IN THE HIGH COURT OF NEW ZEALAND
INVERCARGILL REGISTRY

CIV 2009 425 000574

BETWEEN	JAMES CHARLES COOPER AND SANDRA MICHELLE COOPER Plaintiffs
AND	WILLIAM JOHN REID AND KATHRYN MARY REID Defendants

Hearing: 16 December 2009

Appearances: A D G Hitchcock for Plaintiffs
J N Young for Defendants

Judgment: 18 December 2009 at 11.30am

JUDGMENT OF ASSOCIATE JUDGE OSBORNE
As to Summary Judgment

Introduction

[1] The plaintiffs in May 2008 agreed to sell their dairy farm to the defendants, with settlement to occur in June 2009. A deposit was paid. The defendants were unable to settle their purchase in June 2009. The plaintiffs cancelled the contract and resold the farm. In this proceeding they seek to recover their losses on resale. They have applied for summary judgment.

[2] The defendants do not dispute their liability for damages but oppose the summary judgment application in relation to quantum.

Application for adjournment

[3] The documents in the proceeding were served on the defendants on 29 October 2009. The defendants filed their opposition documents on 10 and 11 December 2009.

[4] At the hearing Mr Young applied for an adjournment. His submissions adopted what was said by Mr Peters, the defendants' solicitor, in a written synopsis. The defendants sought adjournment for two main reasons:

(a) They wished to make further inquiries into the nature of the transaction or transactions by which the plaintiffs resold the property. While they have seen a copy of the resale contract they wish to explore the possibility of that that contract may not have represented the entire transaction.

(b) The defendants wish to have further time to consider the evidence presented in the plaintiffs' second affidavit sworn in 11 December 2009, in reply to the affidavit of the first named defendant filed on 10 December 2009. It was said that the defendants wished to make further inquiries as to the quantum owed.

[5] Given the narrow compass of matters still in issue – relating only to quantum – I proceeded upon the basis that I would hear the submissions of counsel both on the substance of the application and the adjournment. I would then rule in relation to the adjournment application before, if the adjournment were declined, going on to give judgment in relation to the interlocutory application.

The substance

What is not in issue

[6] The background as I have summarised it above at [1] is not in issue.

[7] When the defendants were unable to settle their purchase, the plaintiffs issued a settlement notice. Upon the expiry of that notice, the plaintiffs cancelled the agreement on 30 July 2009 and forfeited the deposit of $1,463,500.00 which the defendants had paid.

[8] The plaintiffs entered into a resale contract in relation to the farm on 17 August 2009. The resale contract was subsequently settled on 15 October 2009.

[9] Clause 9.4(3) of the standard form of contract used by the plaintiffs and the defendants identifies the amount of the loss claimable by the plaintiffs on such a resale. It provides:

> The damage claimable by the vendor under subclause 9.4(1)(b)(ii) shall include all damages claimable at common law or in equity and shall also include (but shall not be limited to) any loss incurred by the vendor on any bona fide resale contracted within one year from the date by which the purchaser should have settled in compliance with the settlement notice. The amount of that loss may include:
>
> (a) interest on the unpaid portion of the purchase price at the interest rate for late settlement from the settlement date to the settlement of such resale; and
>
> (b) all costs and expenses reasonably incurred in any resale or attempted resale; and
>
> (c) all outgoings (other than interest) on or maintenance expenses in respect of the property from the settlement date to the settlement of such resale.

[10] The plaintiffs' damages in this case mainly flow from the fact that the consideration on the resale contract was $9,000,000.00 (plus GST) as against the plaintiffs'/defendants' sale price of $13,000,000.00 (plus GST).

What the plaintiffs say

[11] The sale of the farm to the defendants had been part of a rationalisation of the plaintiffs' farming operations. On the basis of the sale of the farm they committed to the purchase of an adjacent deer farm for the purposes of dairy conversion. That purchase was completed in October 2008 and conversion expenses thereafter incurred.

[12] When the sale to the defendants collapsed the plaintiffs were placed in a hugely difficult situation, well outside the debt equity parameters which were acceptable to their bank. The bank insisted on the active marketing of the farm for resale.

[13] The plaintiffs marketed the farm for resale in accordance with advice from both valuers and real estate agents.

[14] Mr Hitchcock submits it is clear in the circumstances that the plaintiffs acted reasonably in mitigation.

