IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2009-404-340

IN THE MATTER OF	the Land Transfer Act 1952
BETWEEN	ROY WILLIAM RAWSON Applicant
AND	CHARLES MENASCHE ARYMOWICZ Respondent

Hearing: 16 and 17 March 2009

Appearances: David Wilson for Applicant
Simon Judd for Respondent

Judgment: 19 March 2009

JUDGMENT OF HARRISON J

In accordance with R11.5 I direct that the Registrar endorse this judgment with the delivery time of 9:00 am on 19 March 2009

SOLICITORS
Churton Hart & Divers (Auckland) for Applicant
Kelly Flavell Law (Auckland) for Respondent

COUNSEL
DKW Wilson; SRG Judd

Introduction

[1] Mr Charles Arymowicz's application for specific performance of an alleged agreement for sale and purchase of a residential property owned by Mr Roy Rawson has been heard under constraints of urgency. Mr Arymowicz's claimed interest is presently protected by a caveat. Mr Rawson has signed a written agreement with another party which is due for settlement on 27 March 2009.

[2] Mr Arymowicz claims that on or about 5 December 2008 Mr Rawson orally agreed to sell the property to him for a price of $1.15m; and that at Mr Rawson's request he arranged for immediate payment of a deposit of $115,000. Mr Arymowicz relies upon that payment as an act of part performance, relieving him of the burden of proving a written note or memorandum of the contract. An alternative argument that Mr Rawson did in fact sign a written contract was advanced with less conviction by Mr Arymowicz's counsel, Mr Simon Judd.

Background Facts

[3] Mr Rawson owns a property at 146 Sandspit Road, Cockle Bay, Howick. Mr Arymowicz, a Canadian lawyer, first became interested in 2006 when Mr Rawson advertised but then withdrew the property from sale. Mr Arymowicz is married to a New Zealand woman and they have young children. They are looking to settle in the Howick area where Mrs Arymowicz's parents live. Mr Arymowicz considered Mr Rawson's property ideal for their purposes, especially as it was of sufficient size to house Mrs Arymowicz's parents.

[4] Mr Arymowicz's interest was rekindled in late 2008 when Mr Rawson again advertised the property for sale. Mr Rawson failed to sell the property at auction on 2 December 2008. His agent, Ray White Ltd, called for a multi-offer presentation from five interested parties by 2 pm on 4 December. Mr Arymowicz and another submitted the two highest bids at $1.1m. Mr Arymowicz's conditional written offer was made through his agent, Ms Angela Rudling of Bayleys, who formerly worked for Ray White.

[5] Events occurring on the next day, 5 December, are critical to Mr Arymowicz's case. There are major differences between the two principal participants, Ms Rudling, on the one hand, and Mr Rawson, on the other, and to a lesser but important extent between Ms Rudling and Ms Marie Raos of Bayleys, Mr Rawson's agent (Mr Arymowicz was not directly involved). I will return to that dispute when making specific findings.

[6] The uncontested evidence, which is relevant to the ultimate fact-finding exercise, is as follows:

(1) At about 9.30 am on 5 December Mr Rawson phoned Ms Rudling to discuss the sale price for his property. Mr Arymowicz had authorised Ms Rudling the previous evening to raise the offer price by $50,000, from $1.1m to $1.15m following a discussion between Ms Rudling and Ms Raos. At 9.38 am Ms Rudling emailed Mr Arymowicz to advise of Mr Rawson's phone call and that 'he is willing to sell you the house for $1.15m with the current terms and conditions but we need to have acceptance of this price by 3 pm today'. She sent Mr Arymowicz a revised draft offer, and requested him to initial the changes to the purchase price and deposit provisions and return the document 'and the house will be yours';

(2) At about 10.38 am Mr Arymowicz emailed back a signed copy of the amended offer with changes initialled. At 1.06 pm Ms Rudling's personal assistant emailed him to advise that she had handed the document to Mr Rawson's agent (Ms Raos) 'so we now just need to wait for bank details and confirmation that the vendor has signed, so that it is all official';

