IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV-2009-409-000809

	BETWEEN	NGAI TAHU PROPERTY LIMITED Plaintiff
	AND	JASON MAURICE DYKSTRA, ESTHER DYKSTRA AND PHILLIP JAMES SUNDERLAND Defendants

Hearing: 28 September 2009

Appearances: A N Riches for Plaintiff
A N Isac for Defendants

Judgment: 29 October 2009 at 2.30PM

JUDGMENT OF ASSOCIATE JUDGE OSBORNE

Solicitors:
Saunders & Co., P O Box 19520, Christchurch for Plaintiff
Fitzherbert & Rowe, Private Bag 11016, Palmerston North for Defendant

[1] The plaintiff seeks by summary judgment an order requiring the defendants to complete the purchase of a property sold to them in 2008. The defendants do not deny their contractual liability to purchase. The heart of their defence is their contention that it will be impossible for them to complete the purchase for financial reasons. They advance also some other grounds of defence.

[2] The plaintiff looks to the Court to uphold the solemnity and sanctity of contractual obligations entered into. It emphasises that the standard contract used in this case (the ADLS REINZ 8th ed, 2006) expressly provides specific performance as a remedy, over and above the remedies which would exist generally at law. The plaintiff refers to contractual case law which upholds a plaintiff's remedial choice. It wishes to put the defendants to the task of trying to complete their purchase even if it is difficult. The plaintiff says that that task of completing the contract has not been shown by the defendants to be impossible.

[3] Mr Riches advanced his submissions for the plaintiff in a clear way praying in aid policy considerations. Notwithstanding those submissions I find that the plaintiff cannot succeed in this case on a summary judgment application. This is not a commentary on the substantial merits of the defendants' position as they will emerge at a trial – rather it is a recognition of an arguable defence based upon what is referred to for convenience in the equity cases as "impossibility". I will now turn to consider the impossibility defence in detail. As it then becomes unnecessary for me to make any ruling on the other defences, I will deal with those in due course only briefly.

Summary judgment – the principles

[4] The principles which apply to this case as generally to summary judgment applications are as follows.

[5] The starting point for a plaintiff's summary judgment application is r 12.2 High Court Rules, which requires that the plaintiff satisfy the Court that the defendant has no defence to any cause of action in the statement of claim or to a particular cause of action.

[6] Before turning to some particular issues which arise in relation to this case, I summarise the general principles which I adopt in relation to the application:

a) The onus is on the plaintiff seeking summary judgment to show that there is no arguable defence. The Court must be left without any real doubt or uncertainty on the matter.

b) The Court will not hesitate to decide questions of law where appropriate.

c) The Court will not attempt to resolve genuine conflicts of evidence or to assess the credibility of statements and affidavits.

d) In determining whether there is a genuine and relevant conflict of facts, the Court is entitled to examine and reject spurious defences or plainly contrived factual conflicts. It is not required to accept uncritically every statement put before it, however equivocal, imprecise, inconsistent with undisputed contemporary documents or other statements, or inherently improbable.

e) In weighing these matters, the Court will take a robust approach and enter judgment even where there may be differences on certain factual matters if the lack of a tenable defence is plain on the material before the Court.

[7] Once the Court is satisfied that there is no defence, the Court retains a discretion to refuse summary judgment but does so in the context of the general purpose of the High Court Rules which provide for the just, speedy and inexpensive determination of proceedings.

The impossibility defence – what is meant?

[8] Specific performance is an equitable remedy. Text book writers usually discuss “impossibility” as a defence to a proceeding for specific performance.

