Barrett v Dalgety New Zealand Ltd

Supreme Court Christchurch
5-7 March, 23 April 1979
Bain J

Valuer's professional liability – Report prepared for purchaser – Plaintiff, the mortgagee, relied on the report – Whether valuer owed third party a duty of care – Whether there was dereliction of that duty

The plaintiff sought to recover damages for loss alleged to be due to the defendant's negligent professional advice concerning the valuation of land. The defendant's valuation report (prepared on instructions from the purchaser) was accepted at face value and the land was not inspected by the plaintiff (the mortgagee). Prima facie, the amount of the mortgage represented 60% of the assessed value. The purchaser was adjudicated bankrupt and the plaintiff was unable to sell the land. The question for the court was whether the defendant valuer owed a duty of care to the plaintiff and if so, whether there was dereliction of that duty.

Held, 1 A valuer is a person who represents him or herself as having the skill and knowledge which a reasonably competent member of the profession or calling would have and it is his or her duty to use such skill, care and diligence as is reasonably required in the work undertaken.

The valuation must have been foreseen to be for reference to third parties, that in the event of negligence in its advice being established, those third parties relying and acting upon it would have claims against the valuer. A duty of care was owed to those parties. The plaintiff and his solicitor were entitled on a fair reading of the report to regard the valuation of the lot as one to be relied upon for a mortgage.

2 It is a fundamental duty falling on a valuer is to inform him or herself of circumstances which might affect the property. In regard to the lots offered for sale there were variations in matters of access, availability of power and telephone, altitude, planning restrictions. The valuation of lot 2 was grossly excessive. The defendant was negligent in the gross overestimation of the value of the lot. The plaintiff was entitled to damages to compensate him for the loss sustained by relying on the defendant's negligent valuation.

Cases mentioned
Baxter v FW Gapp and Co Ltd [1938] 4 All ER 457
Cann v Wilson (1888) 39 Ch 39
Donoghue v Stevenson [1932] AC 562
Eagle Store Insurance Co Ltd v Gale and Power (1955) 105 LJ 458.
Hedley Byrne & Co v Heller and Partners Ltd [1964] AC 465
Le Lievre and Dennes v Gould (1893) 1 QB 491
Old Gate Estates Ltd v Toplis and Harding and Russell (1939) 3 All ER 209
Peek v Derry (1887) 37 Ch 541

Bain J: The plaintiff in this action claims to recover damages to compensate him for losses alleged to be attributable to the defendant's negligence in the matter of the latter's advice in its professional capacity as a specialist in rural and urban valuation of land. It is accepted in the statement of defence that the defendant employs registered and trained valuers of rural and urban land, but not accepted that it is itself a specialist in rural and urban valuation. However, it has not been contended by the defendant that, in the event of the plaintiff's allegations of negligence in the matter of the valuation report concerned being established, it will not be liable for the consequences.

Source: New Zealand Institute of Valuers (1993). Land valuation cases 1965-1992. Hutcheson Bowman & Stewart Ltd, Wellington.

As at 3 July 1974 one Gerald O'Farrell (now bankrupt) was seized of areas of rural land on the slopes of the hills in the vicinity of the Governors Bay-Dyers Pass Road and Summit Road (near Christchurch). The total area was of 130.3755 hectares (322.1711 acres). There were two titles. In respect of one title a sub-division plan had been deposited from which four separate titles were procurable, these being of Lots 1, 2, 3 and 4. These lots were respective of –

Lot 1	30.3750 ha (75.0597 acres)
Lot 2	(the subject of the action)
	24.9660 ha (61,6935 acres)
Lot 3	26.48 ha (65.4348 acres)
Lot 4	28.1710 ha (69.6134 acres)

On 3 July 1974 and apparently pursuant to instructions from Mr O'Farrell, the defendant's valuer, Mr Patterson and its registered valuer Mr Carpenter, reported having inspected the properties comprised in the two titles about which their report elaborated their conclusions. The instructions by which the report was bespoken are not precisely set out in the pleadings or evidence, but the purpose for which it was required is reflected in the advertisement which appeared in the newspaper a few days after 3 July 1974 and which will be mentioned presently.

The report having described the particulars already mentioned then continued – (misspelling repeated):

"...

