IN THE HIGH COURT OF NEW ZEALAND
NAPIER REGISTRY

CIV-2009-441-237

BETWEEN	FRIMLEY ESTATE LIMITED Plaintiff
AND	STONEWALL HOMES LIMITED First Defendant
AND	MICHAEL JON REDSHAW Second Defendant

Hearing: 18 September 2009

Appearances: T. Petherick - Counsel for Plaintiff
J.G. Krebs - Counsel for First and Second Defendants

Judgment: 28 September 2009 at 3.15 pm

JUDGMENT OF ASSOCIATE JUDGE D.I. GENDALL

This judgment was delivered by Associate Judge Gendall on 28 September 2009 at 3.15 p.m. pursuant to r 11.5 of the High Court Rules.

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Introduction

[1] In this application the plaintiff, Frimley Estate Limited ("Frimley"), seeks summary judgment against the first defendant, Stonewall Homes Limited ("Stonewall"), pursuant to an agreement for the sale and purchase of 21 residential sections at Hastings and against the second defendant, Michael Jon Redshaw ("Mr Redshaw") as an alleged guarantor of Stonewall's liability. Mr Redshaw is a director of Stonewall.

[2] The application is opposed by both Stonewall and Mr. Redshaw.

Background Facts

[3] The parties entered into an agreement for sale and purchase ("the Agreement") on 31 August 2007. The Agreement related to the sale of 21 lots within a Hastings subdivision by Frimley as vendor to Stonewall as purchaser, for a purchase price of $3,307,000.00. Stonewall paid an initial deposit of $165,350.00 on 3 September 2007, and a second deposit of $165,350.00 on 8 November 2007.

[4] Certificates of title were issued for 13 of the lots (Lots 3, 4, 5, 6, 9, 10, 11, 12, 13, 14, 15, 16 and 17) on 28 November 2008. Stonewall was then required to pay an additional 10 per cent deposit of $124,900.00 with respect to the deferred settlements of eight lots. Following the issuing of titles Stonewall was also required to effect settlement with respect to five of the lots (Lots 5, 6, 9, 10 and 11) on 9 December 2008. Stonewall defaulted on the obligation to settle on this date.

[5] On 12 December 2008 Frimley served a settlement notice on Stonewall requiring it to settle the five lots on or before 16 January 2009, noting that time was of the essence. Stonewall failed to settle on 16 January 2009. Stonewall also failed to pay the 10 per cent deposit with respect to the eight deferred settlement lots, in breach of the Agreement and despite demand.

[6] On 28 January 2009 Frimley cancelled the Agreement with respect to the 13 lots. This cancellation is not contested in any real way by Stonewall here. Around 24 February 2009 Frimley instructed a real estate agent to sell the cancelled lots by

way of tender. After expenses and sale commissions, the lots were sold for a net figure of $471,567.55 less than the Agreement price.

[7] Frimley now claims $521,226.00 losses against Stonewall calculated as follows:

(a)	Actual loss on sections sales	$414,567.00
(b)	Advertising fees	$ 1,995.00
(c)	Real estate commissions	$ 47,323.15
(d)	Travel expenses	$ 1,930.00
(e)	Legal fees (non-litigation)	$ 5,782.50
(f)	Penalty interest up to cancellation	$ 16,134.50
(g)	Finance costs	$ 33,493.85 (plus continuing losses).
	Total =	$521,226.00

[8] Frimley seeks summary judgment as to liability against Stonewall for breach of the Agreement, and judgment for losses already suffered as outlined above, amounting to $521,226.00. Frimley also seeks interest on the finance costs from the date of settlement of the onsold lots until the date of judgment, interest from the date of judgment, and costs.

[9] So far as the action against Mr. Redshaw is concerned, Frimley claims that he personally guaranteed the obligations of Stonewall pursuant to the Agreement. Frimley also therefore seeks summary judgment as to liability and for the losses outlined as against Mr Redshaw as guarantor.

[10] These applications are opposed by Stonewall and Mr Redshaw on the basis that they have arguable defences available.

Summary Judgment Principles

[11] Rule 12.2(1) of the High Court Rules provides:

> **"12.2 Judgment when there is no defence or when no cause of action can succeed**
>
> (1) The court may give judgment against a defendant if the plaintiff satisfies the court that the defendant has no defence to [a cause of action in the statement of claim or to a particular part of any such cause of action]."