[9] A settled formulation of what a defendant must prove is that in I.C.F. Spry *The Principles of Equitable Remedies*. The current edition (7th ed, 2007 128-129) puts it this way:

> ...It is clearly established that the courts will not require that to be done which cannot be done...But this is not to say that the mere anticipation of possible difficulties leads to a refusal of relief. If, on the materials before the court, performance may or may not be able to be completed, the various probabilities will be taken into account in deciding on the order that is most just in all the circumstances. Thus it may be most appropriate to order specific performance in the ordinary manner, so that if necessary the defendant may later approach the court for a modification or variation by reason of subsequent difficulties or may rely upon them in any subsequent proceedings in relation to the enforcement of the order. Again, if at the time of the original application there is shown to be a substantial risk that performance will not be possible, it may be most appropriate to make a conditional order or else to adjourn the proceedings until the position becomes more clear. Finally, if a sufficiently great likelihood is shown that performance will not be possible, and especially if no strong considerations of hardship appear on the part of the plaintiff, it may be most just to grant no order for specific performance at all, whether absolute or conditional, and so to confine the plaintiff to remedies in damages.

[10] This passage from Spry, from its earlier editions to the present, has been consistently adopted as also stating the law in New Zealand: see *Colson v Jensen* HC Auckland CP652/90 18 September 1990, Master Williams; *Matarangi Beach Estates Limited v Dawson* (2008) 6 NZ ConvC 194,667 (Hole AJ).

[11] The above passage in Spry is as good a formulation of the relevant considerations as to impossibility as is required for the clear and certain application of such a concept. Subsequent attempts to clarify or provide more precise formulations may not necessarily assist. For instance, while the author speaks of "a substantial risk that performance will not be possible", there has been in New Zealand repeated adoption of a formula of "substantial likelihood or very substantial probability of non-compliance".

[12] I reduce the relevant considerations to the following propositions:

a) A Court of equity will not require that to be done which cannot be done. Equity does not act in vain. See *Equity and Trusts in New Zealand* (2nd ed, 2009) at para 24.4.12, p753.

b) The defendant must establish a very substantial probability that it would not be able to comply with an order for specific performance: see the second formulation in *D'Arcy-Smith v Stace* (2003) 4 NZ ConvC 193,771 at 193,775, [26]. There is a consistency between this formulation and Dr Spry's "sufficiently great likelihood" of impossibility.

c) Anything less than a very substantial probability that performance will be impossible is insufficient – anticipation of possible difficulties or even a demonstrated difficulty in finding purchase money is unlikely to constitute a defence of impossibility. In such cases and subject to any other overriding equitable considerations a Court in equity is likely to order specific performance in the ordinary manner (with or without conditions) – the defendant may then later approach the Court for a modification or variation of the order: see Spry at p128; *D'Arcy-Smith v Stace* above.

d) In an ordinary proceeding, pleading of impossibility is in the nature of an affirmative defence and the onus of proof rests upon the defendant as the person taking the point: *Humphrey v Fairweather* [1993] 3 NZLR 91.

e) On an application for summary judgment, r. 12.2(1) High Court Rules applies. The plaintiff must prove that the defendant has no arguable defence to the claim for an order for specific performance. The onus on the application remains on the plaintiff although, when the plaintiff establishes its contractual entitlement, the evidential onus shifts to the defendants to demonstrate a tenable defence: *Auckett v Falvey* HC Wellington CP296/86 20 August 1986 Eichelbaum J. Thus, where there is raised an impossibility defence to a summary judgment application for specific performance, the plaintiff must prove that the defendant has no arguable defence that there is a very substantial probability that the defendant will be unable to comply with an order for specific performance.