30.3750 Hectares	30,000
24.9660 Hectares	20,600
26.4800 Hectares	20,500
28.1710 Hectares	24,000
109.9920	$95,100

Recommendation: We consider the property to be adequate security for an advance of 60% at the valuation ie the sum of $69,000 (Sixty nine thousand dollars) conditional that each lot namely Lot 1-4 Lot 2 DP 16075 subdivision has its own separate title.

Situation and Access: Lots 1 and 2 are situated on the Governors Bay Dyers Pass Road 8 kilometres from Christchurch.

Lots 3 are situated on the Summit Road while Lot 4 has access via Summit Road to Bush Road which at this stage is a paper road.

Power and telephone are available for connection to Lots 1, 2, 3.

Lot 4 would require additional cost due to access and distance from the existing road (Summit).

Class of Properties: Small farmlets with a considerable area on most, steep with rocky outcrops – no sewage on high pressure water.

Topography: The altitude for the properties range from about:

Lot 1	90 metres to 180 metres
Lot 2	220 metres to 400 metres
Lot 3	240 metres to 360 metres
Lot 4	160 metres to 400 metre

The property as a whole consists of spurs of medium to steep contours running down the ridges to gullies of medium to steep floors with native bush and fern and bracken. Lot 1 faces the North West and is subject to the odd skift of snow however commands an excellent view of the Canterbury Plains and Christchurch. The remaining lot face the South East and look down the Harbour with

each losing the sun early in the afternoon during the winter periods. Lot 2, 3 and 4 are subject to the odd skift of snow.

Winter conditions could be vigorous but not too severe.

Cover and Soil: Cover is mainly English grasses, fern, bracken and native bush with patches of gorse.

The bulk of the area is of the Summit and Stewart Class of brown granular loams over clay of the steep land soils with rocky faces and outcrops there is a portion of Lot 1 PT DP 16075 covered in Tussock, gorse and English grasses which make up the Summit upland and High Country soils of yellow brown earths and finally a portion of Lot 1 is of the Takahe Kiwi soil of yellow grey earths.

Water Supply: Consists of springs and creeks which do tend to dry up and a water scheme which served the whole of the area of comprised in CT 583/79 before subdivision which consisted of a storage tank in Lot 1 DP of the subdivision fed from Lot 3 DP.

Weeds and Pests: Gorse which is a problem because of the ruggedness of the contour.

General: The Blocks of land are of a sizable nature, handy to Christchurch, however Pt Lot 1 on DP 16075 and Parts of Lot 2, 3 and 4 on the subdivisions on Lot 2 DP 16075 are affected by Summit Road (Canterbury) Protection Act and would ideally suit someone wishing to live in a rural atmosphere and with a view."

Between the receipt of this report and 16 July 1974, an advertisement was inserted in the newspaper. It reads:

"FIRST MORTGAGES AT
14 PER CENT
PER ANNUM

First mortgages of $12,360, $12,300, $14,000 and $12,000 respectively are available and the property is situated near Christchurch at Trustee valuations. The mortgages are available for a term of either two or three years and the owner of the land shall reserve the right to repay the mortgage with three months prior notice.

The mortgages are available immediately and interest will commence at date that payment is received. For further information contact:

Mr D A Oldham
Solicitor
90 Hereford Street
Christchurch 1
Telephone 68 774"

This advertisement was seen by the plaintiff who had available a sum of $12,000 for which he had some not immediately future plans related to providing some income for his later years. He was a client of Mr A K Archer, Solicitor, Christchurch and had earlier made investments to Mr Archer's clients on being invited by Mr Archer so to do. He did not at first consult Mr Archer regarding his attraction to the advertised propositions, but went to see Mr Oldham, the solicitor named in the advertisement. He told Mr Oldham that he had $12,000 available for lending on first mortgage and he learned that the borrower on the security as offered of land was a Mr O'Farrell, who was reputed to the plaintiff as a millionaire. The interest rate of 14% offered was very attractive to the plaintiff, as was the term discussed which for some reason not recollected by the plaintiff was fixed in discussion at one year, not two or three as stated in the advertisement. The land available for the mortgage of $12,000 which was attractive to the plaintiff was the above described Lot 2. Having discussed matters with Mr Oldham, the plaintiff went to Mr Archer, to whom he had asked Mr Oldham to send the relevant papers.