[12] The principles of summary judgment have been recently summarised by the Court of Appeal in *Krukziener v Hanover Finance Ltd* [2008] NZCA 187:

> "[26] The principles are well settled. The question on a summary judgment application is whether the defendant has no defence to the claim; that is, that there is no real question to be tried*: Pemberton v Chappell* [1987] 1 NZLR 1; (1986) 1 PRNZ 183 (CA), at p 3; p 185. The Court must be left without any real doubt or uncertainty. The onus is on the plaintiff, but where its evidence is sufficient to show there is no defence, the defendant will have to respond if the application is to be defeated: *MacLean v Stewart* (1997) 11 PRNZ 66 (CA). The Court will not normally resolve material conflicts of evidence or assess the credibility of deponents. But it need not accept uncritically evidence that is inherently lacking in credibility, as for example where the evidence is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable: *Eng Mee Yong v Letchumanan* [1980] AC 331; [1979] 3 WLR 373 (PC), at p 341; p 381. In the end the Court's assessment of the evidence is a matter of judgment. The Court may take a robust and realistic approach where the facts warrant it: *Bilbie Dymock Corp Ltd v Patel* (1987) 1 PRNZ 84 (CA)."

Misrepresentation

[13] Stonewall's first defence is its claim that it was induced to enter into the Agreement by a misrepresentation made on behalf of Frimley as to when certificates of title for the lots in question would be available. Mr. Redshaw in his 12 June 2009 affidavit claims that on 18 April 2007 he spoke with Mr. Alistair Taylor at Frimley, who advised that the titles for the lots would be available at the end of the year or early next year – December 2007 to early 2008.

[14] Mr. Redshaw states that he also discussed the availability of the titles with Ms. Kristy Duff from Frimley in April 2007, and that she advised titles for one set of lots would be available in November 2007, another set in January 2008, and the rest in March 2008. As pointed out by counsel for Frimley, however, the words actually used by Ms. Duff in the email attached to Mr. Redshaw's affidavit are that those

were the dates that titles were "*expected*", that titles "*should*" be available, and timing of the titles would be "*more or less"* along those lines.

[15] Mr. Redshaw, however, describes Mr. Taylor and Ms. Duff as not wavering or making any conditions on their statements regarding when title would be available. He says that he did not necessarily expect that the titles would become available in the months estimated, but that "*titles would be available roughly, say within a couple of months, of when promised*". In fact, the titles did not issue until late November 2008, just over a year after what he says was the first projected date.

[16] As reflected in the Agreement, it was intended that the lots would be sold in stages, so that presumably Stonewall would be able to market the lots and perhaps arrange reduced finance from one stage to the next. Mr. Redshaw contends that the timing of when the titles became available was essential to him because he was required to pay deposits on the land, to register a mortgage, and to construct and sell spec houses to prospective purchasers. As such, Mr Redshaw claims that he was induced into entering into the Agreement by what he says are misrepresentations as to when title would become available. He contends he would never have entered into the Agreement had he known the amount of time it would take for the titles to issue, due to the holding costs, the locking up of finances, and the lack of certainty as to the value of the sections after such a long period of time.

[17] Mr. Stephen (Nick) Duff ("Mr. Duff"), the sole director of Frimley responds to the claims of misrepresentation in his 16 July 2009 affidavit. He states that what was provided to Mr. Redshaw was only a timing estimate, and that an estimate was all that could be provided at that stage because there were so many future variables. He notes that Stonewall is an experienced property development company and is well aware of the process by which titles are issued for subdivisions, and the uncertainty and glitches that can occur in this process. Mr Duff discusses the external problems in this case which were largely beyond Frimley's control, which he says caused the delay in issuing the certificates of title beyond what it had honestly expected and estimated. He states at para 19:

> "19. To summarise, our expectations about when titles would issue, though honestly and reasonably held, varied over time as conditions and rules changed. These changes were largely beyond our control and the allegation by Stonewall that we gave definite undertakings with respect to title are simply not true. It is in the nature of

> the process that at any given time we may have a view about when titles might be expected but we could not and would not ever indicate certainty until 224c certification had been achieved."

[18] Turning now to the authorities on this issue of misrepresentation, a representation relates to an existing fact or past event, and contains no element of futurity. A mere expression of opinion is not sufficient: *Ware v Johnson* [1984] 2 NZLR 518, 527. However, a statement of intention, even though a representation as to the future, can be actionable in some cases. For example, it may include an implied representation as to the maker's existing state of mind – whether they really do have the intention they communicate: *Manderson v Violich* (1992) 5 TCLR 124.