[13] The more general principles as to summary judgment proceedings (which I have referred to above at [4]) apply – so, for instance, I am entitled to take a robust approach and enter judgment even where there may be differences on certain factual matters if the lack of a tenable defence is plain on the material before the Court. Counsel correctly referred me to my unreported judgment in *Carr v Humphries* HC DN CIV-2006-412-513 8 April 2009. That case also involved a plaintiff's summary judgment application – the Court had entered judgment and the defendant was applying to set aside the summary judgment. After referring to the judgment of Master Gendall in *D'Arcy-Smith v Stace* above, I recorded (at [27]) that "[c]ounsel for the defendant accepted that his client had the burden of proving such "substantial likelihood" or "very substantial probability". As the judgment indicates, I adopted that concession and did not go on to analyse the burden of proof. For the reasons I have set out above my reference in *Carr v Humphries* to the burden of proof is incorrect. As it was, on the facts in *Carr v Humphries* the defendant's argument failed because the defendant's evidence had been generalised and lacking in the sort of detail which might indicate to the Court that the defendant had substantial grounds for his assertions (see [29] of the judgment). The judgment ultimately (see [30]) turned on the fact that there was not an **arguable impossibility defence** (my emphasis).

[14] I therefore view the considerations which I have set out at [12] as those which should guide my consideration of the case before me. I will shortly proceed to examine the facts. After that I will also deal with what I consider to be a conceptually incorrect gloss which some cases and commentaries appear to cast on how equity should approach impossibility when the issue is as to financial impossibility.

Other considerations affecting the Court's equitable jurisdiction

[15] Counsel for the parties have referred to a number of other considerations affecting the Court's equitable jurisdiction.

Contractual integrity

[16] The solemnity and sanctity of a contract at law is relevant. The Court should lean in favour of holding the parties to their bargain: *D'Arcy-Smith v Stace* above, at [30]. Where the parties have expressly provided for and included remedies (such as specific performance) the Court generally will uphold the plaintiff's remedial choice: *Butler v Countrywide Finance Limited* [1993] 3 NZLR 623 at 631-632. The object of remedial selection is to put the plaintiff in the position the plaintiff would have been in if the contract had been performed according to its terms, the most obvious choice being some kind of performance-based remedy, (such as specific performance or mandatory injunction: *Butler v Countrywide Finance Limited* at 632). It is not correct to consider the inadequacy of damages as a threshold requirement for specific performance: *Crown Health Financing Agency v Napier Heights Holdings Limited* (2008) 9 NZCPR 93 at [77] (reversed on appeal, sub. nom. *Napier Heights Holdings Limited v Crown Health Financing Agency* [2009] NZCA 420, but not on this point).

Adequacy of damages

[17] While the inadequacy of damages is not a threshold requirement for specific performance, it is relevant for the Court in equity to consider whether damages are an adequate alternative remedy. That involves a realistic assessment of the ability of the defendant to meet an award of damages: *Crown Health Financing Agency v Napier Heights Holdings Limited* above at [78] – [79].

Matters involving unfairness / hardship

[18] While issues of fairness and hardship have been analysed separately as factors relevant to equitable discretion (see for instance Spry at p192-201) the relationship between the two can conveniently be stated in this way as expressed in Spry at p196:

> …[i]n the first place, there may be found to be unfairness in the obtaining of contractual rights and, in the second place, it may appear that undue hardship would be caused by their enforcement.

[19] In order to lead to a refusal of specific performance on the ground of unfairness it is necessary to show that the plaintiff has taken advantage of a position

of inequality in such circumstances that it would be unjust to grant the plaintiff the relief in question: Spry at p192.

[20] The general prerequisites for a refusal of a decree of specific performance on the grounds of hardship are summarised in the *Laws of New Zealand, Specific Performance*, Part II, at 2(14). I adopt them:

> 1. The hardship that operates as a defence must, in general, be such as existed at the time of the contract and not such as has arisen subsequently from a change of circumstances; nevertheless there are exceptional cases in which hardship subsequent to the contract has caused the Court to refuse decree of specific performance;
>
> 2. The hardship that operates as a defence is "great hardship", that is hardship amounting to injustice;
>
> 3. In considering whether there is such hardship on the defendant the Court must also consider the hardship on the plaintiff which would result if the decree of specific performance were refused.

See also *Baker v McLaughlin* [1967] NZLR 405 at 414.