(3) A series of short telephone discussions between Ms Rudling and Mr Rawson followed early in the afternoon. Ms Rudling's personal assistant emailed Mr Arymowicz at 2.52 pm to advise that Ms Rudling 'had just heard verbally that your offer has been signed and accepted so congratulations'. She said that she was waiting for

the paperwork and asked him to organise to transfer a deposit of $115,000 immediately to Ray White's trust account;

(4) At about 2.20 pm Ray White faxed a copy of Mr Arymowicz's revised offer to Mr Les Divers, Mr Rawson's solicitor. Mr Divers had questions about two provisions. One related to payment of the deposit and the other to appliances. He phoned Ms Rudling to discuss these concerns. She told Mr Divers that Mr Rawson had 'already given me verbal acceptance and had instructed me to convey this to Charles in Canada'. She also told him that Mr Rawson 'had requested the deposit be remitted immediately';

(5) At about 4.33 pm Mr Divers discussed the agreement by telephone with Mr Rawson. He was by then in the South Island, having flown from Auckland to Christchurch at about 1 pm. Their discussion took about five minutes and related principally to the deposit provisions. Mr Divers then instructed his legal executive to send a fax to Mr Kelly Flavell, Mr Arymowicz's solicitor, as follows:

> We confirm that we are acting for the vendor in this transaction. We record that our client is signing the agreement on the basis and understanding that the appliances referred to in clause 16(E) are the appliances listed in the schedule.

A copy of this fax was sent to Ms Raos;

(6) During the afternoon Mr Arymowicz phoned Ms Rudling with a request for Ray White's SWIFT code to accelerate the transfer of the deposit. Ms Raos or her secretary provided these details at 4.18 pm;

(7) Ms Raos faxed a copy of the agreement to Mr Rawson in Oamaru at approximately 5.30 pm. He had not seen the document previously. Ms Raos had some reservations about the LIM provision in the contract;

(8) Ms Rudling sent the bank code for the deposit to Mr Arymowicz at 6.03 pm.

[7] Early on 6 December Mr Arymowicz sent a copy of a written instruction to his bank to transfer NZ$115,000 with a value date of 9 December 2008. Ms Rudling phoned Mr Rawson in Oamaru at about midday. Neither Mr Rawson nor his agent ever sent a signed copy of the contract back to Ms Rudling. The next day, 7 December, Ms Rudling learned that Mr Rawson had signed a contract to sell the property to another party for $1.18m.

Cases

[8] Mr Judd submits that Mr Arymowicz has satisfied the factual requirements for granting a decree of specific performance to a purchaser who asserts part performance of an oral contract. Mr Judd identifies the central elements of Mr Arymowicz's claim based upon the principles formulated by Tipping J in *TA Dellaca Ltd v PDL Industries Ltd* [1992] 3 NZLR 88 as follows:

(1) On 5 December 2008 Mr Rawson and Ms Rudling as Mr Arymowicz's agent entered into an oral agreement to sell the property for $1.15m which would have been enforceable but for the Property Law Amendment Act. All the requisite elements for a binding agreement were settled – the parties, price, possession, parcels (description of land) and payment. While both parties expected Mr Rawson to sign a written contract after the oral agreement was entered into, they nevertheless intended to be bound according to the oral agreement before Mr Rawson signed: see *Carruthers v Whitaker* [1975] 2 NZLR 667 (CA) at 672;

(2) Mr Arymowicz partly performed the oral agreement by his act of wiring the deposit of $115,000 to Ray White's trust account, which:

(a) clearly amounted to a step in the performance of a contractual obligation or the exercise of a contractual right under the oral contract; and

(b) when viewed independently of the oral contract was, more probably than not, done on the basis that a contract relating to the land and such as that alleged was in existence.

[9] Mr Judd emphasises the important but subsidiary concept behind the doctrine of part performance that acts of part performance are treated for probative purposes as a satisfactory substitute for the statutory requirement of writing. This concept of substitute proof led to the requirement to establish an act or acts of part performance, independently of the evidence of the oral contract, to show it was probable that there was a contract relating to the land consistent with that alleged: see: *Fleming v Beevers* [1994] 1 NZLR 385 (CA) per Tipping J at 393-394.

