IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV 2009-485-220

	BETWEEN	JOHN ROLAND GILBERT, MARIE ANNETTA GILBERT AND GILBERT TRUST MANAGEMENT LIMITED Plaintiffs
	AND	MATHEW JAMES MANNINEN Defendant

Hearing: 17 March 2009

Appearances: P. Withnall for Plaintiffs
J.A. Langford for Defendants

Judgment: 3 April 2009 at 3.00 pm

JUDGMENT OF ASSOCIATE JUDGE D.I. GENDALL

This judgment was delivered by Associate Judge Gendall on 3 April 2009 at 3.00 p.m. pursuant to r 11.5 of the High Court Rules.

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Introduction

[1] The plaintiffs apply for summary judgment against Mr Manninen ("the defendant") and seek an order that the defendant as purchaser specifically perform an Agreement for the Sale and Purchase of a property at Tawa owned by the plaintiffs.

[2] The defendant opposes this application.

Background Facts

[3] The plaintiffs are the registered proprietors of the property at Unit 3, 157 Main Road, Tawa, Wellington ("the property"). The defendant is a joint operator of a dry-cleaning business in Karori, Wellington and wished to purchase the property to establish a new dry-cleaning business outlet there.

[4] By the Agreement for Sale and Purchase ("the Agreement") dated 24 October 2008, the defendant agreed conditionally to purchase from the plaintiffs as vendors the property at a purchase price of $300,000 (plus GST). The Agreement stated the purchaser to be "Manninen Family Trust", of which Mr Manninen is a trustee. Settlement date under the Agreement was recorded as 18 December 2008.

[5] The agreement was entered into subject to clause 15, which provided:

> "**15. Council consent**
>
> This agreement is conditional on the purchasers obtaining the Wellington City Council's consent to their proposed use for the property within 30 working days of the date of the agreement. This clause is inserted for the sole benefit of the purchasers."

[6] Clause 8.7(1) of the Agreement stated that there was a binding contract for the sale and purchase of the property in existence and this condition in clause 15 was a condition subsequent. Clause 8.7(2) required the defendant to do all things reasonably necessary to enable the condition to be fulfilled by the date for fulfilment.

[7] After the Agreement was signed, the defendant applied to the Wellington City Council for a resource consent to undertake the proposed dry-cleaning business from the property. In his application, he stated that there would be a total of 4-5 staff on the premises at any one time.

[8] On 8 December 2008, the defendant sought an extension of time for confirmation of the clause 15 condition to 5pm 12 December 2008. The plaintiffs agreed to this extension that day. On or about 12 December, the parties also agreed to reduce the purchase price for the property by $3,500 to $296,500 to accommodate the cost of roofing repairs to the premises.

[9] On 12 December 2008, the Wellington City Council granted the defendant's resource consent application to operate the dry-cleaning business from the property. The consent, however, was subject to a number of conditions. In particular, the consent required first, that the "total number of staff on the site at any one time must not exceed five" and secondly, that the defendant provide details of a ventilation system to be installed. The premises did not have an existing ventilation system.

[10] The defendant responded by saying that these conditions imposed on the resource consent meant that the consent was not suitable for his purposes and the proposed use of the property. By fax on 12 December, the defendant sought to cancel the Agreement, claiming that clause 15 had not been satisfied. The plaintiffs reject this contention and maintain that the condition was satisfied, the Agreement is unconditional and remains on foot. They apply for summary judgment against the defendant and seek an order for specific performance of the Agreement.

[11] The defendant in his notice of opposition opposes the application for summary judgment on two grounds. He submits that, first, the Agreement was duly cancelled because the condition in clause 15 was not fulfilled, and secondly, that the remedy of specific performance is inappropriate here because the defendant is unable to pay the purchase price and settle under the Agreement.

Summary Judgment

[12] The Court's power to grant summary judgment is contained in r 12.2 of the High Court Rules, which states:

> "12.2 The court may give judgment against a defendant if the plaintiff satisfies 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."