Breach of trust

[21] A Court in equity will not order specific performance where the defendant's contract was in breach of trust: *Jacobs v Bills* [1967] NZLR 249. In *Jacobs v Bills* McGregor J found that a trustee had entered a contract of sale in breach of trust through selling at an undervalue in circumstances where the plaintiff's (possibly unintentional) conduct had induced the trustee without proper advice to act hastily.

The facts of this case – the alleged impossibility

[22] I refer in this judgment to the first two named defendants as "the defendants". They were sued with Mr Sunderland as trustees of the JED Family Trust. The defendants had settled the JED Family Trust upon themselves in 2004, with Mr Sunderland (their solicitor) as an "independent person" under the Trust Deed but not as a trustee. The plaintiff no longer pursues relief against Mr Sunderland although he had purported as a trustee of the JED Family Trust to sign an earlier contract.

[23] Mrs Dykstra provided affidavit evidence of background and of relevant events.

[24] Mrs Dykstra provided a list of assets and liabilities of the Trust as at 20 October 2008. The Trust held and still holds the family home at Foxton Beach. A detailed valuation report gives the Foxton Beach property a market value of $375,000 as at August 2008. The valuation identifies the land as being in the process of being subdivided into three lots with a total value of the three lots (as if the subdivision were complete) of $503,000, but with no allowance for costs or risk. The valuer in question had provided updated comments in March 2009 noting a downward pressure on prices in 2008/2009 with the possibility of realisation at up to 20% below expectation. Mrs Dykstra refers to the house itself as being in the process of renovation and not in a saleable condition. In October 2008 the mortgage over the property secured borrowings of $211,000.

[25] Mrs Dykstra suggests, upon the basis of the evidence not unrealistically, that the equity in the property may be in the vicinity of $90,000.

[26] Mrs Dykstra says that the Trust owns one other asset being a boat which her evidence indicates may have a net value of $10,000 (taking into account a gross value of $35,000 and a loan over the boat for $25,000).

[27] The trustees first entered into a contract for the purchase of the subject property ("the Taupö property") from the plaintiff in March 2007. Mr Sunderland gave advice before the contract was signed. He also signed the contract as "trustee". The contract was expressly made conditional upon an unconditional contract being entered into within 30 days for the sale of the Foxton Beach property for such sum as the trustees might choose to accept. That agreement never became unconditional and it was subsequently cancelled.

[28] The contract the subject of this case was entered into in January 2008. It was for the same purchase price, $230,000. Although the contract again named Mr Sunderland as a trustee and a party to the contract he was not asked to sign the contract and did not do so. Mr Sunderland has given evidence indicating that he was

not involved in the negotiation of the terms of the second contract. Mrs Dykstra's evidence is to similar effect. She deposes in relation to the circumstances in which the trustees signed the contract:

> We were put under a lot of pressure to get it signed up (on the day of signing) by David Schwartfeger (of the plaintiff) who said that if we had not signed it by 5 pm that day Ngai Tahu would sell the section to somebody else. We thought it would be okay even though we did not have finance approved because we thought we could subdivide our home property and sell a section.

[29] The Taupö property was part of a subdivision. There was therefore to be a period of time before settlement was required, which was expected to be around July 2008. 26 August 2008 subsequently became the settlement date. The defendants were unable to settle then and have not settled since. They did, however, pay an initial deposit of $20,000.

[30] What emerges from Mrs Dykstra's evidence as to the trustees' difficulty may be summarised thus:

a) They had hoped to raise funds (either by term loan or bridging finance) to complete the purchase but were unable to do so.

b) They had had limited income in October 2008 ($562.50 per week for Mrs Dykstra as a 25 hour per week radiographer and $550 per week being drawn by Mr Dykstra out of a garden equipment sale and repair company owned by the Dykstras but with that company accruing significant trading losses in the last three years). Mrs Dykstra's income ceased in mid-2009 as she had a second child in June 2009. Mr Dykstra had suffered a back injury in October 2008 and had surgery in April 2009, the business suffering during that period but Mr Dykstra receiving ACC.

c) Mrs Dykstra refers to loan expenses on the mortgage of $400 per week and on the boat loan of approximately $195 per week. She additionally discloses hire purchase commitments of $75 per week.