[15] When the farm was resold, there were three sums which the plaintiffs took into account in arriving at the loss incurred on the resale, namely the deposit paid by the defendants; a GST refund received in relation to the cancelled contract; and the value of shares which were not transferred under the resale agreement. Taking those into account the loss as calculated by the plaintiffs was $1,127,204.48, calculated as follows:

Loss on the resale of the farm	13,000,000.00
	-9,000,000.00
Exclusive GST	4,000,000.00
Less Deposit	1,462,500.00
Less GST refund	1,335,869.20
Less shares not transferred under the second agreement 16466 x $4.52	74,426.32
	$1,127,204.48

[16] The agreed interest rate for late settlement under the contract was 22% per annum. Pursuant to cl 9.4(3)(a) of the contract the plaintiffs calculated the interest payable on the unpaid portion of the purchase price as $895,032.62, calculated as follows:

> $11,537,500.00 at 22% per annum $6,954.11 per day from and inclusive of 2 June 2009 to 13 August 2009 being 73 days = $507,650.03. ($13,000,000.00, less deposit $1,462,500.00 = $11,537,500.00).

> $10,201,630.80 at 22% per annum $6,148.93 per day from and inclusive of 14 August 2009 to 15 October 2009 being 63 days = $387,382.59. ($13,000,000.00, less deposit $1,462,500.00 and GST $1,335,869.20 = $10,201,630.80).

[17] The plaintiffs also provided evidence that they had incurred legal costs and expenses of $21,561.43 in effecting the resale, an item expressly covered by cl 9.4 (3)(b) of the contract (as well as by usual principles relating to costs of mitigation).

[18] In addition, Mr Cooper gave evidence, supported by spread-sheeted calculations, that the cost of running the property through to settlement of the resale contract involved a net loss of $318,377.79 (ignoring finance costs). While those outgoings (that is other than interest) are expressly recoverable under cl 9.4(3)(c) of the contract, the plaintiffs have not sought to recover those particular expenses. They have limited themselves to the principal loss, the interest claim and the legal costs and expenses, as detailed above at [15], [16] and [17].

[19] On 18 September 2009 the plaintiffs' solicitors wrote to the defendants' solicitors setting out the loss calculations as they then stood. They referred the defendants' solicitor back to his advice in a letter dated 28 May 2009 that in the event of a resale the defendants would be "agreeable in the principle (sic) to entering into an agreement to endeavour to pay the residue off over a period of time". The plaintiffs' solicitors invited proposals in relation to the estimated debt. They explained that the possession date on the resale contract had been set for 1 October 2009 but that as a consequence of an exchange of correspondence between the solicitors in respect of the various conditions contained in the agreement it was currently estimated that settlement (if the agreement became unconditional) was likely to take place on or about 19 October 2009. Copies of the agreement for sale and purchase and the exchange of correspondence were provided.

[20] The defendants made no response to the request for their proposal.

[21] The proceeding was issued. As I have noted, the defendants were served with the documents in the proceeding on 29 October 2009.

[22] Not surprisingly, against this background, Mr Cooper deposed that he believed the defendants had no arguable defence to the plaintiffs' claim.

The defendants' first issue – settlement date of the resale contract

[23] Mr Reid in his affidavit suggested that a sum representing penalty interest from 1 October 2009 to 15 October 2009 should be deducted from the quantum of the plaintiffs' claim. He said that this should be done because the resale agreement had scheduled settlement to take place on 1 October 2009. He notes confusion in the correspondence between solicitors over the settlement date. He says that due to an oversight by the real estate agent the conditional date relating to due diligence was scheduled to expire after the settlement date.

[24] As Mr Hitchcock submitted, it is clear on the evidence that in the way the resale negotiation developed the thirty-five working days after execution of the agreement which was allowed for confirmation of finance ended up occurring after the settlement date (1 October 2009) stipulated on the face of the contract. Mr Cooper explained in his reply affidavit that the terms and conditions of the resale agreement had been in the process of negotiation for a period prior to its eventual signing on 17 August 2009. No recalculation of the dates in the agreement was undertaken by the agent between the time the contract negotiations ended and it was finally signed. To deal with that anomaly, it was agreed between the parties that settlement would take place ten working days from confirmation, or from 1 October 2009, whichever was the later. That led to the settlement date becoming 15 October 2009.