[19] Likewise, a statement which is about the future may sometimes imply a statement about a present fact, and therefore amount to a misrepresentation. For example, in *New Zealand Motor Bodies Ltd v Emslie* [1985] 2 NZLR 569, 593, it was held that a budget forecast, although about the future, implied that there were present facts in existence on which the forecast was logically based. A finding of such an implication may be particularly likely where the statement of opinion as to the future is made by a party who is in a better position to know those underlying facts: *New Zealand Motor Bodies Ltd v Emslie*; *Smith v Land and House Property Corporation* (1884) 28 ChD 7, 15.

[20] Counsel for Stonewall argues that the representations made by Frimley as to when the certificates of title would be available give rise to a reasonable counterclaim pursuant to s 6 of the Contractual Remedies Act 1979, which states as relevant:

> **"6 Damages for misrepresentation**
> (1) If a party to a contract has been induced to enter into it by a misrepresentation, whether innocent or fraudulent, made to him by or on behalf of another party to that contract—
> (a) He shall be entitled to damages from that other party in the same manner and to the same extent as if the representation were a term of the contract that has been broken; and
> (b) He shall not, in the case of a fraudulent misrepresentation, or of an innocent misrepresentation made negligently, be entitled to damages from that other party for deceit or negligence in respect of that misrepresentation."

[21] In response, Frimley's position is that the comments alleged to amount to misrepresentation were clearly only opinions based on an honestly held belief, and that the speakers were in no better position to know the facts than the person

addressed. Counsel for Frimley stated that the present case is analogous to *McDonald v Adams* (1985) 1 NZBLC 102,208. That case concerned an informal estimate based on a site inspection made by a professional as to the cost of re-contouring some land for horticultural subdivisions. The ultimate price exceeded his estimate, and the defendants claimed that his earlier estimates amounted to a misrepresentation. The Court accepted that the estimate of cost was important to the defendants, but that if they had wanted more certainty they could have entered a fixed price contract. The Court further found that only an approximate estimate of the cost was able to be known based on a site inspection, and that the defendants, as professionals in this area, would have realised that. As such, there was no misrepresentation.

[22] In my view, many of the issues raised in this case are similar to those that arose in *McDonald v Adams.* The statements made on behalf of Frimley as to when the titles would be available were not statements of intention, because, as Stonewall would have been aware, that was not a matter under Frimley's exclusive control. They were at most statements of opinion as to the future. As held in *New Zealand Motor Bodies Ltd v Emslie,* a statement as to the future might still be capable of being a representation if it implies that the opinion is based on existing facts. However, Stonewall has not alleged a misrepresentation as to any underlying facts, or as to a state of mind sufficient to make a statement of intention a representation. Counsel for Stonewall simply points to what was alleged to have been said, and notes that it was ultimately incorrect.

[23] Further, although the issue is not raised in Stonewall's evidence, Frimley has provided evidence to show that the statements of opinion were honest and were based on facts in existence at the time. Mr. Duff confirms that in April 2007 Frimley had made its resource consent application, and based on past experiences, discussions with council officers, and the Council's obligations under the Resource Management Act, expected this consent to issue in two to three months, after which building could start. However, the consent did not issue until 17 December 2007, apparently due to problems within the Hastings District Council and engineering concerns. After the consent was issued, Frimley also identified a number of problems with the consent, which required further time to consider and this resulted in a

variation of the consent. Further delays were then encountered in the construction process, arising from problems with the wording of the consent and disagreements with the Council.

[24] Just as the defendants in *McDonald v Adams* could have insisted on a fixed price contract if they wanted to rely on the estimates of cost, if the exact timing of the issue of titles in this case was important, as has been claimed, Stonewall could have insisted on a "sunset clause" providing for a date by which titles had to be issued. Counsel for Stonewall points to an attempt to include a "sunset clause" in the Agreement but this was later removed, apparently at the insistence of Frimley. Counsel for Stonewall endeavours to argue that this shows how important timing was to Stonewall but, as I see it, this does not assist Stonewall's misrepresentation argument. On this, the estimate of cost was also found to be important to the defendants in *McDonald v Adams.* That it was important, however, does not turn a statement of opinion into a representation of fact nor does it alter the terms of the Agreement. And, in my view, the fact that Stonewall had accepted when the contract was signed that its specific attempt to include a "sunset clause", rejected by Frimley, left the Agreement with no timing requirement for title, can only assist Frimley's position here.