[13] The onus is clearly on the plaintiffs to satisfy the Court that the defendant has no defence to the claim. In the leading case of *Pemberton v Chappell* [1987] 1 NZLR 1 at 3, Somers J described the test as follows:

> "At the end of the day Rule 136 requires that the plaintiff "satisfies the Court that a defendant has no defence". In this context the words "no defence" have reference to the absence of any real question to be tried. That notion has been expressed in a variety of ways, as for example no bona fide defence, no reasonable ground of defence, no fairly arguable defence. … On this the plaintiff is to satisfy the Court; he has the persuasive burden. Satisfaction here indicates that the Court is confident, sure, convinced, is persuaded to the point of belief, is left without any real doubt or uncertainty.
> …
> Where the defence raises questions of fact upon which the outcome of the case may turn it will not often be right to enter summary judgment. There may however be cases in which the Court can be confident – that is to say, satisfied – that the defendant's statements as to matters of fact are baseless."

[14] However, in situations where there appears to be no defence to the plaintiff's case on the face of it, the defendant may have an evidential burden to raise a defence. This was also explained by Somers J in *Pemberton v Chappell* (at 3):

> "If a defence is not evident on the plaintiff's pleading, I am of the opinion that if the defendant wishes to resist summary judgment, he must file an affidavit raising an issue of fact or law and give reasonable particulars of the matters which he claims ought to be put in issue. In this way a fair and just balance will be struck between a plaintiff's right to have his case proceed to judgment without tendentious delay and a defendant's right to put forward a real defence."

[15] The Court on a summary judgment application will not normally "*attempt to resolve any conflicts in evidence contained in affidavits or to assess the credibility or plausibility of averments in them*": *Attorney-General v Rakiura Holdings Ltd* (1986) 1 PRNZ 12, 14. Nor will the Court determine real issues of credibility because the determination of such issues requires examination and cross-examination of witnesses not possible under the summary judgment procedure: *Busch v Dive & Marine Tours Ltd* HC AK CP1587/86 19 February 1987; *McGechan on Procedure* at HR12.2.03.

[16] Having said this a Judge will not be bound:

> "[t]o accept uncritically, as raising a dispute of fact which calls for further investigation, every statement on an affidavit, however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself it may be: Eng Mee Young v Letchumanan [1980] AC 331 at 341. (See also McGechan on Procedure at HR12.2.08.)"

[17] *Bilbie Dymock Corporation Ltd v Patel* (1987) 1 PRNZ 84 is authority for the proposition that the Judge is entitled to take a robust approach to cases involving summary judgment, and to dismiss defences which do not stand up to scrutiny. The Court commented at 85-86:

> "… the need for judicial caution has to be balanced, when considering a summary judgment application, with the appropriateness of a robust and realistic judicial attitude when that is called for by the particular facts of the case. In the end it can only be a matter of judgment on the particular facts."

[18] The ultimate issue is as stated by *McGechan on Procedure* at HR12.2.06:

> "The Court must be satisfied there is no defence. In Towers v R & W Hellaby Ltd (1987) 3 NZCLC 100,064, Thorp J said that the critical question will generally be whether the Court is satisfied that the plaintiff's case is unanswerable and the Court will not reach that conclusion if it can see an arguable defence."

Preliminary Issue

[19] A preliminary issue arose here. The defendant raised concerns that it was unclear whether the present proceedings were brought against him personally or against the Manninen Family Trust.

[20] Pursuant to r 4.23 of the High Court Rules, "[t]rustees … may sue and be sued on behalf of, or as representing, the property or estate of which they are trustees …" The effect of this provision is that, unless there is an exclusion of liability in the agreement, the defendant can be held personally liable even though he was acting on behalf of his family trust: *Williamson v Bennett* [2009] BCL 208. There does not seem to be any such exclusion in the agreement. It seems here the defendant signed the agreement as trustee of the Manninen Family Trust and is now sued in that capacity.

Meaning of Clause 15

[21] The principal issue in this case relates to the meaning of clause 15 in the Agreement (noted at para. 5 above) and whether this condition has been satisfied. According to the defendant, clause 15 is to be construed in subjective terms and must therefore be considered with the defendant's intention as purchaser in mind. This argument is based on the wording of clause 15, which refers to the purchaser obtaining the Wellington City Council's consent to "their proposed use". Some

reliance is also placed on the second part of clause 15, which states that the clause has been inserted "for the sole benefit of the purchasers". Thus, the condition is said to be subject to the defendant's discretion as purchaser, enabling the defendant to determine whether the resource consent is suitable for his purpose. It is further argued that the resource consent as granted did not accord with the purchasers' "proposed use" because first, it did not allow for his intended expansion of the business and secondly it required the installation of a ventilation system.