On 16 July 1974, Mr Oldham wrote to Mr Archer seeking confirmation from the plaintiff as to the arrangements as discussed, submitting a search note of the title of which the land for security was part, a copy of the subdivision plan and also a copy of the valuation report dated 3 July 1974. The valuation was reflected by the letter as $20,600 for Lot 2.

The land was not inspected either by the plaintiff, his solicitor, or a valuer as employed by him. The valuation report was accepted at face value, no doubt in its own right but having regard to the personal covenant of the reputedly wealthy mortgagor. The valuation by Dalgetys was seen to be adequate as evidence of the worth of the security offered. The money was advanced, a separate title for the lot was issued and the mortgage was duly executed and registered. *Prima face* the amount of the mortgage represented 60% of the assessed value. Indeed, a second mortgage was registered in favour of the subsequently failed Merbank Limited, over the whole block. The first quarter's interest was paid, but no more. There was default also in the matter of repayment of the principal. O'Farrell was adjudicated bankrupt. After some attempts through Dalgety to realise the security, it was eventually, on 11 August 1976, offered for mortgagee's sale through the Registrar of the Supreme Court at the suit of the plaintiff. At the auction the only bid was that of the plaintiff who bought in at $10,000, having found himself in the dilemma on the progressive lowering of the invitations to bid that if the figure dropped, the less would the value be reflected for the eyes of potential buyers showing any interest.

Thus saddled with an unwanted area of land the plaintiff endeavoured to sell firstly through Dalgetys and later, also through Wrightsons (Challenge Corporation Limited). The only interest shown has been that of the Lands and Survey Department of the Crown which has said it would be willing to purchase for $6,310 if it had funds available, which was not the case. The Government valuation fixed as at 1 July 1976 is $8,500.

The plaintiff has been embarrassed by his ownership in more ways than one, for the land is substantially infested with noxious weeds, the non-eradication of which – and the attempts at eradication – have cost the plaintiff a total of $212 in fines and the threat contained in a notice from the Mt Herbert County Council claiming $1,096.04 being the cost to the County of an exercise of its right of entry and execution of eradication work. Quotes obtained have been in one case $1,860 and another for $1,690 for eradication work. Rates have been paid to the two Counties over which the land is situated – $36.62 to Mt Herbert County in September 1978 and $9.18 and $10.95 to the Heathcote County in 1977 and 1978. It is anticipated that the O'Farrell bankruptcy will return nothing to the plaintiff. It appears that the losses on his original investment will be severe.

In this action, the issues are whether the defendant owed a duty of care to the plaintiff and if so, was there a dereliction from that duty amounting to negligence sounding in damages to be paid by the defendant to the plaintiff and if so, what is the quantum?

The defendant does not I think quarrel with the notion that it owed a duty of care in undertaking and reporting as to its valuation, certainly not in the matter of its obligation to O'Farrell. Since *Hedley Byrne and Company Limited v Heller and Partners Limited* [1964] AC 465, over-ruling in this respect *Le Lievre and Dennes v Gould* [1893] 1 QB 491, it is again accepted that the principle stated by Chitty J in *Cann v Wilson* (1888) 39 Ch 39 correctly applies to the professional work of valuers the principle enunciated by Cotton L J in *Peek v Derry* (1887) 37 Ch 541; this is that although it is not necessary that there should be what may be called fraud, yet, in these actions, there must be a departure from duty; and when a man makes an untrue statement with an intention that it shall be acted upon without any reasonable ground for believing that statement to be true, he makes default in a duty which was thrown upon him from the position he has taken upon himself and he violates the right which he owed those to whom he makes the statement to have true statements made to them. When a man makes a false statement to induce others to act upon it, without reasonable ground to suppose it to be true and without taking reasonable care to ascertain whether it is true, he is liable civilly as much as a person who commits what is usually called fraud and tells an untruth knowing it to be an untruth. A valuer is a person who holds himself out, or purports to act, as a valuer and in so doing

represents himself as having the skill and knowledge which a reasonably competent member of the profession or calling would have and it is his duty to his employer to use such skill, care and diligence as is reasonably required in the work which he has undertaken: 39 *Halsbury's Laws of England* (3rd ed) 11. They are liable to their employers for negligence in making a valuation.

