defendant, early settlement depended purely on agreement.

It is quite clear from the evidence that the parties had no single corresponding intention on this point.

Not surprisingly, counsel for the plaintiffs conceded in closing that rectification was not available in this case.

THE THIRD CAUSE OF ACTION - MISREPRESENTATION

The misrepresentation relied on by the plaintiffs is that the defendant's representatives, knowing that the plaintiffs required an extension which would in fact be likely to be much less than until 30 October 1997, misrepresented that they would settle at any time prior to that date providing that they were given six weeks' notice to enable them to arrange the necessary finance.

On the evidence I have to reject this claim. The proposition advanced by the plaintiffs as to the correct position is very easily stated. It is that there was an agreement incorrectly, or inaccurately recorded by the correspondence which involved a requirement to settle and not a subsequent agreement to settle. The two are simply not reconcilable

Nevertheless the plaintiffs, one of whom was a solicitor as well as being a co-trustee, chose to record the arrangement as it was. I also consider that if one has to consider the issue in the context of misrepresentation, the defendant's representatives made it clear that anything decided at the meetings prior to 30 September 1996 had to be referred to the respective solicitors. At this point the plaintiff, Mr Kitto, had the opportunity to obtain legal advice, which he said he did. Notwithstanding this, the plaintiffs chose to record the position as they did in the letter of 30 September 1996.

In these circumstances I do not see that the defendant can be said to have misrepresented anything. If they had then the position could have been rectified when it was placed in the hands of the solicitors. It wasn't.

FOURTH CAUSE OF ACTION - FAIR TRADING ACT 1986

For the same reasons referred to in relation to the third cause of action, I hold against the plaintiffs under this head.

FIFTH CAUSE OF ACTION - MISTAKE

The plaintiffs relied on s.6(1)(a)(i) of the Contractual Mistakes Act 1977. This states:

> "**6.**(1)(a) If on entering into that contract -
> (i) That party was influenced in his decision to enter into the contract by a mistake which was material to him, and the existence of the mistake was known to the other party or one or more of the other parties to the contract (not being a party or parties having substantially the same interest under the contract as the party seeking relief); ..."

Reference was made to a decision of Salmon J. in ***Denning v Tri Star Customs & Forwarding Ltd*** [1996] 3 NZLR 630 where His Honour held that in order for the plaintiff's plea of unilateral mistake to exist there needed to be three necessary elements:

(a) That they were influenced in their decision to enter into a contract by a mistake that was material to them; and

(b) The existence of the mistake was known to the other party; and

(c) The mistake resulted in substantially unequal exchange of values.

In the present case, I consider that, certainly at the conclusion of the meetings prior to 30 September 1996, Mr Kitto probably quite genuinely thought that agreement had

been reached such that he had negotiated an extension of the contract to, at the outside, 30 October 1997 and that he could require that settlement be brought forward by giving six weeks' notice. It seems to be clear also that he recognised that he could be similarly required to settle early.

At the time of those discussions he was obviously very concerned at the position which had arisen and he had gone to the plaintiffs seeking their indulgence in the matter. The discussions had proceeded on a friendly and reasonable basis and I believe that he thought that the defendant's representatives had agreed to his proposals out of consideration for both his dilemma and the practical situation which arose from that dilemma. He was not told that an extension suited the defendant very well indeed. However, I can see no reason why the defendant's representatives were under any obligation to reveal their position.

As a result Mr Kitto was, at least at the conclusion of the discussions, mistakenly of the view, which he relied on, that he could require a settlement to be brought forward from 30 October 1997.

I also consider it is likely, but I do not have to make a finding on the point, that the defendant's representatives knew of Mr Kitto's belief. I interpret the situation which arose as being a case where both parties were choosing to accept what they each wanted to hear from the re-arrangement following their discussions.

Be that as it may, I do not see that any of these factors have any relevance in the context of mistake, be it unilateral or even mutual, because of the factual situation which followed.

Whatever the defendant's representatives thought or did is overtaken, in my view, by the fact that any oral agreement recorded prior to 30 September 1996, and even if it was noted in writing by one of them, was clearly made subject to a condition that the arrangement had to be referred to, and accepted by, the respective solicitors. As I have said, Mr Kitto did see his solicitor and co-trustee Mr Wilson, and he did take Mr Wilson's advice.

If Mr Kitto was mistaken as to the nature of the arrangement then it is also necessary, in my view, for the plaintiffs to prove on the balance of probabilities, that Mr Wilson was also mistaken as to the nature of the arrangement referred to him for his advice by Mr Kitto.

If the true nature of the arrangement was as stated by Mr Kitto, to include the right of either party to require early settlement, then I find it inconceivable that Mr Wilson would have sent the letter he did.

In this context it is, I think, very important to note that Mr Wilson was not called to give evidence. There is, therefore, no evidence before the Court that he shared Mr Kitto's mistake. I can only conclude that Mr Wilson, he being a solicitor and presumably well aware of the significance of a requirement to settle early as opposed to an agreement to do so, must have been content to record the arrangement as he did. In my view his

letter leaves no doubt that early settlement could only be achieved if there was agreement between the parties.

This finding leaves only the question of what the plaintiffs intended by the inclusion of the reference to the six weeks' notice.

SIXTH CAUSE OF ACTION - NON EST FACTUM

At the commencement of the hearing the plaintiffs sought to rely on the doctrine of non est factum which had not previously been pleaded. It was submitted, and accepted, that such reliance did not actually involve the addition of a new course of action, but rather a refinement of the pleading in relation to mistake. Leave to admit an amended statement of claim was allowed on this basis. The defendant was, in consequence, given leave to file an amended statement of defence and counterclaim to provide for the situation which could arise as a result of the plaintiff's amended statement of claim.

Reference was made to ***Chiswick Investments v Pevats*** [1990] 1 NZLR 169 where Gallen J. held:

> "the essence of the plea of non est factum is that the person signing believed that the document he signed had one character or one effect whereas in fact its character or effect was quite different."

If this test is applied to the present case it seems to me that it is necessary for the plaintiffs to demonstrate that the inclusion of the reference to notice gave to the recorded agreement a character and effect such that the clear reference to prior agreement was somehow to be a different character, namely that either party had the right to require early settlement.

As I have already said, the two propositions are not reconcilable and for the reasons which I have mentioned there can be no reason to doubt that when Mr Wilson sent his letter the fundamental basis for early settlement depended on agreement.

What then did the inclusion of the reference to notice seek to achieve? In my view it was simply a recognition that any agreement to settle early necessarily involved a delay of six weeks to allow the defendant to arrange finance.

The reference to notice was, therefore, in legal terms unnecessary, but it was consistent with the early discussions. Most importantly, from the point of view of the plaintiffs' case, the words do not detract from the basic proposition which they record, namely that the question of early settlement was dependant on agreement.

THE COUNTERCLAIM

The defendant's counterclaim was filed in order to protect its position should I have found grounds for providing relief to the plaintiffs based on mistake or non est factum. This situation has not arisen and therefore it is unnecessary to consider the counterclaim.

There will accordingly be judgment in favour of the defendant on the claim and counterclaim. The plaintiffs are ordered to pay the defendant's costs, disbursements and witness expenses according to scale on the claim.