[22] The plaintiffs reject the submission that a subjective interpretation of clause 15 is available. Instead, it is argued that, on the natural and ordinary meaning of clause 15, it was the mutual intention of the parties simply to make the agreement conditional on resource consent to operate a dry-cleaning business. Because the words "their proposed use" plainly refer to the obtaining of resource consent, they cannot be read as incorporating a subjective meaning. According to the plaintiffs, it is therefore immaterial whether the conditions of the resource consent did not align with what the defendant as purchaser now claims was his intention.

[23] It is clear from the authorities that, when construing the meaning of contractual terms, one must ascertain their natural and ordinary meaning in the context of the Agreement as a whole*: Pyne Gould Guinness Limited v Montgomery Watson (NZ) Limited* [2001] NZAR 789 (CA). Although regard may be had to the "surrounding circumstances", that is the background information which would reasonably have been available to the parties at the time of contracting, the parties' subjective intentions are not to be taken into consideration. Because the focus is on the mutual intention of the parties, there can be no doubt that the meaning of a contract is to be construed objectively. It is possible though for the natural and ordinary meaning to be displaced if it is evident from the surrounding circumstances that the parties intended the words to have a different meaning: *Boat Park Limited v Hutchinson* [1999] 2 NZLR 74 (CA).

[24] For the defendant's argument to succeed therefore, the Agreement must be taken to disclose a mutual intention that clause 15 would only be satisfied if any conditions imposed on the resource consent were to be to the purchasers' satisfaction. It follows that it is necessary, based on an objective interpretation of the

contract, for clause 15 to confer a power of decision on the defendant which is inherently subjective.

[25] I start with the natural and ordinary meaning of the words "[t]his agreement is conditional on the purchasers obtaining … consent to their proposed use". It is difficult to see how this clause could be interpreted as conferring such a power. As counsel for the plaintiffs noted, the clause neither refers to the Agreement being subject to obtaining a resource consent on approved conditions nor does it require the consent to be on terms satisfactory to the purchasers. In my view, there is force in the argument that, if the parties had intended the defendant as purchaser to have such discretion, they could have simply said so. It is not uncommon for parties to expressly require the fulfilment of a condition to be on terms satisfactory to a party. Examples are *Globe Holdings Limited v Floratos* [1998] 3 NZLR 331 (CA) and *Ansley v Prospectus Nominees Unlimited* [[2004] 2 NZLR 590 (CA).

[26] I also accept the argument advanced for the plaintiff that, having regard to the background knowledge available to the parties at the time of entering into the Agreement, a reasonable person in their position would have been aware that the Resource Management Act enabled local authorities not only to grant resource consents but in doing so to impose conditions and that this commonly occurred – *Valentines Properties Ltd v Huntco Corporation Ltd* [2001] 3 NZLR 305 (PC) and *Steele v Serepisos* [2007] 1NZLR 1 (SC). The absence of any wording to this effect in clause 15 is therefore in itself telling.

[27] Counsel for the defendant goes on to submit that the word "their" in conjunction with the words "proposed use" in clause 15 reflects an intention by the parties to enable the defendant as purchaser to decide whether any consent granted was suitable for <u>his</u> proposed use. Counsel says that the defendant's proposed use was to operate a dry-cleaning business without the need for further modification of the premises, and ultimately to have the ability to increase the size of the business. His contention seems to be two-fold: first, that the meaning of "proposed use" must be determined in accordance with the purchasers' subjective intention due to inclusion of the word "their", or alternatively, that the objective meaning of "proposed use" includes the defendant's expansion plans. In support of this submission, counsel referred to statements by the defendant regarding his plans for

the premises. The defendant claims also that he had discussions with the first-named plaintiff regarding the number of staff working at the property, and says that he made it clear that he wished to increase the size of the business. The plaintiffs, who argue that the meaning of "their proposed use" must be confined simply to the operation of a dry-cleaning business, also go on to dispute the claim that discussions took place with the defendant with regard to these matters.