Here, of course, the question is whether that liability goes further than just to the person bespeaking the valuation. Does it extend to a plaintiff, not the person for whom the valuation was written, where the plaintiff is a person who would have been foreseen by the valuer as being a person to whom it could in the normal course of events be submitted as reliable? Since *Hedley Byrne* it has now been accepted (see per Lord Hodson (op cit 506)) that the neighbour doctrine of *Donoghue v Stevenson* [1932] AC 562 at one time thought to be confined to negligence resulting in danger to life, limb or health (and so not to negligence of valuers – vide *Old Gate Estates Limited v Toplis and Harding and Russell* [1939] 3 All ER 209) is of much wider implication and into cases where the valuers would know or have reason to believe that such would be given to and relied and acted upon by third parties – to become potential plaintiffs if negligently misled and damnified.

Such indeed was the case of *Cann v Wilson* referred to above and now reinstated as authority, for in that case it was the third party to whom the client of the valuer referred the negligent valuer's report to the third party's cost, who was the successful plaintiff.

It follows from a valuation such as the present which must have been foreseen to be for reference to third parties, that in the event of negligence in its advice being established, such third parties relying and acting upon it would have claims against the valuer. It follows further that, negligence being established, if it is, a right of action avails to this plaintiff for loss occasioned by the negligence.

In his statement of claim, paras 4 and 5, the plaintiff avers that the valuation of $20,600 given by the defendant of Lot 2 was given in the course of the defendant's business in circumstances such that the defendant, its servants or agents, know or ought to have known that it would be relied upon as having been given in a skilled, competent and diligent manner for considering the amount which might safely be loaned by persons upon first mortgage security of the land and the plaintiff was a person or a member of a class of persons whom the defendant contemplated or should have contemplated would rely on such advice. Relying on such advice, it is averred, the plaintiff advanced his $12,000 on first mortgage "for which the defendant had recommended that the land was adequate security". It is true that such recommendation as was contained in the valuation report of the defendant was that the whole block of the four lots plus the other lot on separate title was adequate security for a mortgage of $69,000, but that was expressly stated to be conditional on each lot of Lots 1 to 4 having its own separate title. Moreover, if it was not contemplated that each lot was to be regarded separately for valuation purposes, with mortgage investment being contemplated, why carry out the exercise of valuing each fragmented area separately? On any reasonable reading of the valuation report, it would appear that each individual lot would stand an individual mortgage on normal trustee margin of equity and certainly that is the way Mr Archer, an experienced solicitor obviously knowledgeable in conveyancing practice viewed it, aided by other portions of the report dealing with each lot individually. In the absence of any disclaimer of responsibility or note of caution then, in the event of negligence in valuation being sustained, the defendant cannot escape responsibility on the ground upon which it was submitted, that no case had been made out for the plaintiff, which submission was reserved for further consideration.

I am satisfied that the plaintiff and *a fortiori* his solicitor, were entitled, on a fair reading of the report, to regard the valuation of Lot 2 in the summary without any words of disclaimer, as one to be relied upon for a mortgage such as was in the event granted in reliance upon it. The summary otherwise was an otiose exercise on the part of the defendant, but not likely to be so regarded by a referee to whom the report was likely to be submitted. Accordingly, the defendant has in my view, a case to answer on the pleadings and on the plaintiff's evidence. It must have been foreseen that the valuation was being obtained for reference to third parties interesting themselves in the property involved and it must have been foreseen that it was intended to show to persons who

would be invited to act in reliance upon it. A duty of care was owed to such persons. It was argued that the report could not be regarded as one justifying a mortgage investment unless, in addition to giving a valuation figure, it also recommended either for or against investment, which the report in question did not do expressly in respect of each lot individually.

