

**IN THE HIGH COURT OF NEW ZEALAND
INVERCARGILL REGISTRY**

CIV 2008-425-000585

IN THE MATTER OF the Insolvency Act 2006

AND

IN THE MATTER OF the bankruptcy of MARK CHARLES
DICKSON
Judgment Debtor

BETWEEN TAKITIMU ESTATE LTD
Judgment Creditor/Respondent

AND MARK CHARLES DICKSON
Judgment Debtor/Applicant

[Contd. over]

Hearing: 12 March 2009

Appearances: R S Cunliffe for Applicant
L A Andersen for Respondent

Judgment: 17 March 2009 at 4:00 pm

JUDGMENT OF ASSOCIATE JUDGE CHRISTIANSEN

*This judgment was delivered by me on 17 March 2009 at 4:00 pm
pursuant to Rule 11.5 of the High Court Rules.*

Registrar/Deputy Registrar

Date:

Solicitors/Counsel:

Macalister Todd Phillips (R S Cunliffe), PO Box 653, Queenstown 9348
L A Andersen, PO Box 5117, Moray Place, Dunedin 9058

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| IN THE MATTER OF | the bankruptcy of DENISE IRENE DICKSON, Judgment Debtor |
| BETWEEN | TAKITIMU ESTATE LTD Judgment Creditor/Respondent |
| AND | DENISE IRENE DICKSON Judgment Debtor/Applicant |

The Judgment

[1] On 8 October 2008 I entered judgment against both applicants in the following terms:

- a) Judgment on the plaintiff's claim against the defendants for an order for specific performance requiring the defendants to specifically perform the contract dated 20 March 2006 to purchase the property described as Lot 7, Takitimu Estates, by making payment to the plaintiffs of \$310,392.38, plus interest on \$277,000 at 14% p.a. from 8 October 2008 until the date of payment.
- b) That the defendants pay the costs of the plaintiff of \$7840 and disbursements of \$1279.39.

[2] Neither applicant took steps to oppose the summary judgment proceedings brought against them.

The application

[3] On 10 December 2008 the applicants were served with bankruptcy notices. The applicants apply to set aside these bankruptcy notices.

Background

[4] The applicants are property developers in the Queenstown area. They purchased a section in the respondent's Queenstown development. They acknowledge signing the agreement for sale and purchase. They also acknowledge "that we have a legal obligation to complete the settlement and to do what we can to comply with the order of the Court". They state they have tried to raise finance in order to complete settlement but have been unsuccessful "given the current state of the financial markets and the tightening of credit".

[5] The applicants state they do not have any assets available to realise sufficient funds to "comply with the High Court order". They say they are fully financially committed. They hope, given time "and the ability to complete some of [their] business development projects currently underway" that they will be able to retire some debt in order to raise the funds to pay the respondent.

[6] Concerning their purchase from the respondent, they state there has been no settlement of the sale and purchase agreement and as a result there has been no conveyance of the property to them. Also, they do not have possession of that property. Since the making of the order for specific performance the respondent has not presented an updated settlement statement to them in contemplation of the transfer of the property. Even so, they acknowledge they would not have settled because they were unable to.

[7] Since the issue of the bankruptcy notices, the applicants have paid the respondent's costs in the amount ordered.

[8] For the applicants, it is submitted that an order for specific performance of an agreement for sale and purchase of land does not give rise to a final judgment or final order for "any amount" within the meaning of s 17 of the Insolvency Act 2006.

[9] Further, it is in the interests of justice that the applicants' applications be granted, because, to allow the respondent to pursue bankruptcy proceedings in the circumstances would amount to an abuse of process.

The Applicants' case

[10] The orders obtained against the applicants on 8 October were orders for specific performance, requiring them to perform an agreement for sale and purchase by paying the purchase price and accrued penalty interest. The obligation to pay the purchase price on the agreement for sale and purchase and the obligation to convey the property are inter-dependent obligations of the purchaser and the vendor. The applicants submit those obligations remain so after an order for specific performance has been granted. Clause 3.7 of the agreement for sale and purchase provided:

3.7 On the settlement date:

- (1) The purchaser shall pay or satisfy the balance of the purchase price; interest and any other moneys, if any, due as provided in this agreement ...
- (2) The vendor shall concurrently hand to the purchaser:
 - (a) the memorandum of transfer of the property ... in registerable form;
 - (b) all other instruments in registerable form required for the purpose of registering the memorandum of transfer;
 - (c) all instruments of title

the obligations in subclauses 3.7(1) and 3.7(2) being inter-dependent.

