IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2009-404-4253

	BETWEEN	MANGAWHAI DEVELOPMENTS LTD (IN RECEIVERSHIP) Plaintiff
	AND	CRAIG DOUGLAS ROLLS Defendant

Hearing: 10 and 11 October 2011

Counsel: P L Rice for Plaintiff
D J Taylor for Defendant

Judgment: 10 November 2011

JUDGMENT OF BREWER J

This judgment was delivered by me on 10 November 2011 at 1:30 pm pursuant to Rule 11.5 High Court Rules.

Registrar/Deputy Registrar

SOLICITORS
Christopher Taylor Lawyers (Auckland) for Plaintiff
Evans Bailey (Hamilton) for Defendant

COUNSEL
Phillip Rice; David Taylor

Introduction

[1] The plaintiff seeks an order for specific performance (alternatively, damages) of a written agreement by which the plaintiff agreed to sell a piece of land ("lot 14") to the defendant for $255,000 including GST (if any).

[2] The defendant opposes the plaintiff's claim on the ground that he was induced to enter the agreement by misrepresentations and subsequently lawfully cancelled the agreement because of them. Alternatively, by way of counterclaim, the defendant alleges that the representations made by the plaintiff to the defendant amounted to a breach of Part 1 of the Fair Trading Act 1986 in that they were actions made in trade, were deceptive and misleading, and did deceive and mislead. Accordingly, the defendant seeks an order declaring the agreement to be void.

The main issue

[3] The parties are agreed that the main issue in this case is whether the interchanges between the parties prior to the defendant signing the agreement for sale and purchases entitle the defendant to cancel the contract pursuant to s 7 of the Contractual Remedies Act 1979:

> **7 Cancellation of contract**
>
> (1) Except as otherwise expressly provided in this Act, this section shall have effect in place of the rules of the common law and of equity governing the circumstances in which a party to a contract may rescind it, or treat it as discharged, for misrepresentation or repudiation or breach.
>
> …
>
> (3) Subject to this Act … a party to a contract may cancel it if—
>
> (a) He has been induced to enter into it by a misrepresentation, whether innocent or fraudulent, made by or on behalf of another party to that contract; …
>
> (4) Where subsection (3)(a) … of this section applies, a party may exercise the right to cancel if, and only if,—
>
> (a) The parties have expressly or impliedly agreed that the truth of the representation … is essential to him; or

(b) The effect of the misrepresentation … will be,—

(i) Substantially to reduce the benefit of the contract to the cancelling party; or

(ii) Substantially to increase the burden of the cancelling party under the contract; or

(iii) In relation to the cancelling party, to make the benefit or burden of the contract substantially different from that represented or contracted for.

[4] A party may only cancel a contract for misrepresentation under the Contractual Remedies Act in response either to a representation that was essential to the cancelling party (s 7(4)(a)) or to a misrepresentation that resulted in a substantial disadvantageous consequence (s 7(4)(b)). The Supreme Court in *Mana Property Trustee Ltd v James Developments Ltd* approached s 7 (albeit in respect of a breach of a term) thusly:[1]

> Cancellation can occur in reliance on subs (4) only when the performance is essential to the cancelling party or will have one or more of the described substantial consequences for that party. Professor Burrows succinctly comments that s 7(4)(a) deals with the importance of the term which has been broken, s 7(4)(b) with the seriousness of the consequences of the breach.[2] A breach of an essential term with only a minor effect entitles cancellation under para (a) and so, under para (b), does a breach of any term, even a minor term, if it has a serious effect.

Factual background

[5] The plaintiff (now in receivership) was the developer of a 47 lot subdivision at Devich Road, Mangawhai, known as "Lake View Estate". In mid-2005 the plaintiff had not completed the subdivision (indeed it had only recently commenced the subdivision process) but had begun to "pre-sell" lots in it. It authorised a local real estate agent and an independent contractor, Matthew Blomfield, to market the lots. It is common ground that Mr Blomfield acted as a sales agent for the plaintiff at the material times.

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1 *Mana Property Trustee Ltd v James Developments Ltd* [2010] NZSC 90, [2010] 3 NZLR 805 at [22].

2 John Burrows, Jeremy Finn and Stephen Todd Law of Contract in New Zealand (3rd ed, LexisNexis NZ Ltd, Wellington, 2007) at [18.2.2].

