

Privy Council Appeal No. 1 of 1915.

Duncan Rutherford - - - - *Appellant,*
v.
William Acton-Adams - - - - *Respondent.*

FROM

THE COURT OF APPEAL OF NEW ZEALAND.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE 8TH JULY 1915.

Present at the Hearing :

VISCOUNT HALDANE. LORD SUMNER.
LORD PARKER OF WADDINGTON.

[*Delivered by* VISCOUNT HALDANE.]

The real question in this case is whether the appellant, the purchaser of a large tract of land, can, after entering into possession and taking a conveyance, claim compensation for misrepresentation as to the mileage of fencing on the land. The contract was silent as to the fencing, but it is contended that on this subject the respondent's agent made a material misrepresentation as to the mileage which induced the appellant to enter into the contract. Their Lordships will proceed on the assumption that this was so. As, shortly after the payment of the deposit, the purchaser entered into possession and has taken profits, rescission is now impossible. It is equally true that as there is no charge made of fraudulent misrepresentation, no claim can be made for damages for deceit. The only possible remedy open to the appellant

as purchaser is to claim compensation against the vendor for the deficiency in the mileage of fencing by invoking the well known jurisdiction of a Court of Equity in cases of specific performance to order compensation for discrepancy between what is agreed to be conveyed and what can be conveyed.

But their Lordships are in agreement with the majority of the learned Judges of the Court of Appeal of New Zealand in thinking that the case is one to which this remedy has no application. Under the agreement the balance of the purchase money was to be paid on 30th June 1912, and upon payment the vendor was to convey. The purchase money had all been paid excepting two sums of 3,400*l.* and 170*l.* (being interest), which had been retained by the purchaser to meet his claim for compensation for the deficiency. The purchaser's solicitors had written a letter, dated 1st July 1912, in which they proposed that on payment of the rest of the purchase money remaining unpaid the vendor should convey without prejudice to his right of action for the two sums referred to, and they tendered the conveyance for execution without prejudice to their client's claim for shortage of fencing. The proposal was carried out. The result was, in their Lordships' opinion, that the vendor had under the contract a valid claim at law for payment of the 3,400*l.* and the 170*l.* They are further of opinion that the purchaser cannot counter-claim for compensation. They have examined the cases on the point decided both in this country and in the Courts of New Zealand. The result of this examination is to satisfy them that the principle which applies ought to be laid down as follows. In exercising its jurisdiction over specific performance Courts of Equity look at the substance and not merely at the letter of the contract. If a vendor sues and is in a position to convey sub-

stantially what the purchaser has contracted to get, the Court will decree specific performance with compensation for any small and immaterial deficiency, provided that the vendor has not, by misrepresentation or otherwise, disentitled himself to his remedy. Another possible case arises where a vendor claims specific performance and where the Court refuses it unless the purchaser is willing to consent to a decree on terms that the vendor will make compensation to the purchaser who agrees to such a decree on condition that he is compensated. If it is the purchaser who is suing the Court holds him to have an even larger right. Subject to considerations of hardship he may elect to take all he can get, and to have a proportionate abatement from the purchase money. But this right applies only to a deficiency in the subject-matter described in the contract. It does not apply to a claim to make good a representation about that subject-matter made not in the contract but collaterally to it. In the latter case the remedy is rescission, or a claim for damages for deceit where there has been fraud, or for breach of a collateral contract if there has been such a contract.

Their Lordships have arrived at the conclusion that as rescission cannot now be asked for, and as there is no such collateral contract as has been referred to, the claim of the purchaser, the appellant, fails. They cannot find in the letters which they have mentioned anything which gives him a new or different right. They will therefore humbly advise His Majesty that the appeal should be dismissed with costs.

In the Privy Council

DUNCAN RUTHERFORD

v.

WILLIAM ACTON - ADAMS.

DELIVERED BY
VISCOUNT HALDANE.

LONDON :

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1915.