Self-evidently, the total of these commitments alone ($670 per week) exceeds Mr Dykstra's drawings.

d) Mr and Mrs Dykstra have yet to sell either of the bare lots intended to be subdivided off the Foxton Beach property. Mrs Dykstra says that there is no demand for vacant land and that Foxton Beach has been particularly badly hit by the recent financial crisis. Her valuer's advice to her lawyer in March 2009, when Mrs Dykstra completed her second affidavit, was that the general property market in the Foxton locality and in the general Horowhenua area is very much a buyer's market with fewer transactions than in previous years. In addition to pointing to the financial crisis the valuer refers to unemployment statistics and more job insecurity.

Is there an arguable impossibility of performance?

[31] The plaintiff's case is that the defendants should be able to perform the contract by at least some means. I therefore turn to consider the three suggested possibilities that arose in argument.

Borrowing without any other change

[32] Any borrowing by the Dykstras would be in addition to the house loan ($211,000); boat loan ($25,000); and hire purchase debt (unquantified). The total quantified liabilities are in the order of $236,000.

[33] The Dykstras would have two significant sums to pay at the settlement of their purchase being the balance of the purchase price ($210,000) and the penalty interest claimed by the plaintiff (based on $29,400 per annum being an additional $34,300 if the Dykstras were to settle 14 months late). Therefore the approximate total to be borrowed for completion would be $245,000 (without legal or financing costs).

[34] That would have to be borrowed by a couple with a single income which comprises unsustainable drawings of approximately $550 per week. The level of

income does not at present cover the present financial needs of the defendants without the addition of further interest payments.

[35] While the evidence discloses that there was a time when the defendants had an offer of finance, there has subsequently been a withdrawal of that finance offer. Mrs Dykstra's evidence is that an approach through a mortgage broker around the time of settlement also produced no loan offer. Unsurprisingly, the email communication from her bank produced by Mrs Dykstra (dated 23 October 2008, before Mrs Dykstra gave up work) indicates that the bank did not consider that the income situation was sufficient to service an increase in borrowing.

[36] In relation to the possibility of further borrowing without any other step, I find that the defendants have an arguable case that there is a very substantial probability that the Dykstras would not be able to complete the purchase through that means.

Sale of the Foxton Beach property

[37] Mr Riches submitted that there is no adequate evidence of attempts by the defendants to sell their Foxton property and to then finance the balance of the purchase. He pointed to correspondence from the defendants' solicitors to the plaintiff's solicitors in October 2008 "stating that the client has not ability to settle the transaction, unless their Foxton section is sold". Mr Riches suggested that these statements do not constitute impossibility. In fact what the letter in question indicates is that Mr and Mrs Dykstra had entered the original sale and purchase agreement hoping to obtain bridging finance pending the sale of the two subdivided sections. The letter goes on to indicate that without finance, the Dykstras would have no ability to settle the transaction unless the two Foxton sections were able to be sold, but that at that stage there was no prospect of a sale. The letter does not refer to an intention to sell the Foxton Beach property as a whole.

[38] The defendants' original strategy was straightforward – the third section at Foxton Beach which they intended to retain contained their home and their means of providing a residence for themselves and their family. The Taupö property is bare land. Any sale of the Foxton Beach property and subsequent financing of the Taupö

property purchase would carry with it the additional level of expenditure involved in housing themselves elsewhere while owning a vacant lot bearing no return.

[39] This requires a brief examination of what would financially occur in that situation.