[25] The defendants' complaint as to this fifteen days slippage is without merit. Its lack of merit could be demonstrated in a number of ways but decisively by reference to the fact that the plaintiffs' claim is for loss incurred on a bona fide resale under cl 9.4(3) of the contract. It matters not that the defendants contend that the plaintiffs might have obtained or enforced a harder bargain on the resale. The contractual requirement upon the plaintiffs was to effect a bona fide resale, which the evidence indicates they did. The argument of the defendants is also unmeritorious at a more general level, having regard to the fact that the plaintiffs' efforts produced a

resale within a relatively short period after the defendants failed to settle their own contract. On any view of mitigation principles, the evidence indicates that the plaintiffs acted reasonably in agreeing to a 15 October 2009 settlement.

The defendants' second issue – settlement statement

[26] Mr Reid said this in his affidavit:

> Furthermore, while a copy of the subsequent agreement has been provided, I have not been provided with any further information in relation to that sale, specifically the settlement statement for the transaction.

[27] Again, this was a wholly unmeritorious point to take in defence. The evidence establishes that the defendants were provided with detailed information (including the contract) relating to the pending resale as early as 18 September 2009. Despite a specific request for a proposal at that time the defendants failed to respond. The proceeding was subsequently issued and served. The defendants having been served with the proceeding in late October 2009 apparently chose then not to make a request for the settlement statement, electing to raise the issue in the context of their defence by affidavit on 10 December 2009.

[28] The plaintiffs had been open with information as to the resale before it was settled. In instituting this proceeding, Mr Cooper had provided comprehensive evidence and extensive documentary support (running to some thirty seven exhibits). While it happened that his first affidavit did not exhibit the resale settlement statement it did depose in a detailed manner to the losses on the resale. Immediately the absence of the settlement statement was raised by Mr Reid on 10 December 2009 Mr Cooper swore a second affidavit on 11 December 2009 attaching the settlement statement. The statement is a predictable document, consistent with the original evidence of Mr Cooper. In the five days from its production in evidence through to the hearing (and including at the hearing), neither the defendant nor their solicitor have suggested that any argument as to the quantum of damages arises from the settlement statement. I am satisfied that none does.

The defendants' third issues – was the resale contract an entire transaction?

[29] The third and final issue raised by Mr Reid in his affidavit is put in these terms:

> 5. I have also been advised that the written form the subsequent agreement does not represent the entire transaction between Jaesea and My Farm. The information provided to me suggests that the amount actually received from My Farm by Jaesea is more than is recorded in the subsequent agreement.
>
> 6. I have endeavoured to make enquiries confirming the if to me as alluded to in paragraph 5 but I believe I will need at least one further month before I can complete my enquiries in that regard.

[30] There are two responses to this evidence. The first response is in terms of factual information and was provided in the reply affidavit of Mr Cooper. Mr Hitchcock made submissions on that matter and I will return to it shortly. But in my judgment, the issues raised by Mr Reid in his affidavit, to the extent that they can be categorised as "issues" at all, can be dealt with more peremptorily.

[31] Mr Reid's evidence, as I have quoted it, is rank hearsay.

[32] High Court Rule 7.30(1) provides (in relation to interlocutory applications):

> 7.30 Statements of belief in affidavits
>
> (1) A Judge may accept statements of belief in an affidavit in which the grounds for the belief are given if—
>
> (a) the interests of no other party can be affected by the application; or
>
> (b) the application concerns a routine matter; or
>
> (c) it is in the interests of justice.

[33] Hearsay evidence is one example of a statement of belief.

[34] The provision (in r 7.30) that the maker of the affidavit must give the grounds for the belief in turn requires that the source or sources of the information be stated (as well as the grounds of the belief): see *Concorde Enterprises Ltd v Anthony Motors (Hutt) Ltd* [1976] 1 NZLR 741 at 745 – 746. The high point of admitting

hearsay evidence in interlocutory applications might be said to have been described in *Makin v Hayward* (1991) 5 PRNZ 139, in which Master Williams QC said at 141 – 142:

> It is commonplace for deponents in interlocutory applications to stretch the strict rules of admissibility in relation to the evidence which they give. In many cases, as the authorities show, there can be no objection to such a course. It promotes the speedy resolution of interlocutory applications. It avoids the proliferation of affidavits. And it accords with the desirable objects of lessening "cost delay and inconvenience".

His Honour went on however to indicate that if objection is taken to affidavits on technical grounds the rules of evidence must be complied with.