[6] In August 2005 Mr Blomfield visited the defendant at the defendant's office in Hamilton. The visit was in relation to the defendant's occupation as a finance advisor, but in the course of the visit Mr Blomfield told him about the Lake View Estate subdivision. Mr Blomfield, in his evidence, said that he himself was excited about the subdivision, believing that there was money to be made, and it is evident that he passed on that excitement to the defendant. The defendant's evidence, corroborated by Mr Blomfield and not contradicted by other evidence, is that Mr Blomfield told the defendant that the subdivision was to be a high quality lifestyle subdivision of larger sized sections with "clear sea views, expansive lake views and in close proximity to the town and beach at Mangawhai". The defendant expressed himself to be interested in acquiring one of the sections.

[7] On 30 August 2005 Mr Blomfield emailed to the defendant a list of some of the sections for sale with their asking prices. Attached to the email was a sales brochure for the Lake View Estate subdivision which had been prepared by Mr Blomfield and approved by the plaintiff.

[8] The sections listed in the email were sections which Mr Blomfield had secured for himself as being attractive sections. He had a good relationship with the defendant (although not a social relationship) and wanted to focus him on a good quality section. As part of the brochure there was an aerial photograph of the subdivision with the proposed subdivision plan overlaid on it. I am satisfied that the defendant and Mr Blomfield discussed by telephone which of the sections might best suit the defendant before they settled on lot 14. The asking price was $275,000 and Mr Blomfield felt able to advise the defendant that this could be reduced by $20,000 for an early purchase. I am satisfied that the telephone discussion or discussions would have included the amenities of the subdivision and the views available from lot 14.

[9] Significantly, I find that Mr Blomfield made known to the defendant that Mr Blomfield had not seen the subdivision either.

[10] The defendant agreed to purchase lot 14 for $255,000. The agreement for sale and purchase was prepared and, eventually, signed on 21 October 2005. A

payment of a $10,000 deposit was made. The defendant did not view the subdivision before signing the agreement.

[11] The completion of the subdivision, as anticipated, took some time. Before it was completed, in February 2007, the defendant finally went out and viewed lot 14. He gave evidence that he was shocked by the lack of views and the distance of the subdivision from the sea and from Mangawhai. He instructed his solicitors to cancel the agreement. The plaintiff did not accept the cancellation and proceeded on the basis that the contract was binding. The subdivision was completed and certificates of title were issued on 29 October 2007. On 6 December 2007 the defendant was informed that a certificate of title had issued for lot 14 and settlement was set for 13 December 2007 in accordance with the relevant provisions of the agreement for sale and purchase. The defendant maintained his position that the agreement had been cancelled lawfully in February 2007.

What representations were made by Mr Blomfield on behalf of the plaintiff?

[12] I find that the representations described in para [6] — that lot 14 had clear sea views, expansive lake views and was close to the town and beach — were representations made by Mr Blomfield as sales agent of the plaintiff. I find that the contents of the brochure, prepared by Mr Blomfield as sales agent of the plaintiff and authorised by the plaintiff for use in marketing the subdivision, are also representations on behalf of the plaintiff.

Were the representations untrue?

[13] Both parties called evidence on this issue. I accept that from lot 14 one can, depending on the weather, catch a "peep" of the sea on the horizon. I find that that is not the same as the property having clear sea views.

[14] The property does have good views of the lake and I find that in context they can reasonably be described as expansive lake views.

[15] The property is some kilometres from the Mangawhai village and Mangawhai Heads beach. It would take perhaps five minutes and 10 minutes respectively to drive there from lot 14.[3] I accept the evidence[4] that "close" is a relative term and depends upon context. Given that the brochure supplied to the defendant on 30 August 2005 clearly shows that this was a rural subdivision at some distance from the sea, I find that "close" in the context of this subdivision meant a drive of several minutes. The evidence is that the drive times are in the range of five minutes to 10 minutes. Accordingly, I find that this representation, in the round, was true.

[16] It was submitted by the defendant that I should not construe the representations separately. It is their overall effect to which I must refer. I agree with this submission. I find that overall the brochure plus the oral representations conveyed to the defendant that lot 14 was, while not coastal, nevertheless attractively situated so that a purchaser would enjoy good views of the sea and lake and be close enough to the town and beach to be able to drive to them without it being a journey. That overall picture was untrue. While being close enough to the town and beach for the trip to them not to be a journey, and while having good views of the lake, the distant view of the sea did not associate the lot with it. Lot 14 was part of a rural subdivision from which distant views of the sea could be achieved by some of the lots but not by lot 14. Lot 14 had, from part of it, a "peep" of the sea depending on the weather.