[10] Mr David Wilson for Mr Rawson submits that Mr Arymowicz's case falls short of the high evidential threshold necessary to displace the presumption that parties proposing to enter into a contract for the sale and purchase of residential property do not intend to be bound until the contract is signed: *Carruthers v Whitaker*. He accepts Mr Judd's distillation of the legal requirements from *Dellaca* but submits that neither principal element of Tipping J's test is proven. However, Mr Wilson accepts that, if they are, it would not be unconscionable to order specific performance of the oral agreement.

Decision

[11] Mr Judd relies on Ms Rudling's evidence that:

(1) During their discussions on 5 December Mr Rawson variously advised her that he would accept Mr Arymowicz's offer at $1.15m on the basis that he would pay immediately a deposit of $115,000 (she said that Mr Rawson was worried about Mr Arymowicz's good faith, given his residence overseas); and

(2) On the faith of this advice she arranged for Mr Arymowicz to make immediate payment, which she confirmed affirmatively to Mr Rawson.

[12] Mr Rawson denies Ms Rudling's account. He admits that they had various discussions on 5 December but says he was stipulating for a purchase price of $1.2m. He denies ever reaching agreement with Ms Rudling at $1.15m and says that he always conveyed to her that any offer would have to be first approved by his solicitor. He denies asking for immediate payment of the deposit. He admits, though, that by late afternoon on 5 December he intended to sign an agreement with Mr Arymowicz at $1.15m. Some of his evidence is corroborated by Ms Raos and, to a lesser extent, Mr Divers.

[13] There is a direct conflict between Ms Rudling and Mr Rawson. I regret that I did not find either of them completely reliable. Only Ms Raos fell affirmatively into that category. However, assistance is available by probative reference to extraneous facts, from which inferences can be drawn and the consistency of accounts measured.

[14] There are two related aspects of Mr Arymowicz's case – agreement on a price and immediate payment of a deposit. While they are interwoven, an analysis of Ms Rudling's evidence shows that the two subjects arose independently during her discussions with Mr Rawson on 5 December.

[15] The first discussion, at about 9.30 am, concerned price. Mr Rawson initiated the dialogue. He telephoned Ms Rudling following her discussion the previous day with Ms Raos. The two knew each other from Ms Rudling's time at Ray White.

[16] I am satisfied that the purpose of Mr Rawson's call was to advise Ms Rudling that he would accept an increased offer from Mr Arymowicz at $1.15m. I do not accept Mr Rawson's evidence that he nominated $1.2m. He did not refer to this figure in either of his two affidavits sworn in support of an application to remove Mr Arymowicz's caveat. I accept Ms Rudling's account. It is consistent with the advice contained in her email sent to Mr Arymowicz immediately afterwards. The

email is close to a contemporaneous note made of the discussion and it is inconceivable that Ms Rudling would have erred as fundamentally as Mr Rawson asserts in recording what he conveyed.

[17] Thus, from the outset of their discussions on 5 December, Ms Rudling and Mr Rawson were proceeding on the shared premise that he intended to accept a signed offer of $1.15m from Mr Arymowicz. Ms Rudling does not, however, say that Mr Rawson raised the issue of payment of the deposit then. It is appropriate to recite the special deposit and related provisions contained in Mr Arymowicz's offer as follows (italicised parts in Mr Arymowicz's handwriting):

> 15.0
> This contract is *subject to* the Vendor or the Vendors Solicitor receiving confirmation that the deposit has arrived in the Ray White Trust Account as per Clause 16 *and Clause 18*.
>
> 16.0
> A) The deposit is to be transferred by international T/T on the *third* available working day after this agreement has been signed by both parties *and approved* directly to the Ray White Trust Account.
> B) The Purchaser will fax proof of this transfer within *96* hours of this agreement being signed by both parties *and approved*.
> C) The Vendor warrants that prior to settlement the pool fencing will be compliance in accordance with the Manukau City council pool fencing regulations.
> D) The Vendor will deliver good and marketable title, free and clear of all liens and encumbrances in fee simple absolute.
> E) All appliances are included in the sale.
>
> *16.01*
> *If Clause A or B not fulfilled Vendor or Purchaser may terminate the contract by giving written notice to solicitors, there shall be no liabilities to anyone and deposit shall be returned if and when received.*
>
> 17.0
> This offer is valid until 5pm *Saturday 6th* December 2008.
>
> *18*
> This agreement is conditional for *3* working days upon the Purchaser's Solicitor's approval *of all matters in the agreement except price*.