[35] It has been recognised that a summary judgment application, while interlocutory, is not to be treated as a purely procedural interlocutory application where an attitude of flexibility as to hearsay is often extended. The substantive nature of a summary judgment application requires that the rules of evidence be complied with: see *Ports of Auckland Ltd v The Ship "Raumanga"* (1998) 12 PRNZ 84 at 86.

[36] Admissibility of hearsay statements in civil proceedings is dealt with in the Evidence Act 2006 a way which effectively incorporates the relevant High Court Rules:

> **20 Admissibility of civil proceedings of hearsay statements in documents related to applications, discovery or interrogatories**
>
> (1) In a civil proceeding, a hearsay statement in an affidavit made to support or oppose an application is admissible for the purposes of that application if, and to the extent that, the applicable rules of court require or permit a statement of that kind to be made in the affidavit.

[37] I apply these legal principles to the hearsay content of Mr Reid's evidence: His paragraph 5 evidence is inadmissible under r 7.30 in that:

(a) the grounds for believing the hearsay evidence are not stated;

(b) there is no identification of the source of the information; and

(c) none of the three bases for accepting statements of belief under r 7.30(1)(a) – (c) is established. This is not a case where no other party's interests are affected; it is not a case which concerns a routine matter; and it is not in the interests of justice that the Court rely on this unattributed hearsay evidence, either as a basis for adjournment or as a basis for declining summary judgment.

Even leaving aside the absence of stated grounds for belief and identification of the make of statement, Mr Reid's paragraph 5 is unsatisfactorily vague in the extreme – the comment that "the information provided to me suggests…" inexplicably fails to indicate what "the information" was.

[38] There is a further factor which affects the justice of the case, namely the failure of the defendants to go to the "horse's mouth". The plaintiffs had provided detailed information to the defendants in September. There is no suggestion that further information would have been withheld if requested. The concept that, in the absence of a request made directly to the plaintiffs, the Court should give the defendants "at least one further month" to make enquiries is unreasonable.

[39] In these circumstances, I decline to treat paragraph 5 of Mr Reid's affidavit as admissible evidence in this proceeding. Without that hearsay evidence, Mr Reid's remaining ground of opposition to judgment falls away.

[40] For completeness, I refer briefly to the reply affidavit of Mr Cooper. Mr Cooper deposes that there is nothing in the suspicion which Mr Reid raised in paragraph 5 of his affidavit. Mr Cooper deposes to pasture damage caused to the farm by a weed spraying operation after the resale agreement was entered into. That led to discussions and a compensation claim by the purchaser. The plaintiffs put in place pasture management arrangements in the interim. Mr Cooper then came to an arrangement directly with the purchaser whereby supplements were left for the purchaser at settlement and the plaintiffs arranged for the direct drilling with grass of fifty seven acres of the farm.. This resulted in the purchaser completing settlement without deduction or further claim. I note that the plaintiffs have absorbed the costs in this regard.

[41] The evidence of Mr Cooper is entirely satisfactory. The suspicions quoted by Mr Reid would not constitute an arguable reason to question Mr Cooper's evidence.

Refusal of adjournment

[42] In these circumstances, an adjournment of the proceeding would have been inappropriate. I so ruled at the conclusion of submissions at the hearing. The objective of the High Court Rules is to secure the just, speedy and inexpensive determination of the proceeding. The defendants' solicitor submitted that a delay would not prejudice the plaintiffs' position, given particularly the fact that interest will be accumulating on the quantum claimed. I am not prepared to make assumptions at the plaintiffs' risk. The plaintiffs may well ultimately be in an improved financial position if they have judgment now rather than later. On any view of the matter, an adjournment in relation to the straightforward facts of this case does nothing to achieve the expectation that the Court should deliver a speedy process.

[43] I therefore declined the application for adjournment.

Summary judgment

[44] I am satisfied that the defendants, in addition to their liability to judgment (which they accept), have no arguable defence to the quantum claimed by the plaintiffs.

Orders

[45] There will be summary judgment for the plaintiffs against the defendants, jointly and severally, in the following sums:

(a) Damages in the sum of $2,043,798.30 pursuant to cl 9.4(3) of the contract dated 19 May 2008.

(b) Interest to the date of judgment in the sum of $30,102.40.

(c) Costs and disbursements in the sum of $7,677.20.

Solicitors:
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