

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

CIV 2009-404-6215

BETWEEN WILLIAM HENRY BRIEN
 Plaintiff

AND JAMES OWEN LESTER
 Defendant

Hearing: 3 December 2009

Appearances: N Woods for plaintiff
 No appearance for defendant

Judgment: 7 December 2009

JUDGMENT OF ALLAN J

*In accordance with r 11.5 I direct that the Registrar endorse this judgment
with the delivery time of 10.30 am on Monday 7 December 2009*

Solicitors:
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[1] The plaintiff seeks judgment for \$190,000, together with interest and costs. The sum claimed represents an amount invested by the plaintiff in a geothermal energy project on Great Barrier Island, promoted by the defendant. The project did not proceed.

[2] The defendant has not filed a statement of defence. On 19 November 2009 Abbott AJ directed that the proceeding be set down for hearing by way of formal proof, and observed that it was for the defendant to take such steps as were open to him, if he wished to present a defence to the claim.

[3] At that time, the defendant was represented in the course of a case management telephone conference by Mr J Frederickson, who advised the Court that he could not say for certain at that point whether he would be acting or not, and that a decision as to whether the claim would be defended was likely to be taken in the context of the making of a successful application for legal aid.

[4] Nothing further has been heard from the defendant. The hearing before me therefore proceeded by way of formal proof.

Background

[5] The plaintiff, who is 78 years old, first met the defendant about three years ago. They had been distant acquaintances until November 2008, when the defendant was able to assist the plaintiff with repairs to the air conditioning in his motor car. In subsequent discussions, the defendant invited the plaintiff to become involved in the defendant's project, aimed at installing a geothermal power plant on Great Barrier Island. The defendant's plan was to float a company and to offer shares to members of the Island's population. The defendant told the plaintiff that he had incorporated a company, Acquisition Holdings Ltd, which would allocate shares to such of the 800 residents of Great Barrier Island as wished to participate.

[6] Although the plaintiff considered the proposal to be a little simplistic and suggested that both parties should see the plaintiff's solicitor, the defendant was eventually able to persuade the plaintiff to provide a cheque for \$10,000, on the basis that he would become entitled to 10,000 \$1 shares in Acquisition Holdings Ltd. That was on 18 December 2008.

[7] A few days later the defendant returned to the plaintiff's home to deliver a folder which contained plans and details of the proposed project. The document contained detailed costings and promised a return of \$342,000 or approximately 8% on invested capital.

[8] In late December – early January the plaintiff made two further payments to the defendant, each of \$5000. At that stage therefore the plaintiff had contributed \$20,000.

[9] On 12 January 2009, the defendant arrived at the plaintiff's property. In evidence, the plaintiff said the defendant was "in a flurry". He needed a further financial contribution from the plaintiff in order to pay a deposit on land which had been earmarked for the project. This land comprised a total of 135 hectares and was owned by a Mr Grey. The defendant had represented to the plaintiff that the land was for sale for about \$7 million, but that the Department of Conservation was prepared to pay \$12 million, because kauri trees standing on the site were worth \$20 million. However the department could not buy from Mr Grey because those parties had fallen out. The defendant wanted \$120,000 from the plaintiff for the deposit on the proposed purchase from Mr Grey. He himself could not find that sum.

[10] The plaintiff was offered 2.5 million shares in Acquisition Holdings Ltd to cover the \$120,000 investment.

[11] On that same day the defendant gave the plaintiff a document headed "Memorandum of Understanding" which recorded the initial investment of \$10,000.

[12] The plaintiff acceded to the defendant's request. He provided a cheque for \$120,000 for which he received a further memorandum of understanding dated

25 January 2009. The plaintiff produced copies of his bank statements which recorded the withdrawals represented by the cheques given by him to the defendant.

[13] The defendant indicated that the payment of \$120,000 would be refunded in full to the plaintiff upon completion of the proposed on-sale of the property to the Department of Conservation. The defendant said the department had agreed to pay \$12 million for the 135 ha block, and that settlement of the purchase would occur on 25 May 2009. On settlement there would be a \$5 million surplus, such sum to be utilised in funding the geothermal power project.

[14] On Mr Brien's evidence, the defendant spoke on several occasions of his concern that there was a second developer interested in buying sites on the Island. The defendant was concerned that someone else might secure land needed for the project. The plaintiff says he was given to understand there was a need for considerable urgency about securing the land.