Are the statements actionable?

[17] Statements or representations are not actionable if they are merely honest statements of opinion recognised as such.[5] In this case Mr Blomfield had made known to the defendant that Mr Blomfield himself had not seen the subdivision and was passing on comments he had received from the developers. Nevertheless, they were passed on in conjunction with the brochure and they were not qualified by

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3 See, for example, the brief of evidence of Mark Aslin, dated 20 September 2011, at [11].
4 Brief of evidence of Michael Travers Sprague, dated 27 September 2011, at [14.6].
5 *Bisset v Wilkinson* [1927] AC 177 (PC).

invitations or exhortations to the defendant to check for himself. Accordingly, I find them to be actionable.

Did the representations induce the defendant to enter into the contract?

[18] In *Savill v NZI Finance Ltd*, the Court of Appeal noted that under s 7 a representation must be causative of the decision to enter into the contract:[6]

> [B]efore the appellants can be entitled … to cancellation of the contract under s 7 for any innocent misrepresentation, they must show that if there were a misrepresentation to them by … the respondent, they were induced by it to enter into the contracts with the respondent.

[19] In the present case the defendant gave evidence that the representations did induce him to enter into the contract.[7] He said that he cancelled the contract in February 2007 immediately following his first inspection of lot 14 because of his shock at realising that it did not match the representations. The onus is on the plaintiff to satisfy me on the balance of probabilities that this evidence cannot be relied upon.

[20] The plaintiff addresses its onus by referring me to the following and inviting me to draw inferences:

(a) The defendant was not a man untutored in business and of limited business experience. He had spent his working life in the finance industry. He was not, therefore, commercially naïve. He was not someone who would make this important commercial decision in reliance on representations made by someone who he knew had not seen the lot himself — not if the representations as to views and proximity to Mangawhai were of prime concern to him.

(b) The defendant knew all about coastal property. He had previously owned three beach properties, the last two having been bought for speculative gain. The defendant was candid in his evidence that he

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6 *Savill v NZI Finance Ltd* [1990] 3 NZLR 135 (CA) at 141 per Bisson J; see also *Buxton v The Birches Time Share Resort Ltd* [1991] 2 NZLR 641 (CA) at 647 per Hardie Boys J.

7 Notes of evidence, p 78.

signed up to buy lot 14 as an investment because he believed that coastal subdivisions were appreciating assets.

(c) I should infer that the defendant did not really care about the truth of the representations. He had seen the brochure and he believed that any well-situated lot in that subdivision would appreciate in value. Particular attractions were the discounted price ($275,000 down to $255,000) and the anticipated lengthy period before title would be available and the balance of the price fell due. The expected appreciation in value during that period could enable the defendant at once to on-sell at a profit.

(d) I should infer that if the lot was bought by the defendant as a future holiday place for his family, and with the views being of such importance, then he would not have waited until February 2007 to inspect it.

(e) I should infer that what prompted the inspection was the softening property market and a realisation by the defendant that this might turn out to be a losing investment. Having seen the lot the defendant elevated the representations to a prominence they had not occupied at the time he signed the agreement.

[21] I am satisfied on the balance of probabilities that the representations did induce the defendant to enter into the contract. Certainly he considered the purchase to be a good investment. But I accept that he would not have bought any old lot. He wanted an attractive lot which would give the best gain. The brochure makes it clear that not all lots have sea views. As an experienced owner of coastal property the defendant knew the importance of such views. I accept his evidence that the lake views were of secondary importance in his mind. In my conclusion, had Mr Blomfield told him that lot 14 really had no views of the sea at all, apart from a distant "peep", the defendant would have directed his attention to other lots which did have sea views.

Did the plaintiff intend for the defendant to be induced?

[22] Again in *Savill v NZI Finance Ltd*, the Court of Appeal held that there must be intention by the representor to induce entry into the contract:[8]

> At general law, inducement involves purpose as well as result. Not only must the representation have caused the representee to enter into the contract but also the representor must, either in fact or in contemplation of law have intended to cause him to do so …. [I]t remains the law that it is not enough for a party to say that a representation caused him to act in a particular way. He must also show either that the representor intended him to do so, or that he "wilfully used language calculated, or of a nature to induce a normal person in the circumstances of the case to act as the representee did" ….

[23] I am satisfied that when Mr Blomfield described the property as having clear sea views, expansive lake views and being close to the town and beach, he intended, on behalf of the plaintiff, to induce the defendant to purchase lot 14. He was a sales agent seeking to make a sale amidst a climate of infectious enthusiasm for coastal properties. His statements were not a mere puff.