[25] Even viewing the case put forward by Stonewall in its best possible light, in my view there is nothing capable of giving rise to an arguable counterclaim in misrepresentation here.

Parties to the Agreement / Limitation of First Defendant's Liability

[26] Stonewall also endeavours to argue that it was not party to the Agreement, as the Agreement was signed only in the company's capacity as trustee of the Stonewall Properties Trust. I am satisfied, however, that this argument is not tenable. The Agreement is clearly signed by Stonewall, and the fact that it was signing as trustee is immaterial as to who the real parties are, as a trust is not a separate legal entity from the trustees: *NZHB Holdings Ltd v Bartells* (2005) 5 NZCPR 506, para 34.

[27] However clause 14 of the Agreement is significant here. This clause does appear to alter the liability of a party who has entered into the Agreement as a trustee. Clause 14 states:

> "If any person enters into this agreement as trustee of a trust, then:
>
> (1) That person warrants that:
> (a) that person has power to enter into this agreement under the terms of the trust;
> (b) that person has properly signed this agreement in accordance with the terms of the trust;
> (c) that person has the right to be indemnified from the assets of the trust and that right has not been lost or impaired by any action of that person including entry into this agreement; and
> (d) all of the persons who are trustees of the trust have approved entry into this agreement.
>
> (2) If that person has no right to or interest in any of the assets of the trust except in that person's capacity as trustee of the trust, that person's liability under this agreement shall not be personal and unlimited but shall be limited to an amount equal to the value of the assets of the trust that are available to meet that person's liability unless the right of that person to be indemnified from the assets of the trust has been lost and, as a result, the other party to this agreement is unable to recover from that person that amount."
>
> (emphasis added)

[28] That cl 14 applies in this case, and limited Stonewall's liability was accepted before me by Mr. Petherick, Counsel for Frimley. Stonewall is the proper party to the Agreement and no tenable defence as to liability is raised here. However, Stonewall's liability as to quantum is clearly limited by cl 14. A determination as to quantum will require evidence as to the available assets of the trust, evidence which is not presently before the Court. Other aspects of quantum in this case, including the calculation of penalty interest, are complex. As such, liability as to quantum cannot be determined on the material before the Court in this summary judgment application.

Mitigation / Failure to Obtain a Reasonable Price

[29] Although it was neither pleaded in the notice of opposition nor discussed in counsel for Stonewall's written submissions, Mr Redshaw in his affidavit suggests that Frimley may have been negligent in marketing the on-sale of the sections in question to third parties and in claiming that the properties were being sold due to "builder's default". For Stonewall, Mr Trevor William Kitchin, a registered valuer, has provided affidavit evidence that the sale levels achieved were 8-10 per cent below market values for the time.

[30] This issue was not discussed in any great depth before me. I did not understand counsel for Stonewall to be seriously advancing this ground as a possible defence. In any event, that the sales may have been below market value does not mean that Frimley has failed in its duty to mitigate or been negligent. As to the advertising of the properties as a sale following a builder's default, counsel for Frimley submitted that this was analogous to advertising a sale as a "mortgagee sale". As the Court of Appeal held in *Taylor v Westpac Banking Corporation Ltd* (1996) 5 NZBLC 104,104, such advertising is not categorically improper.

[31] Mr Duff has provided evidence that professional real estate agents were engaged to sell the properties. No factual or legal arguments were advanced on behalf of Stonewall to raise in any real way the possibility that Frimley failed here in its duty to mitigate its loss or obtain the best reasonable price.

Guarantee

[32] It was argued for Frimley that, in signing the Agreement, Mr Redshaw signed not only as a director of Stonewall and principal party, but also as a guarantor in his personal capacity. Frimley relies on cl 23 of the Agreement which states:

> "If the purchaser is a company then at the request of the vendor the directors of that company shall jointly and severally guarantee the performance of the purchaser's obligations pursuant to this agreement."

[33] Council for Frimley relies on the case of *Chiswick Investments Ltd v Pevats* [1990] 1 NZLR 169 for the proposition that a guarantor may sign a document in a dual capacity. In that case, the relevant guarantee clause read as follows:

> "AND where the Employer is a company the undersigned shareholders holding together not less than 80% of the share capital of the Employer in consideration of DFC agreeing at their request (as is hereby acknowledged) to make Loans to the Employer HEREBY JOINTLY AND SEVERALLY AND UNCONDITIONALLY AND IRREVOCABLY GUARANTEE to DFC the due and punctual payment and performance by the Employer of its obligations under the Deed AND agree…".