[40] Responsibly Mr Riches did not challenge Mr Isac's proposition that a realistic net sale proceeds figure from the Foxton Beach property might be $90,000. On the evidence, that has to be a realistic possibility particularly given that the Dykstras would be having to sell relatively quickly into a difficult market. Assuming the Dykstras were then able to pay the full $90,000 towards the purchase of the property they would be required to source borrowings of some $165,000 to be secured over a property purchased for $230,000. While their outgoings on the mortgage might be expected to drop by approximately 20% (the mortgage loan then being $165,000 rather than $211,000) the saving of finance expenses on a weekly basis might be less than $100. As against that, the family would not be having to find rental accommodation. Despite the lowering of the level of overall debt, the Dykstra's already difficult financial position week-to-week is likely to be aggravated. Far from having a better financial position to take to their bank, the Dykstras would be taking a worse financial position.

[41] It is therefore arguable that there is a very substantial probability that the Dykstras would not be able to complete the Taupö property purchase following the sale of the entire Foxton Beach property.

Possibility of the sale of two subdivided lots

[42] If there is a fundamental difficulty for the defendants in selling the entire Foxton Beach property having regard to the consequential lack of accommodation, it might be suggested that an alternative for the defendants is to sell the two subdivided bare lots and to retain ownership (at least for the time being) of the remaining "house block". This would preserve a residence and indeed reflects the original plans they had.

[43] However, the evidence indicates there is no present market for the sale of the bare land blocks. No assumption can be made as to the availability in the near future of funds from such sales. Accordingly, if the defendants are ordered to complete the purchase by a given date, there is arguably on this scenario a very substantial probability that they would not be able to comply with the order.

Overall argument as to impossibility

[44] In these circumstances, having examined the three possible routes by which the defendants might reach a point of settlement, I conclude that on the issue of impossibility alone the plaintiff has not satisfied the Court that the defendant has no defence. It is arguable that there is a very substantial probability that the defendants would be unable to comply with an order for specific performance. I recognise that at trial the defendants may or may not satisfy the Court, on the evidential onus, that there is a very substantial probability that they would be able to comply with an order for specific performance. However, that is a matter to be determined on full evidence at trial.

A gloss on "impossibility" applying to financing cases?

[45] Mr Riches urged upon the Court the view that the defendants were merely relying on a difficulty in finding purchase money. He relied upon passages in the judgments of Master Gendall in *D'Arcy-Smith v Stace*, particularly at [19]. Mr Riches also relied upon the New South Wales decision in *Pasedina (Holdings) Pty Limited v Khouri* (1977) 1 BPR 9460. In that case Holland J stated at p9460:

> Counsel for the defendant was not able to refer me to any case where difficulty on the part of the purchaser in finding the purchase money was held to amount to a defence of impossibility or hardship. I doubt whether difficulty, however great, could make a defence of impossibility.

And at p9461 Holland J added:

> …I doubt whether difficulty confronting a purchaser in finding the purchase money could, by itself, constitute sufficient reason to deny a vendor an order for specific performance.

[46] The *Pasedina* judgment emphasises the obvious point that a difficulty in performing is not the same as an impossibility of performance.

[47] Despite the understandable observations of Holland J, equity does not proceed on any rule that a particular source of impossibility (argued in this case to be financial) cannot be treated as impossibility. The issue remains (as it is expressed in Spry at p127), whether it will be within the power of the defendant to comply with the proposed order. Such inability might arise for financial reasons. As much is recognised by the editor of the *Laws of New Zealand, Specific Performance Part IV* at 12(114), where it is stated that:

> Lack of cash resources when the party in default has other assets is unlikely to amount to impossibility.

[48] Implicitly, a case where the party has neither cash resources nor other assets may give rise to a successful impossibility defence. For the reasons I have set out, the defendants have an arguable case that this is not a situation of mere difficulty but rather a situation of impossibility within the authorities.