[18] Ms Rudling says that Mr Arymowicz had that morning agreed to remit the deposit as soon as possible, leading to his request at 11.57 am for details of Ray White's account; and that Mr Rawson first raised the subject when he phoned at 2.22 pm:

> [t]o make sure I understood he had accepted Charles' offer and to question details of the deposit being transmitted from Canada indicating he wanted to be sure it would arrive as soon as possible.

This discussion followed personal delivery of Mr Arymowicz's signed amended offer to Ms Raos a little over an hour earlier.

[19] Ms Rudling says that in the same discussion Mr Rawson asked her to instruct Mr Arymowicz to remit the money immediately 'so proof would be in our hands by Monday morning'; and that he said 'I give you my word' when she explained that it was a serious undertaking to 'give verbal acceptance without paperwork finalised'.

[20] Ms Rudling's evidence of a division of the components of price and deposit, separated by some hours, is not easy to reconcile with Mr Arymowicz's case that the two were part of a composite acceptance. Logically, if Mr Rawson was concerned about Mr Arymowicz's good faith, he would have asked for proof about the deposit when discussing price with Ms Rudling at 9.30 am. Also, Mr Arymowicz's confirmation when signing the offer of the special conditions, providing for payment of the deposit within three days after the parties had signed the agreement, does not easily reconcile with an alleged agreement that Mr Arymowicz would pay the deposit immediately, and before Mr Rawson had signed.

[21] Two other aspects of Ms Rudling's evidence raise doubts about her reliability. One is the email from Ms Rudling's personal assistant to Mr Arymowicz at 2.52 pm, advising that Ms Rudling had just heard that Mr Rawson had signed the offer. Ms Rudling says that she was on Waiheke Island at the time and dictated a message to her assistant; and that it followed a call from Ms Raos to confirm that Mr Rawson had accepted Mr Arymowicz's offer and requested the deposit to be sent immediately. The other is Ms Rudling's statement that Ms Raos called later to advise that 'Roy was signing the deal and we would get the documents back that afternoon'.

[22] Ms Raos denies both assertions. I have no hesitation in accepting that she did not speak with Mr Rawson about the contract until he phoned her at 4.43 pm. She did not attempt to fax him a copy in the South Island until about 5.30 pm when he

had arrived at Oamaru and gave a friend's fax number. Ms Raos readily accepted that throughout she expected Mr Rawson would sign the agreement subject to his lawyer's approval, although she had some reservations particularly about the LIM provision.

[23] Ms Raos was a clear and decisive witness. I formed a favourable impression of her professionalism. I accept that she would not have advised Ms Rudling that Mr Rawson had accepted the offer at a time about two hours before she spoke with him and that she would not represent that he was signing the agreement when she had no authority for that purpose. I accept that she conveyed to Ms Rudling her expectation of Mr Rawson's acceptance at the offer price of $1.15m but no more.

[24] This finding adverse to Ms Rudling casts about upon the rest of her evidence about events that afternoon. It is compounded by my unease at her account of two subsequent discussions with Mr Rawson. In cross-examination she explained in some detail questions raised by Mr Rawson about the deposit clause in a telephone discussion at 1.33 pm. She gave a careful explanation for the three day grace period required by Mr Arymowicz. But I accept Mr Rawson's denial, corroborated by Ms Raos, that he had not received a copy of the signed contract at that time. Ms Raos had collected it less than half an hour previously, and she had no way of forwarding a copy to Mr Rawson because hew as in transit to the South Island.

[25] Second, there is Ms Rudling's next telephone discussion with Mr Rawson at 2.20 pm. There is a degree of unreality about Ms Rudling explaining the concept of oral acceptance of an offer, in the context where she knew the parties were transacting on the premise of a written contract, and securing Mr Rawson's 'word'. I must say that this account does not ring true when Ms Rudling knew Mr Rawson was a builder who relied on professional advice.

[26] Mr Judd places weight upon two other factors. One is Ms Raos' provision of the SWIFT code details for Ray White's bank account at about 4.18 pm. But I agree with Mr Wilson that there is nothing significant in this act. It would not be out of the ordinary for the vendor's agent to supply this information on request where the

agents expect the contract to be signed, and the relevant provisions are for payment of a deposit by an overseas purchaser by telegraphic transfer.