[24] It is not sufficient for the plaintiff to say that a prudent purchaser would have inspected the property personally before entering into the contract. The plaintiff invited the defendant to rely on its representations. It is no defence that the reliance was unreasonable or that the untruth of the representations was reasonably discoverable.[9]

Did the parties agree that the truth of the representation was essential?

[25] This brings me to consider the first ground for lawful cancellation under s 7(4)(a) of the Contractual Remedies Act. The assessment for determining essentiality was summarised in *Mana Property* as:[10]

> [25] In the end, the preferable approach is to ask whether, unless the term in question was agreed at the time of contracting to be essential, the cancelling party would more probably than not have declined to enter into the contract. That question must be answered by an objective contextual

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8 *Savill v NZI Finance Ltd* at 145 per Hardie Boys J.

9 *J B Aubin Realty Ltd v Hinton* [2011] NZCA 465 at [45]–[54].

10 *Mana Property Trustee Ltd v James Developments Ltd* [2010] NZSC 90, [2010] 3 NZLR 805 at [25]; see also *Tramways Advertising Pty Ltd v Luna Park (NSW) Ltd* (1938) 38 SR (NSW) 632.

> appraisal which disregards what a party may unilaterally have said about its intention in that regard.

[26] I have already found that the defendant was induced by a misrepresentation to enter the contract. While that is a relevant factor, inducement is not decisive for determining essentiality. Nevertheless, having heard the evidence and submissions from both parties, I am of the view that the defendant would on the balance of probabilities have declined to enter into the contract if he had known that the property did not have clear sea views. I am therefore satisfied that the representation as to clear sea views was essential to the defendant.

[27] The remaining issue is whether the parties expressly or impliedly agreed that the truth of the representation was essential. In other words, was the essentiality of the representation to the defendant something that "ought to have been apparent to the promisor"?[11] The Supreme Court in *Mana Property* stated of implied agreement that:[12]

> The court must ask itself whether, without expressly stating that the term [*or representation*] is essential … the parties can be seen, in context, to have intended that that should be the position.

[28] The answer in this case is yes. The defendant made it apparent that he wanted a property with clear sea views and the plaintiff's agent induced him to purchase the property on the basis that the representations were true. The essentiality of the representations to the defendant is something that ought to have been apparent to the plaintiff.

[29] I find that the defendant was induced to enter into the contract by a misrepresentation, the truth of which was essential to him. His cancellation of the contract in February 2007 was therefore lawful. That is sufficient to resolve this case, but for completeness I will go on to consider whether the consequences of the misrepresentation were substantial.

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11 *Tramways Advertising Pty Ltd v Luna Park (NSW) Ltd* at 641, cited in *Mana Property Trustee Ltd v James Developments Ltd* at [15].

12 At [24].

Did the misrepresentation result in a substantial disadvantageous consequence?

[30] The alternative ground of cancellation, under s 7(4)(b)(i), is that the effect of the misrepresentation was substantially to reduce the benefit of the contract to the defendant. Guidance on the Court's approach as to substantiality is provided in *MacIndoe v Mainzeal Group Ltd*:[13]

> Substantiality in that statutory context is a matter of fact, degree and impression. It has the same flavour as "significantly" and "considerably". It is equally incapable of any kind of arithmetical analysis. One must stand back and, assessing the matter objectively, determine whether the effect of the breach will be, to take the most obvious provisions subparas (i) and (ii), substantially to reduce the benefit of the contract … or substantially to increase the burden … under the contract.

[31] And in *Jolly v Palmer*, Hardie Boys J stated:[14]

> The statute does not define the word "substantially" and the Court should not attempt to do so either. It is enough to say that what is required is something more than trivial or minimal, but I think [counsel] went too far when he argued that what is required is a difference so great as to alter the subject-matter of the contract. Each case must be considered on its own facts, and an individual determination made having regard to the nature of the contract and of its subject-matter and to all the circumstances of the case. In a house purchase, recognition must be given to the fact that values, and hence benefits, are not capable of precise assessment and are likely to be affected by a range of extraneous factors both objective and subjective. Further, the matter cannot be determined solely by reference to the amount of any difference between value and price, for an identical amount may be substantial in the case of a low cost property but quite insignificant in the case of an expensive one.

[32] For this inquiry, benefit need not be a commercial benefit. But that is the nature of benefit I will first consider in this case. This is because I find that the benefit principally sought by the defendant in entering the agreement was an asset worth at least the purchase price and with the potential to appreciate in value.