[49] I do not ignore Mr Riches' submission, again based on *D'Arcy-Smith v Stace* and also later cases, that a plaintiff's choice of remedy should be respected. The strength of that approach must however lie particularly in cases where there is more than one appropriate remedy. If for any reason – be it impossibility or otherwise – specific performance is an inappropriate remedy, then remedial choice must count for much less in the Court's discretion. Care must be taken to examine the facts of each case on its merits. Mr Riches' reliance in this context upon *Matarangi Beach Estates v Dawson* above is on point. Mr Riches noted the importance attached by the Court to remedial choice and in particular to the choice of the vendor to have the contract performed where the vendor had lost the opportunity to sell a property in a more buoyant market through the existence of the contract. Mr Riches noted that the Court in the *Matarangi Beach Estates* case had ordered specific performance notwithstanding the Associate Judge's finding that the defendants could not get mortgage finance. But the earlier emphasis in the judgment is overshadowed by the Judge's analysis of the financial position which would result from completing the purchase. The Judge found that the facts indicated clearly that it was possible for the defendants, given time, to meet their obligations to the plaintiff and to settle their purchases. The plaintiff's remedial choice was effected precisely because the Judge was satisfied that the defendants could potentially meet their obligations.

[50] I also do not ignore Mr Riches' submission that there is a likelihood in the present case that the defendants could avoid or delay payment if damages are awarded rather than specific performance. Given that I have concluded that the defendants are in a position to argue that there is a very substantial probability that they will not be able to complete, damages may emerge as the only effective remedy. There is no evidence to indicate that these defendants would willingly avoid or delay payment of damages if ordered – their conduct in relation to this litigation has been to face up to their difficulties, to recognise their liability to a damages award, and to put to the Court the arguments as to why damages is the appropriate award. In the event that the plaintiff elects to re-sell the property and to obtain a damages award, it will have its rights of enforcement including the ability to charge the defendants' equity in the Foxton Beach property.

[51] Finally, I have asked myself whether, notwithstanding the defendants' arguable defence of impossibility, the Court should nevertheless consider a half-way house position along the lines suggested in the passage I have quoted from Spry (above paragraph [9]). There the author comments on the situation where on the materials before the Court performance may or may not be able to be completed. He comments that it may be most appropriate to order specific performance in the ordinary manner so that if necessary the defendant may come back to the Court later for different orders. The plaintiff could also later, in terms of *Johnson v Agnew* [1980] AC 367 at 394, apply to the Court to dissolve the specific performance order and ask the Court to put an end to the contract and to award damages. A relevant example of that jurisdiction arose in the *D'Arcy-Smith v Stace* litigation – see the second judgment of Master Gendall, unreported, HC WG CIV 2003-485-220, 8 September 2003.

[52] Once a defendant satisfies the Court in relation to a summary judgment application for specific performance that the defendant has an arguable case based on impossibility, it is not open to the Court to order specific performance upon the basis that the defendant may or may not be able to comply. There will be occasions where the evidence is equivocal and the defendant does not satisfy the evidential burden of demonstrating a very substantial probability that the defendant will be unable to

comply with the specific performance order. On the evidence in this case at summary judgment level, that is not a conclusion available to the Court.

Orders

[53] I dismiss the plaintiff's application for an order of specific performance by way of summary judgment.

[54] Pursuant to the agreement of counsel regarding costs outcomes at the conclusion of the hearing I reserve costs in line with the position adopted by the Court of Appeal in *NZI Bank Limited v Philpott* [1990] 2 NZLR 403.

[55] I adjourn the proceeding to a telephone conference at *9.30am 11 November 2009*. I direct counsel to confer and to file three working days before the conference preferably a joint memorandum setting out proposed timetabling for the proceeding. In that context I note the concern expressed by counsel for the plaintiff as to the adequacy of damages in this case. The plaintiff in discussion with counsel will undoubtedly wish to reflect upon the extent to which the plaintiff's interests will be improved or worsened if the parties incur the costs of preparation for and involvement in a trial concerning specific performance.

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