

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

CIV 2008 409-002821

BETWEEN PEGASUS TOWN LIMITED
Plaintiff
AND RICHARD BISHOP
Defendant

Hearing: 21 April 2009

Appearances: D Lester for the Plaintiff
J Forsey for the Defendant

Judgment: 22 April 2009

JUDGMENT OF ASSOCIATE JUDGE CHRISTIANSEN

Counsel:

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[1] The plaintiff applies for summary judgment seeking specific performance pursuant to an agreement for sale and purchase dated 23 April 2006 (the agreement). By that agreement the plaintiff sold and the defendant agreed to purchase Lot 309 in the Pegasus Town Development. The purchase price was \$198,000. A deposit of 10% was payable with interest due at 15% for late settlement. The agreement provided for settlement to occur five working days following notification that title had issued. Title issued on 17 March 2008. Settlement was due on 31 March 2008.

[2] On 23 September 2008 the plaintiff issued a settlement notice. That expired on 9 October 2008.

[3] The defendant takes no issue with the above stated terms of contract. Instead his opposition to the summary judgment application was filed on the grounds:

- a) At all times he was acting for Pegasus Property Limited, a company now in liquidation.
- b) The purchase of Lot 309 was on behalf of Pegasus Property Limited.
- c) The plaintiff knew that Lot 309 was purchased by Pegasus Property Limited and treated the purchase as such in its own records and in correspondence.
- d) He did not receive the notice advising issue of title, nor the subsequently issued settlement notice.

Additional relevant terms of the agreement

[4] The purchaser is described as Richard Bishop or Nominee.

[5] Clause 1.3(2) of the agreement notes:

“Where the purchaser executes this agreement with provision for a nominee or as agent for an undisclosed principal, or on behalf of a company to be formed, the purchaser shall at all times remain liable for all obligations on the part of the purchaser hereunder.”

[6] At page 11 of the agreement it is recorded:

“This Agreement comprises the entire Agreement between the Vendor and the Purchaser. No variation, representation or undertaking by the Vendor or any person purporting to be acting on behalf of the Vendor shall be binding on the Vendor unless in writing and signed by an authorised Director of the Company. No person is authorised to commit the Vendor in any way in relation to this Agreement or matters supplemental to it unless signed off in writing by an authorised Director of the Vendor Company. This Agreement shall not be binding on the Vendor unless it is signed off in such a manner.”

Relevant principles

[7] The plaintiff must satisfy the Court that there is no reasonably arguable defence available to the defendant. If the defence raises questions of fact on which the Court’s decision may turn then summary judgment will usually be inappropriate. But, even if there are differences on certain factual matters the Court may enter summary judgment if the lack of a tenable defence is clear. If there are no circumstances suggesting summary judgment might cause injustice then summary judgment will usually be granted (*Jowada Holdings Limited v Cullen Investments Limited*, CA248/02, 5 June 2003).

The defendant’s case

[8] He contends the evidence shows unfair conduct by the plaintiff and hardship to himself. He accepts he signed the agreement in his own name or nominee. He accepts that Saunders & Co were specified as the solicitors acting in relation to the purchase. He says he purchased Lot 309 in the context of a bulk purchase of lots by Pegasus Property Limited on the basis that that company would have the purchase

assigned to it and assume responsibility for the payment of the deposit and the settlement.

[9] The defendant's evidence is that the initial \$1,000 (part payment of deposit) was paid by Pegasus Property Limited and that company conducted all discussions and negotiations in relation to planning issues pertaining to Lot 309 which was incorporated into plans that were drawn up between the plaintiff and Pegasus Property Limited for a number of lots including Lot 309.

[10] Apart from receiving one letter from the plaintiff chasing up payment of the balance of the deposit in 2006 there were no further direct discussions between the plaintiff and him in relation to the deposit or other issues concerning Lot 309. There is evidence of discussions between the plaintiff and Pegasus Property Ltd regarding the latter taking an assignment of the defendant's interest and the defendant had nothing to do with these discussions.

[11] The defendant denies the claim of the plaintiff's Mr Templeton that he had a senior management role at Pegasus Property Limited. He says Mr Templeton's own evidence demonstrates that the plaintiff effectively dealt with Lot 309 as being a lot purchased by Pegasus Property Limited. Although formal notices prepared by the plaintiff's solicitors and addressed to him were sent to the offices of Saunders & Co that firm did not communicate any of those documents or their significance at that time or subsequently. Had they done so the defendant may have acted to cancel the agreement. Hence there is an issue of hardship to the defendant.

Considerations

[12] The evidence discloses that the \$1,000 part deposit was not paid by Pegasus Property Limited but by RDMC Limited which is owned by Pegasus Property Management Limited and another with the defendant as a director. There was an earlier agreement between the plaintiff and Pegasus Property Limited by which the lots purchased by the latter were to be subject to special favourable conditions of sale. Mr Templeton was subsequently requested by Pegasus Property Limited to treat Lot 309 as if it were a Pegasus Property lot thereby conferring sale and

settlement benefits. However such were only offered on the basis of a 10% deposit being paid. In this case only an initial \$1,000 part deposit payment was ever made. Accordingly no documentation was ever completed bringing Lot 309 under the Pegasus Property Limited's contract with the plaintiff.

[13] It is common ground that an assignment to Pegasus Property Limited did not ultimately occur nor that there is any contract or assignment to that effect.

[14] Prior to the plaintiff issuing liquidation proceedings against Pegasus Property Limited in 2008 Lot 309 was not one of the lots included in the claim.

[15] There were no variations to the Agreement between the plaintiff and the defendant. Had such occurred then and such would be required by law to be in writing.

[16] The defendant said that when he filled in the agreement, and subsequently, he understood he was purchasing Lot 309 on behalf of Pegasus Property Limited. He said he understood the purchase would be assigned before the need to settle arose. But, as Mr Forsey concedes, the defendant would have had to be involved in the process. Though there were discussions with the plaintiff regarding assignment there was no obligation upon the plaintiff to take them any further than they went. There is clear evidence of close connections between the defendant and Pegasus Property Limited interests.

[17] Although the defendant asserts that all development costs on the lot were met by Pegasus Property Limited, there is no evidence the plaintiff was aware of this.

[18] The defendant blames his lawyers for failing to pass on notices to him. He said if he had received those notices he would have taken steps to assign the agreement to Pegasus Property Limited. If the lawyers were at fault then that is a matter between them and the defendant. There is no evidence of unfair or disentitling conduct by the plaintiff. Further, claims of hardship are unsupported by reference to evidence suggesting the plaintiff was responsible for same.

[19] I accept Mr Lester's submission that no good grounds exist that should impact on the plaintiff's expectation of specific performance.

Judgment

1. There is an Order by way of specific performance that the defendant settle the agreement **fifteen working days** following the making of this Order.
2. There is an Order that the Registrar of the High Court of Christchurch be appointed agent for the defendant to complete on behalf of the defendant any documentation necessary to give effect to a settlement of the agreement.
3. The defendant shall pay the plaintiff's costs on a category 2(B) basis.
4. Leave is reserved to the plaintiff to apply for further orders if required for enforcement.

Associate Judge Christiansen