[27] The other is Mr Divers' failure to challenge Ms Rudling's advice in their discussion about 5 pm that Mr Rawson 'had already given me verbal acceptance and had instructed me to convey this to Charles in Canada'; and that 'Roy had requested that the deposit be remitted immediately so the copy of the T/T would be available by Monday morning'.

[28] I do not accept Mr Judd's submission that the logical inference from this exchange is that Mr Divers' failure to remonstrate is consistent with Ms Rudling's evidence of the existence of an oral agreement. Mr Divers had not then spoken with Mr Rawson about the contract or received instructions. He was not in a position to deny an assertion of an event beyond his knowledge. He was making inquiries about two provisions of concern. One, relating to appliances, was resolved in his subsequent discussion with Mr Rawson. In my judgment Ms Rudling's communication of Mr Rawson's verbal acceptance of Mr Arymowicz's offer is entirely consistent with Mr Divers' advice shortly afterwards that Mr Rawson intended to sign the agreement. Mr Rawson himself admitted that that was his intention by that time.

[29] What is perhaps more significant is Mr Divers' advice that Mr Rawson 'is signing the agreement' in its existing form – that is, providing for payment of the deposit due in three days – but on the understanding that the appliances were those identified in the schedule. There was no reference to immediate payment of the deposit or of a response by Mr Arymowicz's representatives that the parties had agreed orally to accelerate performance of that obligation. Significantly also Mr Arymowicz's instructions to his bank were to pay on 9 December (10 December in New Zealand), the third available working day after the agreement had been signed, in accordance with clause 16. None of this is consistent with an agreement that the deposit was to be paid immediately or straight away.

[30] I accept that there may have been an exchange or exchanges between Ms Rudling and Mr Rawson on the afternoon of 5 December about payment of the

deposit. It would not have been unreasonable for him to make inquiries about this subject. I believe that Ms Rudling has exaggerated or elevated their effect, to the unjustifiable degree of asserting that Mr Rawson unequivocally accepted the offer on Mr Arymowicz's assurance of immediate payment (which did not occur in any event but was delayed for three days).

[31] In summary, I am not satisfied that Mr Arymowicz's case has crossed the high evidential threshold necessary to show that the parties' common intention was that they would become legally bound by Mr Rawson's oral acceptance of Mr Arymowicz's offer before completion of the formal process of signing and accepting written offers. I agree with Mr Wilson that the parties' common intention throughout 5 December was that they would not be legally bound until each signed a written contract. The process followed by Ms Rudling in arranging for Mr Arymowicz to sign and return copies of the offer document from Canada, submitting it to Mr Rawson's agent, discussing its terms with her and Mr Rawson's solicitor, and her subsequent inquiries into the whereabouts of the written document show that that was Mr Arymowicz's intention.

[32] On the other side of the equation, Mr Rawson's conduct in liasing with and seeking advice from his solicitors and agent reflects the same intention. I am satisfied that he intended to accept Mr Arymowicz's offer from the time he knew of its receipt early in the afternoon on 5 December but he did not intend to commit himself until he had obtained professional advice on the document's terms and signed accordingly.

Result

[33] I dismiss Mr Arymowicz's application for a decree of specific performance and I order that caveat number 8026067.1 be removed from identifier NA137A/394, North Auckland Land Registry.

[34] I am prepared to hear from counsel on costs. They would normally follow the event but in the unusual circumstances of this case, where I am satisfied that Mr Rawson has been largely responsible for bringing this litigation on himself, I

would be prepared to make an exception and direct each party to bear his own costs. However, if counsel wish to apply for an order, Mr Wilson is to file his memorandum on or before 1 April 2009 and Mr Judd is to file a memorandum in answer by 15 April 2009. Memoranda are to be no longer than five pages.

[35] I wish to express my gratitude to Messrs Judd and Wilson for the quality of their argument and their preparation of this case for trial at short notice without in any way diminishing from its integrity. The case was finely balanced and in an unusual sense the force of the argument presented by each counsel has caused me greater difficulty in reaching a decision than might otherwise have been the case.

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Rhys Harrison J