[11] The applicants' point is that there has been no conveyance of the property to them. They are not in possession of it and there has been no consideration therefor provided by the respondent. Therefore, the respondent has not performed its inter-dependent obligation in order to transform the obligations on the applicants under the agreement for sale and purchase (and the orders for specific performance) to pay the purchase price and interest into a debt due and owing of the purchase price and interest. The obligations of the purchasers and the vendor therefore remain wholly unperformed.

[12] Mr Cunliffe submits that the judgment of the High Court on 8 October 2008 is not a final judgment for the amount of the purchase price of the property and interest due under the agreement for sale and purchase. An order for specific

performance does not amount to a judgment for a sum of money: *Summer and Winter Fuels Ltd v Pickens* (1990) 4 PRNZ 621.

[13] Accordingly, the respondent cannot meet the requirement of s 17(1)(a) of the Act as it relates to those sums.

[14] Mr Cunliffe submits that because of the inter-dependence of the parties' obligations and because the vendor cannot recover the purchase price without having conveyed, the vendor is left with a claim for unliquidated damages. Quoting from Stonham 'The Law of Vendor and Purchaser' at 18.35:

In such a case the vendor's remedy (unless he has actually conveyed the estate to the purchaser) is not to recover the price, but is limited only for unliquidated damages, and it is nothing to the point that the vendor remains ready and willing to deliver the property and refuses to treat the purchaser's rejection of the contract as discharging the vendor from it, but on the contrary keeps the contract open. He can, at common law only recover unliquidated damages, and is limited to the loss which he has actually sustained. ...

[15] The applicants' fallback position concerns its claim of an abuse of process. The applicants claim that the respondent "appears to be using the bankruptcy process to pressure [them] into paying the purchase price". They state they have kept the respondent informed of their circumstances; that the respondent is aware that bankrupting them will effectively destroy their business ventures and eliminate any ability they have to run their construction company. They say the bankruptcy notices were served to place pressure on them to settle the sale knowing that if they were subject of bankruptcy orders, they would be devastated and all their business projects destroyed.

[16] Mr Cunliffe submits the respondent has other forms of execution available to it, i.e. they could seek an order for sequestration of the applicants' assets. It is acknowledged that if, as a result of that process, no assets could be found, then an act of bankruptcy will have been committed.

[17] Alternatively, the respondent could cancel the agreement for sale and purchase and look to resell the property. If a loss on resale occurred then the

respondent could obtain a judgment for that loss and enforce it, if necessary, by the issue of a bankruptcy notice.

[18] The applicants state that they have paid that part of the judgment in which there was a “final order”, namely by meeting the costs and disbursements awarded.

The Respondent’s case

[19] The respondent’s claim arises due to the applicants’ failure to settle in terms of a settlement notice served upon them. In that situation a vendor can either seek to enforce the contract by specific performance or cancel a contract and seek damages. The former is a discretionary remedy and can be resisted by a defendant who does not have the means to comply with the order sought for specific performance. In this case, the applicants did not defend the proceedings or allege they were unable to comply with the orders sought.

Considerations

[20] There is evidence the applicants are under financial strain. But, there is little evidence regarding their asset or liability position. The Court infers there are assets available. The Court has no information regarding those.

[21] An order for specific performance can be enforced by committal or sequestration. The former recourse is unavailable because the order for specific performance requires payment of a sum of money pursuant to an agreement for sale and purchase.

[22] A writ of sequestration is not available where a purchaser is unable to comply with an order of the Court and has not wilfully disregarded that order.

[23] The applicants claim the Court is unable to enforce payment of a sum of money pursuant to an order for specific performance. Ordinary methods of enforcement can be used to enforce an order for specific performance that requires payment of a sum of money.

[24] Rule 17.2 of the High Court Rules provides:

A Court order, except an order made on any interlocutory application, may be enforced in the same way as a judgment in the proceeding to the same effect.

[25] Rule 17.3 lists a number of enforcement processes.

[26] Modern commercial reality is that the Court will consider adjudicating a debtor bankrupt if the debtor is unable to pay his/her debts, unless it is equitable that the Court does not make an order for adjudication.