[28] In the end, whether or not the plaintiffs were aware of the defendant's desire to expand the business may well be seen as immaterial. Any such discussions as I see it are not likely to be sufficient to give clause 15 the meaning contended for by the defendant. Mere discussions as to the number of staff intended to be on the premises, or the defendant's future business plans, in my view do not allow the conclusion that a more literal interpretation of clause 15 "*flouts business common sense*", or that it reflects "*an intention which [the parties] plainly could not have had*": *Boat Park* at 83.

[29] The plaintiffs go on to submit that statements by the defendant of his subjective intention regarding the meaning of clause 15 are inadmissible. Although this is correct, from the arguments advanced at the hearing before me, it does seem that the defendant's contention was a different one. His counsel contended that, based on the word "their", in the clause, it was the mutual intention of the parties that the defendant as purchaser would have a discretion in determining the "proposed use" of the land. As I see it, however, this discretion cannot extend to the consent itself.

[30] While therefore I accept that the defendant was entitled to exercise some discretion as to his stipulated use and purpose for the premises, in my view the meaning of the words "their proposed use" must be determined in the context of the resource consent application itself. The defendant stated in this application that the proposed use of the premises was to be for the operation of a dry-cleaning business, which was described as employing 4-5 staff. And, the defendant concedes that expansion plans were not mentioned anywhere in the application itself.

[31] It is difficult to see therefore how the use of the word "their" in conjunction with "proposed use" could possibly reflect an intention by the parties to enable the

purchaser to have a blanket discretion to decide whether on any grounds, the consent granted was suitable. The operative word in clause 15 seems to me to be "consent". Hence, whatever the precise meaning of "proposed use" may be, it would be inconsistent to give it a meaning that was at odds with the use actually applied for by the defendant. It was the defendant's obligation to seek the Council's consent to its proposed use, the details of which initially seemed to be left to the purchasers' discretion. However, once resource consent was sought and granted, there is a reasonable argument that the defendant had no right to question the suitability of the consent, particularly for a proposed use he failed to specify in his application. This interpretation of clause 15 in my view is also consistent with the defendant's obligation to take all reasonable steps to fulfil the condition: see clause 8.7(2) of the Agreement and *Connor v Pukerau Store* [1981] 1 NZLR 384 (CA). And, after all, the Council might have granted a resource consent for a greater number of staff on the premises had the defendant made it known that this was of interest to him.

[32] Also, I do not accept the argument advanced for the defendant that the words "for the sole benefit of the purchasers" have the effect of conferring a discretion on the defendant. As counsel for the plaintiffs pointed out, it is clear from cases such as *Globe Holdings* that such terms merely clarify who is entitled to exercise the right to confirm or cancel a condition.

[33] For all these reasons, I conclude that a consideration of the natural and ordinary meaning of the words of the condition in clause 15 in the context of the Agreement is not likely to assist the defendant here.

Implied terms

[34] Counsel for the defendant, however, went on to submit that the Court should imply a term into the Agreement whereby the defendant as purchaser was entitled to cancel if the Council imposed unusually onerous or unsatisfactory conditions on its consent and that consent needed to be wholly compatible with the defendant's proposed use of the property. It is contended that it would be absurd to expect the defendant to continue with the contract if conditions imposed had required an extravagant amount of compliance work, and that it follows the present case falls at least within a "grey area", thus making it unsuitable for summary judgment. On this

aspect, authorities make it clear that the Court in certain circumstances is able to imply a term into a contract to repair an intrinsic failure of expression.

[35] That said, counsel for the defendant referred the Court to the Court of Appeal decision in *Rod Milner Motors Ltd v Attorney-General* [1999] 2 NZLR 568, in which it was held that the Crown breached an implied condition that it would adhere to the original process of calling for tenders. A term was "*deduced by implication from the express terms of the contract*" that the provisions of the original plan would be adhered to. In the alternative, the Court also implied the term as necessary to give business efficacy to the contract, relying on a five-point test approved in *Devonport Borough Council v Robins* [1979] 1 NZLR 1.