Was there, then, a dereliction of the duty of care imposed on the defendant here such as to cause the plaintiff to venture into a transaction which was known, or ought to have been known, to be ill-advised? It is accepted that valuers like others can make mistakes. They may be over-optimistic or over-pessimistic in their views of a particular property and sometimes two valuers may differ quite markedly in their views. Their views are matters of opinion. It is not a question of acting otherwise than in good faith, for a person can so act and can still be negligent. A fundamental duty falling on a valuer is to inform himself or circumstances which might affect the property: *Baxter v F W Gapp and Company Limited* [1938] 4 All ER 457 (per Goddard L J (as he then was)) at first instance – approved *Baxter v F W Gapp and Company Limited* [1939] 2 All ER 752 (CA). A mere over-valuation does not of itself show negligence but very gross over-valuation, unless explained, may be strong evidence of negligence or incompetence: per Du Parcq L J (same case) (1939) 2 All ER at p 758.

Here it seems inescapable that in the figure of $20,600 into which the global valuation of Lots 1 to 4 inclusive was divided to produce, by simple arithmetical division, an apportionment of the whole area as set out in the table quoted per the quote. That "Summary of Valuation" included in the quote from the report cannot sensibly be read as being anything other than a valuation attributed to each portion of the whole viewed separately, even though, as the defendant has tried to persuade me, it was only really a valuation of the whole area, one as stated to be adequate security for an advance of 60% amounting to $69,000. Any other view for reasons already discussed, would be inconsistent with the context of the report where each of Lots 1 to 4 separately has mention made of its own features. Moreover, the advance supported of $69,000 for the whole is conditional on there being separate titles available for each of the four lots. It is significant also that the advance suggested as sustainable at $69,000 is dependent on separate titles being available for the respective four lots.

Even on the face of the report it does not appear that the respective lots have been weighted or lightened in value as the case may be because of attractiveness or detractiveness in the matter of the factors mentioned. There are variations in matters of access, availability of power and telephone, extra cost of access to Lot 4 as compared with other lots including Lot 2 and even for variations in altitude. Contours and topography are different. Infestations of weeds are different. A major factor relating to valuation is that Lot 1 is the only one accommodating living quarters – a two roomed cottage at least capable, so the evidence before me shows, of being enlarged – the other three lots have no living quarters of any kind. This advantage over Lot 2 would make Lot 1 worth three times the value of Lot 2 in the estimation of the plaintiff's valuer, Mr Bridgeman. In respect of these on the evidence before me of the valuers, erection of a house on the lots as single entities is impossible because of town and country planning restrictions denying building permits on this rural land on other than economic units which none of the lots are. There are also building and improvement restrictions arising from the statute known as the Summit Road Protection Act 1963 which in effect inhibits the erection of residential structures and affects fencing up to a certain distance from the road.

For the plaintiff, Mr Bridgeman gave his assessment of Lot 2 as $6,240 which, if accepted as being commensurate with a 1974 assessment, would make a $20,600 valuation at that time grossly excessive.

Apart from that *prima facie* evidence from which negligence is capable of being inferred, there were also the other factors referred to at first instance in *Baxter v F W Gapp and Company Limited* (supra) when Goddard L J (as he then was) observed that among the duties of professional valuers, there is a duty to use reasonable care in coming to the valuation which he was employed to make and he must be taken to have held himself out as possessing the experience and skill required to value the particular property . . . He ought to have taken steps to inform himself of the values of

properties there, or of *any circumstances which might affect the property* (the emphasis is mine). Here it was apparent for one essential detail that the individual lots, as farmlets or small landed residential areas which is obviously what the subdivision was intended to exploit, except Lot 1, were seriously disadvantaged because of the restrictions on building development imposed by legal difficulties apart altogether from other handicaps such as access, topography, lack of water and reticulation of electricity and telephone aspect, effluent disposal and so on. There were also the varying disadvantages in the matter of dilapidated fencing (if any at all) outcrops of rock to varying degrees and noxious weeds problems.