[34] Pevats had signed as a witness to the affixing of the company seal on the agreement. He had never intended to sign as a guarantor. However, the Court found that the scheme of the document as a whole, and the fact that Pevat's signature was witnessed in the place reserved for witnessing shareholder signatures, meant that

Pevat had signed the document in a dual capacity and was prima facie liable as guarantor.

[35] Similarly, in *Doughty-Pratt Group Ltd v Perry Castle* [1995] 2 NZLR 398 the directors of a company signed a document on behalf of the company as principal. The signatures were found to have been made in their dual capacity as guarantors, pursuant to the following clause (which they had also initialled):

> "The *Directors* of Associated Sharebrokers Ltd namely *Dennis Peter Lennan* and *David Craig Wylie* agree to guarantee the covenants of Associated Sharebrokers Ltd under this agreement and any sublease or assignment arising herefrom."

[36] As I see it, the key difference between this case and the above authorities, is that cl 23 is not in itself a guarantee. The directors do not agree to answer to Frimley for the debt, default, or liability of Stonewall pursuant to cl 23: Property Law Act 2007, s 27(4). As stated by counsel for Mr Redshaw, cl 23 is a conditional clause requiring a non-party to take some step on demand. That both parties also viewed the clause in this light is suggested by the surrounding facts. On 23 January 2009 Frimley's solicitors wrote to Mr Redshaw's solicitors requesting that a guarantee be signed, perhaps implying that at that point in time, no guarantee existed. A separate guarantee was never signed by Mr Redshaw.

[37] Counsel also argued that any claim against Mr Redshaw pursuant to the Agreement is prevented by privity of contract. Counsel for Mr. Redshaw further suggested that the only way cl 23 could be enforceable would be through an action for specific performance, requiring directors to provide a guarantee in circumstances where they had refused to comply with a request. However, Frimley has not sought specific performance, and specific performance following cancellation of the Agreement is in any event barred by s 8 of the Contractual Remedies Act 1986.

[38] Counsel for Mr Redshaw also submitted that if cl 23 were a guarantee, its terms are so vague that it must be void for uncertainty. As cl 23 would limit the liability of a guarantor to the liability of the purchaser, arguably Mr Redshaw's liability as to quantum would also be limited to the value of the assets of the Stonewall Properties Trust.

[39] Frimley has not shown to the summary judgment standard that any valid or enforceable guarantee exists between Mr. Redshaw and Frimley. That is a matter on which further argument and evidence properly tested at trial would be required. As such, Frimley's application for summary judgment as against Mr Redshaw must fail.

Result

[40] Both Stonewall and Mr. Redshaw here effectively conceded the material facts advanced for Frimley regarding default by Stonewall under the now cancelled Agreement and its liability in damages to Frimley for the loss and expenses on resale of the sections in question. The specific affirmative defences advanced by Stonewall first, of misrepresentation on the part of Frimley, secondly, that the wrong party has been sued and thirdly, that Frimley has failed to obtain a reasonable price on resale and thus fulfil its duty to mitigate, must all fail.

[41] On issues of quantum, however, as I have noted in para. [28] above, the limitation of Stonewall's liability to the available assets of the Trust pursuant to cl 14 of the Agreement will apply here.

[42] Frimley's application for summary judgment against Stonewall therefore succeeds in part. Rule 12.3 High Court Rules permits the entry of summary judgment as to liability, with quantum to be determined subsequently.

[43] Summary judgment as to liability for breach of the Agreement is granted to Frimley against Stonewall, such liability being limited by cl 14 of the Agreement to the value of the available assets of the Trust.

[44] This matter is then to be the subject of a directions telephone conference at 3.45 pm on 15 October 2009 to time table a quantum hearing for the matters outlined at para. [43] above.

[45] So far as Frimley's application for summary judgment against Mr. Redshaw is concerned, for the reasons outlined above that application is dismissed.

[46] As to costs, Frimley's summary judgment application has been successful in part and has failed in part. Costs are reserved and are to be the subject of further consideration when the quantum hearing noted at para. [44] above takes place.

'Associate Judge D.I. Gendall'