[36] In response, counsel for the plaintiffs submitted that neither of the two tests in *Rod Milner* was satisfied in the present case. He said an implied discretion can neither be deduced from the express words of clause 15 nor inferred to give business efficacy to the Agreement. Counsel argued that what the defendant seeks relief from here is not that an absurd consequence flows from the wording of clause 15, but that the extent of the consequences was not foreseen by the defendant as purchaser. The latter, however, does not provide a basis for an implied term. The plaintiffs thus submit first, that a limit of five staff on the premises is not an absurd consequence, and secondly, that the purchasers must have foreseen the requirement to install a ventilation system. The real issue is the burden and expense of satisfying these conditions as opposed to the contract's purpose or efficacy.

[37] The plaintiffs argue also that *Rod Milner* significantly differs from the present case. In particular, it is said that there is no need in the present case to imply a term as there was in *Rod Milner,* where a term was implied against a background of long-standing expectations.

[38] In his submission, counsel for the defendant also relied on *Valentines Properties Ltd v Huntco Corporation Ltd,* a case which he said had broadly similar facts to the present. The *Valentines Properties Ltd* case, however, involved a conditional clause which expressly conferred a discretion on the purchaser to approve conditions imposed by the local authority's consent and went on to provide

that such approval was not to be unreasonably withheld. This case thus has little bearing on the interpretation of clause 15 here which is silent as to those aspects.

[39] I remind myself that the application before me is one for summary judgment and I bear in mind that I must decline the application if an implied term in the nature contended for by the defendant is at least reasonably arguable.

[40] Although I am inclined to agree with the plaintiffs' view that the actual conditions imposed by the consent here are not sufficiently severe to justify an implied term, I cannot go so far as to conclude that a court could never arguably infer such terms in response to conditions incidental to resource consent.

[41] In *Clough v Martin* [1978] 1 NZLR 313, the Court of Appeal held that a contract that was subject to a statutory condition not only required the vendors to take all reasonable steps to obtain approval of the relevant authority in that case, but also called for compliance with *reasonable* conditions imposed by the authority. At [36], it was said that "*[n]o doubt the vendors would have to submit to reasonable building line and sewerage conditions, notwithstanding that they involved much expense and affected other land of the vendors, if that were necessary to achieve the subdivision provided for by the contract.*" In the end, however, it was held the vendor was not in breach of his contractual obligation because the provision of a building line would have had the effect of materially altering the subdivision agreed to by the parties.

[42] The Supreme Court recently accepted *Clough* as appropriately stating the law in the context of s. 225(1) of the Resource Management Act 1991: *Steele v Serepisos* [2007] 1 NZLR 1. S. 225(1) deems any agreement for sale of a property in a proposed subdivision to be subject to a condition that the necessary survey plan will be deposited under the Land Transfer Act. In *Steele*, the condition imposed by the consent authority related to the connection of drainage to the existing main drains. Both parties had expected that this condition would be able to be fulfilled via an easement across neighbouring land. The neighbour, however, refused to consent to the easement, and the only alternative involved costs that were $18,000 in excess of what had been anticipated. When the vendors refused to comply with the condition, the purchaser sued for specific performance.

[43] In the Supreme Court the majority held that the vendors were required to take all reasonable steps to deposit the plan, and "*thus to take all reasonable steps to fulfil conditions that might be imposed on the plan's approval, provided those conditions were themselves reasonable*": Tipping J at [23]. More importantly, however, the Court dismissed the purchaser's submission that once a condition on a plan approval was itself reasonable, the vendor must fulfil the condition regardless of how onerous the compliance process may be. The purchaser there went on to argue that the vendors had assumed the risk that fulfilment of the condition might be more onerous than expected, and that the only relief available in such circumstances was provided by the doctrine of frustration. In rejecting the purchaser's submission, Tipping J noted at [28] that *"[i]t would be artificial to make a sharp distinction between the reasonableness of a consent authority's condition in itself and the reasonableness of the steps necessary to fulfil it.*" The majority of the Supreme Court then came to the conclusion that, because the parties had envisaged a particular method of fulfilling the condition of the plan approval, the steps necessary to comply with the alternative method did not meet the requirement of reasonableness as between the parties.