Even on the evidence of the defendant's valuers, the valuation of $20,600 for Lot 2 was grossly excessive in 1974. Mr Cooke gave a detailed valuation discussing such meagre comparisons of values as were available and also such features as are set out earlier arrived at a figure of $12,500 as the value of Lot 2, this being in fact more by $1,500 than the valuation he made of the same area for the Official Assignee in 1975, the reason being the possibility of obtaining subsidy assistance now in the matter of gorse clearance even though the land itself is impossible of cultivation. Mr Cooke spoke of the two factors related to a valuer's report for mortgage purposes, namely the actual value of the property plus the recommendations wither way, as to the advisability of lending which, he said, depended not only on values but also ability to service the loan. This relates rather to the amount it is safe to lend on mortgage, as to which reference may be had to 39 *Halsbury's Laws of England* (3rd ed) 11, where it is mentioned that a valuer, advising a trustee, must take into account all the circumstances connected with the property, including its nature and must advise as to the amount which it is safe to advance on the property. It was of interest to note from Mr Cooke's evidence, that had he been given the task of valuing the whole area concerned as one subdivided as it is into lots, he might have valued it as one entity or he might have valued each lot separately, in which case he would have expected the aggregated values to equate with the value of the whole. He must be presumed to have meant that an assessment of each lot might have allowed one way or other for individual features one way or the other which would in any event have manifested themselves in a proper inspection and assessment of the whole.

The other valuer called by the defendant, Mr Oldfield, conceded that if the respective four lots Nos 1 to 4 had been able to be built on with houses, the value of Lot 2 might have been justified at $20,600, but without that he acknowledged a very limited market for 60 acres of the land concerned, likely only to commend itself to someone interested in increasing an area already held of rural land. He agreed with Mr Cooke that it was irresponsible to value Lots 2, 3 and 4 as residential propositions such as was obviously an influential feature reflected in the paragraph headed "General" with which the report, the subject of this action, concludes. That paragraph is as follows:

> "The blocks of land are of a sizable nature, handy to Christchurch, however Pt Lt 1 on DP 16075 and Parts of Lot 2, 3 and 4 on the subdivision on Lot 2 DP 16075 are affected by Summit Road (Canterbury) Protection Act and would ideally suit someone wishing to live in a rural atmosphere and with a view."

I am of the opinion that, competent and respected though on the evidence, they undoubtedly were especially the latter, the valuers, Messrs R W Patterson and F A J Carpenter were negligent in their gross over-estimation of the value of Lot 2 and that that *prima facie* conclusion gathers considerable weight from the fact that the property was given that appraisal by reason of insufficient attention to restrictions on the erection of residences, mainly by law but also physically. The legal restrictions were easily ascertainable by the sort of enquiry required of a competent valuer, but they were overlooked in breach of their professional duty of care.

The plaintiff is thus entitled to damages from the defendant to compensate him for such loss as he sustained by relying on the defendant's negligent valuation.

As to the assessment of damages, the heads of claim set out in *Baxter v F W Gapp and Company Limited* (supra) were –

(a) the difference between the sum advanced and the proceeds of sale;

(b) the amount of interest which the mortgagor failed to pay;
(c) the cost of insurance and repair while the mortgagor was in possession;
(d) expenses of abortive attempts to sell and the agent's commission when a sale was made; and
(e) legal charges of possession and sale.

In the instant case the property concerned has not been sold. In such circumstances the personal covenant having totally failed as the collateral security because of O'Farrell's barren bankruptcy, the basis suggested by Devlin J in *Eagle Store Insurance Company Limited v Gale and Power* (1955) 105 LJ 458 in lieu of (a) is what would the plaintiff have got if he had realised his security. According to the evidence before me, the nearest realisation expectancy for the lot is what the Lands and Survey Department would pay if funds permitted, viz $6,310, so that, based on Alternative A as submitted to me as the most appropriate for contemplation and using guidelines analogous to those in the last-mentioned cases, the amount need to restore the plaintiff to his position before his reliance on the valuation would seem to be:

Principal sum	$12,000.00
Interest 26/1/75 to 11/8/76 (being the date of exercise at power of sale 1.539 years at 14%)	2,586.74
Costs on power of sale	507.60
	$15,094.34
Interest 11/8/76 to 23/4/79 (2.699 years at 7-1/2%)	3,055.47
Noxious Weed penalties	
22/8/77	53.00
9/2/78	103.00
28/11/78	56.00
Noxious weed clearance	1.096.04
Rates – Mt Herbert County Council 1978	36.62
Heathcote County Council 1977	9.18
1978	10.95
	$19,514.60
Less value of land	6,310.00
	$13,204.60

There will be judgment accordingly for the plaintiff in the said sum of $13,204.60 together with costs and witnesses' expenses to be fixed by the Registrar.