[33] Both parties appreciated this point. Each called a registered valuer to give evidence of the market value of lot 14 at the time the defendant agreed to buy it.

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13 *MacIndoe v Mainzeal Group Ltd* [1991] 3 NZLR 273 (CA) at 284–285.

14 *Jolly v Palmer* [1985] 1 NZLR 658 (HC) at 662–663.

[34] For the plaintiff the valuer was Mr Sprague. His evidence was that if the lots in the subdivision were ranked then he would place lot 14 in about the middle. Having looked at the sale prices achieved for 27 of the lots at the relevant period,[15] he was of the opinion that $255,000 for lot 14 reflected its market value.

[35] For the defendant the valuer was Mr Aslin. His evidence was that lot 14 was worth only $225,000 in October 2005. Mr Aslin did not have access to the information on actual sales upon which Mr Sprague placed reliance. He referred instead to the three examples of lots from the subdivision for which sales were actually completed in the relevant period. He also used as comparisons sales of other properties he took to be relevant.

[36] Mr Aslin, in his oral evidence, did not accept as valid the reliance Mr Sprague put on the sales prices of the lots in the subdivision contained in the signed contracts. However, I do not place much weight on his reasoning (that contract prices can be manipulated by developers) because there was no evidence to give it a factual basis. Nor, having heard the evidence of all the witnesses familiar with lot 14, do I accept Mr Aslin's claim in his report that lot 14 was "one of the less desirable lots within the subdivision".[16]

[37] Overall, I prefer the evidence of Mr Sprague. He based his valuation on actual contract prices not available to Mr Aslin. I accept, on the descriptions of other witnesses, that Mr Sprague's opinion that lot 14 was at the middle of the range of lots is about right. It follows that I accept the plaintiff's argument that lot 14, at the time the defendant signed up to buy it, was worth the purchase price.

[38] The question I am concerned with, however, is not whether the defendant paid market value for the property, but whether the value of the property that the defendant purchased was substantially reduced when compared to the value that the property would have attracted had the plaintiff's misrepresentations been true. Valuation is not an exact science. Values cannot be easily assigned to features or

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15 Sale prices in this context are prices contracted for regardless of whether purchasers later failed or refused to settle.

16 Market valuation report prepared by Mark Aslin of TelferYoung (Northland) Limited, dated 12 September 2011, at [10].

characteristics that do not exist with regard to a particular property. Mr Aslin advises that it is not possible to quantify with any certainty the effect that clear sea views would have had upon the value of lot 14.[17] I agree. But I accept that a premium attaches to properties that have sea views (compared to those that do not) and that if lot 14 had clear sea views, this would have had a positive effect on its value.

[39] Mr Aslin estimates that if lot 14 had met Mr Blomfield's description, its value would likely have been higher by approximately 20 per cent as a minimum figure. (Although I bear in mind my finding that Mr Aslin's property valuation was below value.) Mr Sprague did not attempt to quantify the difference in value that would arise if the plaintiff's misrepresentations were true. Hence there are no reliable figures from which I can determine whether the difference in value was substantial.

[40] Fortunately, figures are not necessary. Substantiality is a matter of fact, degree and impression. In *Brown v Castles*, this Court accepted that a misrepresentation suggesting that the views from a property would remain preserved because of permanent height restrictions substantially reduced the value of the property.[18] Similarly, in this case, I accept that the lack of clear sea views from a property that was represented to have such views substantially reduced the value of the property to the defendant. That the property did not have clear sea views substantially diminished the overall appeal of what the defendant had contracted to buy and its value as an investment property. The defendant was therefore justified in cancelling the agreement on the basis of the detriment caused by the misrepresentation.

Conclusion

[41] I am satisfied that the representation as to clear sea views was essential to the defendant and that it was erroneous. In addition, the effect of the misrepresentation was substantially disadvantageous to him. Therefore, the defendant lawfully cancelled the contract in February 2007. The plaintiff's application for specific performance must fail.

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17 Brief of evidence of Mark Aslin, dated 20 September 2011, at [15].

18 *Brown v Castles* HC Rotorua A215/85, 15 September 1987, Doogue J at [3.2.7].

[42] That being the case, it is unnecessary for me to determine whether, in addition, Mr Blomfield's representations amounted to misleading and deceptive conduct in trade rendering the agreement void.

Costs

[43] The defendant is entitled to costs on a 2B basis.

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Brewer J