[44] Whilst the decision in *Steele v Serepisos* relates to the interpretation of a particular statutory condition, in my view it may well be that a similar approach applies in cases such as the present in the context of a purely contractual condition. Here, there are conflicting statements and limited evidence as to the reasonableness of the Council's ventilation requirement. The defendant suggests that he did not expect to have to undertake any modification of the premises, implying that a ventilation system may not generally be necessary. The plaintiffs, on the other hand, believe that such ventilation systems are commonly required. In his 3 March 2009 affidavit the defendant deposes that the installation of the required ventilation would need substantial modifications to the existing roof of the building at a possible cost of $20,000.00 to $30,000.00. No other detail or evidence is before the Court however as to what the Council's ventilation requirement would entail and whether or not that condition and the steps necessary to fulfil it could be considered reasonable. An assessment of these issues and the factual differences between the parties at trial in my view is therefore desirable.

[45] I reach that conclusion here with some reluctance because of my concern about the nature of the defendant's present evidence which I regard as unsatisfactory in many respects. His obligation in opposing the present summary judgment application was not an onerous one – only to put before the Court enough to suggest that an arguable defence exists. He has done that – just, although that defence can only be seen as marginal. It follows therefore, and I find that the plaintiffs here have not done enough (in terms of the required standard of proof set out in *Pemberton v Chappell*), to show the defendant has no arguable defence and therefore I must decline their summary judgment application for an order for specific performance. That should not be seen however as indicating any view on my part that specific performance may not be an appropriate remedy for the plaintiffs in this case after a full hearing and testing of all the appropriate evidence.

Specific Performance

[46] Although, given these findings, I need not do so here, for the sake of completeness I will now briefly deal with the defendant's second ground of defence, impossibility of performance. Relying on the case of *Butler v Countrywide Finance Limited* [1993] 3 NZLR 623, the defendant submits that damages are the appropriate remedy in this case because it would cause considerable unfairness and hardship to the defendant if he was required to specifically perform the contract. In particular, he submits that the first-named plaintiff, Mr Gilbert had a clear advantage in drafting the clause because he is a real estate agent and the defendant himself has no expertise in property sale agreements. He claims also that he cannot compel his co-trustee to approve the contract and, due to the resulting unavailability of trust assets, is thus unable to settle.

[47] Relating to the issue of unfairness, it should be noted that the defendant's submissions do not amount to claims of undue influence or unconscionable bargain. Indeed, it is difficult to see how the making of the contract involved more than a common inequality in expertise between Mr Gilbert and the defendant. Email correspondence between the two parties shows that the defendant is not wholly inexperienced in property matters.

[48] The plaintiffs submit that there is considerable doubt whether a purchaser's inability to pay the purchase price can amount to a defence of impossibility at all, and that specific performance by summary judgment can still be granted against a purchaser unless the vendor is unable to show that there was no substantial likelihood or very substantial probability of non-compliance: *D'Arcy Smith v Stace* (2003) 4 NZ Conv C 193,771, *Gillespie Projects Limited v Prestidge & Ors* (CP 283/IM/01, Auckland Registry, 2 October 2001, O'Regan J) . Mr Withnall for the plaintiffs argued that the defendant had not adduced any reliable or independent evidence as to his inability to pay. On the contrary, the supposed impossibility is said to be based on the defendant's and his wife's assessment of the contract's financial implications. Mr Withnall further submits that if the defendant wishes to rely on a lack of personal resources, he must be fully forthcoming about his financial circumstances. The defendant's assertion of impossibility is also in conflict with his unrefuted offer to complete the settlement at a lower purchase price three days after he had sought to cancel the agreement.

[49] I accept that mere difficulty on the part of the purchaser to pay for the property is unlikely to amount to a defence of impossibility or hardship: *Pasedina (Holdings) Pty Ltd v Khouri* [1997] 1 BPR 9460. In my view, there is no "substantial likelihood" here that the defendant would not be able to settle the agreement. Material factors are that the defendant did not indicate that finance might be a problem at the time of contracting, and that he does not seem to have informed the vendors of his inability to pay following cancellation of the agreement: *Colson v Jensen* (CP652/90, Auckland Registry, 18 September 1999). The defendant also did not provide evidence as to his efforts to raise finance. Had I needed to, I would have rejected this second ground of defence advanced by the defendant here.

Result

[50] For the reasons, I have outlined above, but, as I have noted, only by a rather narrow margin, the plaintiffs fail in their present application for summary judgment.

[51] Costs are reserved.

[52] This matter is now listed for call in the Associate Judge's List at 10.00 am on 27 April 2009 for directions to be made to proceed to trial.

'Associate Judge D.I. Gendall'