

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

CIV 2007-404-007385

BETWEEN	CHEUNG KWONG CHIU, YAM WAH CHUNG Plaintiffs
AND	SOUTHSIDE GROUP LTD First Defendant
AND	TONY ISMAIL Second Defendant
AND	KNIGHT FRANK AUCKLAND LTD Third Party

Hearing: 21 April 2009

Appearances: R Edwards for Plaintiff
S Corban/E Lawless for Defendants

Judgment: 21 April 2009

ORAL JUDGMENT OF ASSOCIATE JUDGE ROBINSON

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[1] The first defendant applies for orders that the second named plaintiff answer interrogatories and for further discovery. The application is supported by the second defendant and opposed by the plaintiffs. The proceedings are brought by the plaintiffs for a declaration that there is no valid agreement for sale and purchase entered into between the plaintiffs and the first defendants relating to land and property owned by the plaintiffs at 59 Kirkbridge Road, Mangere.

[2] There are further causes of action pleading that the agreement for sale and purchase is not binding applying the non est factum principle and that the plaintiffs can avoid the contract relying on the Contractual Mistakes Act.

[3] The second named plaintiff is the wife of the first named plaintiff. She signed an agreement for the sale and purchase of property they owned at Kirkbride Road, Mangere. The purchaser named in the agreement is the first defendant. The second defendant is the real estate agent involved in the transaction.

[4] In her statement of claim the second named plaintiff pleads a limited understanding of the English language and claims that when she executed the agreement she did so believing she was signing an authority to list. She also claims that as a result of the second defendant's conduct and representations the document she executed was fundamentally different to the agreement for the sale in this case. The plaintiffs also plead that the second named plaintiff had no authority to enter into an agreement for the sale of the property to the first defendant.

[5] The first defendant has obtained evidence supporting the conclusion that the second named plaintiff signed an agreement for sale and purchase when she and the first named plaintiff acquired the property at 59 Kirkbridge Road. The first defendant has produced a copy of the caveat lodged by the plaintiffs to protect their interest under an agreement for sale and purchase entered into on 13 February 19997. As a consequence, the first defendant has requested the second named plaintiff to answer the following interrogatories:

- a) Have you ever signed an agreement for sale and purchase of property whether in New Zealand or elsewhere other than the agreement at issue in these proceedings?
- b) If the answer to question 11 is yes, for each agreement please give details of the property and whether you were signing the agreement as the vendor or purchaser.

[6] Because the first defendant has evidence that the second named plaintiff did sign an agreement to purchase the property at Kirkbridge Road in February 1997 and that such agreement has not been discovered, the defendant seeks further discovery and in particular an order that the plaintiffs must discover any agreements for sale and purchase of property whether in New Zealand or elsewhere executed by the second named plaintiff on or before 21 March 2006 other than the agreement at issue in these proceedings.

[7] In opposing the application counsel for the plaintiff could raise no valid argument that a requirement to answer an interrogatory limited to disclosure of agreements for sale and purchase of property in New Zealand would be improper but points out that the interrogatory in this case is far too wide because the interrogatory requires disclosure not only of agreements for sale and purchase in New Zealand but agreements of sale and purchase entered into by the plaintiff overseas which could possibly include agreements in mainland China or other countries.

[8] I am satisfied that in the circumstances of this case evidence of the second plaintiff's previous dealings with real estate in New Zealand is clearly relevant to a primary issue and that is the second plaintiff's knowledge of the procedure and documents that have to be completed when purchasing and selling property in New Zealand. She is claiming that the document she signed was an authority to list and/or advertise the property and not an agreement. Clearly, evidence of other agreements for sale and purchase relating to property in New Zealand executed by the second named plaintiff must be relevant to enable the Court to assess the validity of her claim that the document she signed was not an agreement for sale and purchase but an authority to list and advertise the property for sale.

[9] I am also satisfied that execution of agreements for sale and purchase of property in Australia would be relevant because of the similar systems relating to property transactions in Australia and because of the use of the English language in Australia. However, I do not consider it appropriate to require the second named plaintiff to disclose evidence of property dealings other than in Australia and New Zealand. I fail to see how her involvement in the purchase or sale of properties say in mainland China would be relevant in determining her knowledge of English and of the procedure involved in the sale and purchase of property in New Zealand.

[10] In any event, I conclude that under s 8(1)(b) of the Evidence Act 2006, that evidence must be excluded because its probative value is outweighed by the risk that such evidence will needlessly prolong the proceedings. By way of example if the first named plaintiff disclosed that she signed an agreement for the purchase of a unit in Beijing there could be considerable delays and expense involved in obtaining the services of an interpreter and possibly in obtaining evidence from witnesses in Beijing. Ultimately the fact that she may be aware of the way in which property is disposed of in Beijing would have very little relevance to her knowledge of the way in which property is purchased and sold in New Zealand.

[11] Similarly, I am satisfied that the second named plaintiff must disclose and discover any agreements for the sale and purchase of property whether in New Zealand or Australia she executed before 21 March 2006. I come to that conclusion for the same reasons I have set out with regard to the application for interrogatories.

[12] In summary therefore, I make the following orders:

- a) The second named plaintiff must answer the following interrogatories numbered 11 and 12.

11 – Have you ever signed an agreement for sale and purchase of property in New Zealand or Australia other than the agreement at issue in these proceedings prior to 21 March 2006?

12 – If the answer to question 11 is yes, for each agreement please give details of the property and whether you were signing the agreement as the vendor or purchaser.

[13] There is an order that the plaintiffs file and serve an affidavit within seven days in relation to the following documents:

- (a) Any agreements for the sale and purchase of property in Australia or New Zealand executed by the second named plaintiff on or before 21 March 2006 other than the agreement at issue in these proceedings.

Costs

[14] As the first defendant has been in the main successful, the first defendant is entitled to costs on a 2B basis with disbursements as fixed by the registrar. Similarly the second defendant is entitled to costs on a similar basis with disbursements as fixed by the registrar.

Application for leave to issue third party notice

[15] The first defendant has issued a third party notice against Knight Frank Auckland Ltd. Knight Frank Auckland Ltd employed the second defendant when the plaintiffs entered into the agreement for sale of their property to the first defendant. The first defendant's claim against Knight Frank Auckland Ltd alleges breach of the Fair Trading Act, negligent misstatement and negligence and seeks damages to be assessed on the loss suffered by the first defendant because the agreement for sale and purchase did not proceed.

[16] Following the issue of the third party notice Knight Frank Auckland Ltd has gone into liquidation. However, the first defendant has evidence to the effect that QBE Insurance International Ltd is the insurer of Knight Frank Auckland Ltd. As a result, the first defendant now applies for leave to issue a second third party notice against QBE Insurance International Ltd. The evidence in support of that application includes correspondence between the solicitor's for the first defendant and QBE

Insurance International Ltd giving that insurance company notice of the first defendant's intention to bring this application. There has been no response to that correspondence. In bringing the application the first defendant will be relying on s 9 of the Law Reform Act 1936.

[17] The application is not opposed by the plaintiff or the second defendant. However, the plaintiff is anxious for the substantive claim to proceed to hearing on 3 August 2009 being the date fixed for the hearing of these proceedings. In not opposing the application counsel for the plaintiff emphasises that the plaintiff's position is on the basis that the fixture is not prejudiced. In the circumstances I am satisfied that there are good reasons for the first defendant not issuing the application for a third party within the required time and the delay has been explained. I am satisfied that there are good grounds for the issue of the third party notice. Accordingly therefore I will direct that the third party notice issue. Service to be effected within fourteen days. The costs will be reserved.

Associate Judge Robinson