[15] On 5 March 2009 the defendant sought and obtained from the plaintiff a cheque for a further \$50,000. This sum was needed in order to secure the rights to other sites on the Island before anyone else got there first. The defendant promised to allocate a further \$50,000 worth of shares to the plaintiff.

[16] Thereafter on several occasions the plaintiff sought to see copies of the agreements relating to the land transactions. Eventually he obtained a copy of a draft agreement for sale and purchase in respect of the proposed sale to the Department of Conservation. The plaintiff says he repeatedly asked the defendant to accompany him to discuss arrangements with the plaintiff's solicitors, but that he "got fobbed off". The parties did attend at the office of the defendant's accountant who suggested that the parties get specialist accounting advice. The defendant declined to take that advice.

[17] During March 2009, the plaintiff became concerned about the defendant's bona fides. He ascertained that the owner of the 135 ha block, Mr Grey, had not sold his land to the defendant, nor had there been any negotiations to that end. The defendant had stayed with Mr Grey's family over the Christmas period, but Mr Grey

did not have a high opinion of the defendant. The plaintiff also ascertained that there had been no test bore holes drilled on the Island, as had earlier been represented by the defendant. Neither had any application been made to the Council for a resource consent. Moreover, the plaintiff discovered that the Department was not a willing buyer of the site concerned, whether for \$12 million or otherwise. Further, there was no evidence of interest by other property developers in sites which the defendant was endeavouring to purchase, and so no need for the deposit of \$120,000 which the defendant had sought and obtained from the plaintiff.

[18] In short, the defendant had taken no steps whatever to implement his proposals, and funds supplied by the plaintiff had not been applied for the purposes for which the defendant had represented they would be used.

[19] On several occasions since discovering the true position, the plaintiff spoke to the defendant. He asked him for his money back. The defendant said he would refund the amount concerned and would sell one of his properties in order to do so. But nothing was forthcoming.

[20] On 29 June 2009, the plaintiff's solicitors sent to the defendant a letter of demand. There was no response. The plaintiff accordingly issued this proceeding.

The statement of claim

[21] The plaintiff pleads several causes of action: negligent misrepresentation, pre-contractual misrepresentation, breach of the Fair Trading Act, breach of the Securities Act, and deceit. As Mr Woods submits, each of these causes of action appears to have been made out. It is sufficient for present purposes to hold that the plaintiff's evidence establishes the elements of negligent misrepresentation. It is a proper inference that, although the defendant had prepared a dossier that included a detailed technical discussion and some indicative costings, he had no intention at the time at which he secured the various sums from the plaintiff of applying them for the stated purpose. In other words he was misrepresenting the true position to the plaintiff, and because he did so knowing that the funds would not be applied in the manner represented he acted (at least) negligently.

[22] The defendant's refusal to provide any explanation of his conduct and his subsequent neglect to repay the plaintiff provide reinforcement of the conclusion that the plaintiff is entitled to recover the sum sought.

Result

[23] For these reasons there will be judgment in favour of the plaintiff against the defendant for the following sums:

a)	The amount paid by the plaintiff to the defendant		<u>\$190,000.00</u>
b)	Interest as follows:		
1.	\$10,000 at 8.4% between 12.01.09 and 03.12.09 (334 days @ \$2.30 per day)	768.00	
2.	\$10,000 at 8.4% between 28.02.09 and 03.12.09 (286 days @ \$2.30 per day)	657.00	
3.	\$120,000 at 8.4% between 25.01.09 and 03.12.09 (321 days @ \$27.61 per day)	8,862.81	
4.	\$50,000 at 8.4% between 05.03.09 and 03.12.09 (280 days @ 11.50 per day)	<u>3,220.00</u>	
	Total Interest		13,508.81
c)	Costs on a category 2B basis as follows:		
1.	Commencing proceeding 3 days	4,800.00	
2.	Sealing 0.2 days	320.00	
3.	Mention on 19 November 0.2 days	320.00	
4.	Obtaining judgment on formal proof 0.3 days	480.00	
5.	Today's mention 0.2 days	<u>320.00</u>	
	Total costs		6,240.00
d)	Disbursements		
1.	Filing fee	1,100.00	
2.	Service fee	<u>236.74</u>	
	Total disbursements		1,336.74

[24] There will accordingly be judgment for \$190,000 together with interest of \$13,508.81, costs of \$6,240.00 and disbursements of \$1,336.74, making in all a total of \$211,085.55.

C J Allan J