NZLR (Green)

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

C.P. NO. 1085/87

LOW PRIORITY

BETWEEN ENCORE FINANCE LIMITED

Plaintiff

A N D P.G. CROSS

Defendant

Hearing: October 7, 1987

Counsel: Mr. Parmenter for Plaintiff
Mr. Fardell for Defendant

Judgment: 14 OCT 1987

JUDGMENT OF MASTER TOWLE

This application was brought for Summary Judgment in the following circumstances. At all relevant times the Plaintiff was the lessee of the three properties leased from the Dilworth Trust Board situated at 33-35 Maranui Road, Newmarket and at 80 Great South Road. The properties were all contiguous to each other and in February 1987, the Plaintiff had negotiated an arrangement with the Dilworth Trust Board as owner of the freehold, to amalgamate the titles and grant a single new lease to permit development on the land as a whole.

In May 1987 the Plaintiff had entered into a separate agreement for the purchase of another property on the corner of Great South Road and Maranui Road which land, together with the other two properties the subject of this agreement for sale and purchase, gave a total area of 3,950 square

metres. The Plaintiff indicated that this was too large for it to develop alone.

On 29th June 1987, after some negotiations, the Plaintiff entered into an agreement with the Defendant for the sale and purchase of the three portions of leasehold land at a price of $1.1 million, with a deposit of $110,000 becoming payable when the agreement became unconditional. The following conditions attached to that agreement:

> "12.0 This agreement is entirely conditional upon the approval of the purchaser being given within 14 days of the date of this agreement.
>
> 12.1 The purchaser may at his option convert this agreement to a purchase of the shares in Encore Finance Limited - with the only assets of the company being the property contained within this agreement.
>
> 12.2 The consent of the Dilworth Trust Board to the transfer shall be obtained by the vendor."

The purchaser was described in the agreement as being "a trustee of a company to be formed and/or nominee".

The evidence was that during the negotiations carried out in the last week in June 1987, the Defendant had expressed interest in both properties. He was known to the Plaintiff to be a person of considerable experience and expertise in property development. In the event, as well as entering into the agreement for the sale of the three leasehold properties, on the same day the Plaintiff entered into a separate agreement with the Defendant relating to the other property known as the Atlas Gentic property but no copy of that agreement or of its terms and conditions was made available to the Court.

Subsequent to the signing of the two agreements and before the one with which this proceeding is concerned became unconditional, the Plaintiff embarked upon quite separate negotiations with another potential purchaser for the sale

of both properties. As a result of these discussions an approach was made by Mr. Newlove of the Plaintiff company to Mr. Cross as a result of which the parties agreed upon an extension of the original time for satisfying the condition in the agreement which would have expired on 13th July. The original date was twice extended finally to expire by 5 pm on Wednesday, 15th July. On that day there was a telephone discussion between Messrs. Newlove and Cross as a result of which the Defendant sent the following telex:

> "We confirm our telephone conversation of today's date. For the residential section we confirm we will go unconditional and reserve our right to the commercial site (Atlas Gentic) until midday Thursday the 18th July."

The deposit of $110,000 was not paid and the Plaintiff has brought this action seeking payment on the grounds that the conditions in the agreement had been satisfied and that it was unconditional. The claim recorded that the Defendant had repudiated the agreement by letter sent from its solicitors to the vendor's solicitors on 17th July but that the Plaintiff had refused to accept the repudiation and claimed the deposit.

The allegations in the Statement of Claim were verified by the first affidavit of Mr. Newlove who swore it in his capacity both as a principal of the firm of Daniel Overton & Goulding and also as a director of the company. He deposed that he was authorised to give evidence on behalf of the company and as to his belief that the Defendant had no reasonable defence to the Plaintiff's claim, though whether his belief was expressed in his capacity as a director or as solicitor to the company was not made clear.

A preliminary point was raised by Counsel for the Defendant at the hearing that the affidavit had failed to comply with the provisions of Rule 138(2)(b) in that it did not

make it clear that Mr. Newlove was deposing as to anything other than his own personal belief. I was referred to the decision of Doogue, J. in Registered Securities Limited v. Lemrac Farm Limited & Others reported in the Hamilton Registry under M. No. 184/86 - a decision given on 24th October, 1986. While noting the objection, I proceeded to hear the application.

The Defendant, in giving notice of opposition, filed three affidavits, one by Mr. Cross himself and the other two by P.G. Murphy and B. Ryan. These disclosed for the first time that the Plaintiff had actually entered into an agreement for sale and purchase of all the properties, including both the leasehold ones and the Atlas Gentic property, to a purchaser called Sunrise Finance Limited at a price of $3.3 million. That agreement, which was undated, was not expressed in any way as being subject to the release by the vendor from any previous obligations to sell to the Defendant. Mr. Cross deposed that Mr. Newlove had visited him on 9th July (which was still within the 14 day conditional period) and invited him to execute an abandonment of his rights as purchaser under the agreement dated 29th June on the basis that the Defendant would be paid $100,000 for costs and expenses incurred from the proceeds of the sale of the Plaintiff's property to some other purchaser which was due for 7th August. It is quite clear that the other negotiations must have been with Sunrise but until Mr. Cross filed his affidavit in opposition there was nothing before the Court to indicate that there had been any negotiations subsequent to the signing of the agreement on 29th June. Although the correspondence relating to the extension of the original 14 days was put before the Court and the message of acceptance sent on 15th July, the Plaintiff had not disclosed that it had taken the initiative in arranging the extensions or that it was negotiating a "buy out" arrangement with the Defendant. In response to the Defendant's filing of the three affidavits, the Plaintiff filed two further affidavits by Mr. Newlove and one by a Mr. McElhinney, responding to certain of the matters