[27] Section 17 of the Insolvency Act 2006 provides:

- (1) A debtor commits an act of bankruptcy if –
 - (a) a creditor has obtained a final judgment or a final order against the debtor for any amount; and
 - (b) the execution of the judgment or order has not been halted by a Court;
 - (c) the debtor has been served with a bankruptcy notice; and
 - (d) the debtor has not, within the time limit specified in subs (4) –
 - (i) complied with the requirements of the notice; or
 - (ii) satisfied the Court that he or she has a cross-claim against the creditor.

[28] The applicants claim that the order for specific performance was not a final order for any amount. Mr Anderson submits the order for specific performance was a final order as it finally disposed of the rights of the parties. Both propositions are probably correct. The difference lies in what can be done to enforce those orders.

[29] The applicants acknowledge a breach of their contractual obligations. They do not explain how they propose to make payment or what difficulties affect them presently. Claims of difficulties lack particular, but the lack of particular does not present any difficulties for disposition of the present application.

[30] An order for bankruptcy may not be appropriate when a debtor is unable (as opposed to unwilling) to comply with an order for specific performance for the sale

and purchase of land. In that case, the correct procedure may entail the order for specific performance being vacated. The vendor should then pursue a claim for damages.

[31] It is not an abuse to use a bankruptcy notice to compel payment of money due under a Court order or judgment. That is the purpose of the notice. But, it may be an inappropriate procedure in a specific performance action if a debtor is unable to pay.

[32] The evidence is that the respondent was able to determine at an early stage that the applicants were unable to comply with a Court order. The only forms of execution ostensibly available to the respondents are committal and sequestration. As earlier commented, the former is unavailable in the particular case, and the latter is available only if there is a wilful disregard of the Court's order. The respondent states that because the avenues of usual recourse are clearly not available, then recourse to bankruptcy is not inappropriate. I do not think that necessarily follows. Committal engages the contempt process; sequestration the "unwilling to do" process.

[33] Traditionally, orders for specific performance did not specify the sum of money required to be paid as a condition of compliance with such an order. In this case the confusion arises because the order did detail the amount required to be paid. Mr Andersen submits the order specifically requires the performance of an obligation to pay. Moreover, he submits the respondent was entitled to an order for payment because it had demonstrated it was ready, willing and able to settle. Moreover, the contract for sale and purchase contained no requirement to transfer until payment was received.

[34] Mr Andersen says the applicants' own evidence indicates a sequestration application would be a waste of time. At the end of the day, the applicants are without means to meet their contractual obligations and therefore recourse to bankruptcy is, after all, commercial reality in the outcome.

[35] There is much common-sense in that approach but I still think it is wrong.

[36] The failure to comply with an order for specific performance does not give rise to a final judgment for any amount. It is a final judgment, but not for any amount. The words in s 17(1) provide the key. Section 17(1)(a) refers to “a final judgment or a final order ... for any amount”. Therefore, if a judgment is obtained for a sum of money which is not paid, then an act of bankruptcy is committed.

[37] In this case, the debate has focused upon the manner in which I endorsed the order for specific performance.

[38] I accept Mr Cunliffe’s submission that the form of that order could be considered misleading. While it identifies the purchase price, it must also contemplate the situation that the parties inter-dependent obligations are complied with. Therefore, until there is a transfer of land, no debt arises. It means a conveyance must occur before the debt due can be sued upon, and that has not happened in this case. That situation is not altered by the contractual terms which does not oblige a vendor to transfer documents of title until he has received payment. The reason is that an order for specific performance does not change a legal situation which exists prior to that order being complied with.

[39] This is demonstrated by the fact that if there was to be an order for bankruptcy the respondent could not prove in that bankruptcy because it still had the land.

[40] The respondent is not without avenues of recourse, however daunting they may at this stage appear to be. An application for a sequestration order would provide an opportunity to test the applicants’ claims of being unable to pay the respondent. As I have earlier noted, the applicants’ claims of inability to pay are not well supported by particulars.

[41] Also, the respondent has a contractual right to cancel a contract, sell the property and to seek damages for any loss incurred in the outcome.

[42] An order for specific performance is an equitable remedy. A bankruptcy notice will not likely provide a short cut to recovery even though the order for

specific performance refers to the amount a creditor ought to have paid upon his contract of debt.

Judgment

[43] The applicants' applications are granted and the respondent's bankruptcy notices are set aside.

[44] A single sum of costs on a 2B basis shall be paid in respect of both applications.

Associate Judge Christiansen