deposed to on behalf of the Defendant. Mr. Parmenter asked for these two further affidavits by Mr. Newlove to be read as part of the Plaintiff's case but agreed not to rely upon the affidavit of Mr. McElhinney.

In support of his submissions that the Defendant did not have any reasonably arguable defence to the Plaintiff's claim, he submitted that the conditions had all been satisfied by the extended date and that the deposit was payable. He submitted that the agreement was still on foot and that the Plaintiff was entitled to sue for the deposit even though this, in effect, was seeking a form of limited specific performance. In response to the grounds of opposition advised by the Defendant, he submitted that the agreement clearly identified the interest which was to pass on sale and that there was no uncertainty as to what was taking place. He submitted that the terms of the new lease to be granted by the Dilworth Trust Board were clearly established and the Defendant knew from the time of the beginning of the negotiations that the titles were to be amalgamated. He pointed out that no objection was made by the Defendant as purchaser to the vendor's title within the time stipulated in the agreement. As regards the subsequent negotiations for the "buy out" arrangement, he submitted that the payment to the Defendant could only be made if there was an unconditional agreement and that the vendor could not have agreed to pay $100,000 to the Defendant until it could get such an agreement with Sunrise. He submitted that the only conclusion was that the Sunrise agreement was not an unconditional one. He submitted that until the proceedings were issued and notice of opposition was filed, there had been no suggestion that there might have been any misrepresentation between the parties relating to the position over the Sunrise agreement or that the Defendant might have been induced to give its consent to making the agreement unconditional as it did on 15th July because of those representations.

In reply, Mr. Fardell submitted that the application should be rejected on a number of grounds. Specifically he submitted that the Plaintiff, in seeking to enforce payment of the deposit, was endeavouring to obtain an order for specific performance in a limited way and was trying to separate this from performance of the contract as a whole. This was objectionable since there was some evidence that the relationship between the parties might have been affected by the subsequent negotiations over the "buy out" arrangement.

He submitted that there were disputed issues of fact which were fundamental to the Plaintiff's case and fatal to Summary Judgment procedure which could not be resolved from the affidavits. This was particularly so in relation to the question of when the Sunrise agreement was first disclosed to the Defendant. This was a vital issue as it went to the rights of the parties. He also submitted that there were other areas where credibility was at issue and the whole series of events starting from the time the parties first entered into negotiations down to 17th July, should be verified by viva voce evidence tested by cross-examination in the ordinary way. In addition, the Defendant had given notice that it wished to counterclaim for payment of the $100,000 which it claimed was due under the "buy out" arrangement but the circumstances surrounding this arrangement were inseparable from the negotiations between the parties as to whether or not the original purchase was to proceed.

After carefully studying the affidavits and having the benefit of submissions of Counsel, I am not satisfied that the Plaintiff has discharged its onus of proof that the Defendant has no reasonable defence to the claim as presented. I find a somewhat uncommendable lack of fullness in the matters deposed to by Mr. Newlove in his original affidavit and am not satisfied as to whether or not the parties, subsequent to their original agreement,

reached a further agreement to vary it by the "buy out" arrangement. Although Mr. Parmenter invited me to consider each of the possible defences suggested by the Defendant in its notice of opposition, and to consider whether any of them had real merit, I find I could not reach conclusions on several of the suggested defences without the benefit of full evidence tested by cross-examination in the ordinary way. This is not one of the occasions when the issues are clear cut or where the Defendant is endeavouring to float fanciful or hypothetical defences which, on close examination, sink quietly to the bottom. The parties concerned were experienced in property development and negotiations, and I believe there is a bona fide dispute as to what their rights and remedies were against each other.

For these reasons I am not prepared to enter judgment on the Plaintiff's application which is accordingly dismissed.

The Plaintiff is, however, entitled to have the matter finally determined with a minimum of further delay. I direct that the Defendant shall file and deliver a full and explicit Statement of Defence and counterclaim within 21 days and that the Plaintiff be permitted a further 14 days to plead to the counterclaim. This dispute is one where discovery will be important and I make a further order that each party should deliver to the other a verified list of documents on which they may rely within a further 14 days.

As to costs, I fix these in an amount of $1,750.00 in favour of the Defendant in relation to this hearing but the final incidence of these is to depend upon the outcome of the proceeding.

MASTER R.P. TOWLE

Solicitors:

Brandon Brookfield, Auckland, for Plaintiff
Russell McVeagh McKenzie Bartleet & Co., Auckland, for Defendant