IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2008-488-870

BETWEEN	STEVEN JONATHON GREER, JOHN FOSTER GREER, MARGARET VIOLET GREER, OAKLAW TRUSTEES LTD Plaintiffs
AND	BRUCE EDWIN CORCORAN, LILLIAN FAITH CORCORAN, MARK SMITH Defendants

Hearing: 31 March 2009

Appearances: R Enright for Plaintiffs
P Magee for Defendants

Judgment: 24 April 2009

JUDGMENT OF ASSOCIATE JUDGE ROBINSON

This judgment was delivered by me on 24 April 2009 at 5 pm,
Pursuant to Rule 11.5 of the High Court Rules

Registrar/Deputy Registrar

Date…….

Solicitors: Kirkland Enright, PO Box 1290, Auckland
Thomson Wilson, PO Box 1042, Whangarei

[1] The plaintiffs seek by way of summary judgment, damages for the loss suffered as a result of the defendants failure to settle the purchase of the plaintiffs' property. When these proceedings were commenced, the plaintiffs were seeking an order for specific performance. However, following the issue of the proceedings, the plaintiffs have arranged for a sale of the property at a loss and now seek an order for the defendants to pay damages for the loss the plaintiffs have suffered.

Facts

[2] On 6 February 2008 the plaintiffs entered into an agreement with the defendants for the sale to the defendants of the plaintiffs property at 12 Konini Street, Riverside, Whangarei. The purchase price to be paid by the defendants was $500,000. The sum of $25,000 was paid as deposit. The balance of the purchase price was to be paid on settlement date which is the possession date stated in the agreement. That date is 17 October 2008 or ten working days after the plaintiffs solicitors notifies the purchasers solicitors that a separate certificate of title has been issued for the property (whichever is the later). The agreement incorporated the standard conditions of sale (ADLS 8th Ed 2008 (2)).

[3] The agreement was conditional upon the defendants obtaining an unconditional agreement for the sale of a property at 3 Lincoln Place, Kamo, Whangarei by 16 May 2008. Included in the agreement was the following further term:

> 19.0 The vendor shall proceed with all reasonable speed at the expense of the vendor to obtain a new Title to the property in accordance with the Whangarei District Council resource consent. This agreement is conditional upon the vendor obtaining the issue of a new Title by 30 September 2008. This condition is inserted for the sole benefit of the purchaser.

[4] On 20 March 2008 the defendants advised the plaintiffs that the agreement for the sale of their property at 3 Lincoln Place had become unconditional.

[5] On 29 September 2008 the plaintiffs' solicitors lodged the relevant documentation with LINZ to enable the plaintiffs to obtain the issue of a new title as required by condition 19 of the agreement for sale and purchase. The lodgement abstract and tax invoice produced by the plaintiffs from Land Infonet shows that the documentation was lodged as a fast track with priority.

[6] On 30 September 2008 the solicitor for the defendants contacted the solicitor for the plaintiffs to emphasise the need for condition 19 as to the issue of a new certificate of title being completed that day. The plaintiffs' solicitor advised the defendants solicitor that the title documents had been lodged for registration and that in effect the plan had been deposited.

[7] By letter of 30 September 2008, received by the defendants solicitors at 9.36 am that day, the plaintiffs' solicitors advised as follows:

> Referring to our telephone discussion this morning we advise that all documents requisite to the issue of title have been lodged with LINZ (copy of View Pending Transaction attached). Accordingly, the condition in clause 19.0 is satisfied with our client vendors having fulfilled their obligations in respect of the matters within their control in this regard *Sicilian Estates Limited v Deavoll* [2007] BCL 926 – copy of High Court decision attached as discussed).
>
> The agreement is now unconditional in all respects and it appears that settlement date will be 17 October 2008 or the fifth working day after a search copy of the title is obtainable (clause 3.16(1), whichever is later. We will correspond further in this regard.
>
> In the meantime, we note that the deposit of $25,000 is now payable.

[8] The solicitor for the defendant wrote a lengthy letter on 30 September 2008 in reply to the letter from the plaintiffs' solicitor. In that letter, the defendants' solicitors advised the plaintiffs' solicitors that condition 19 of the agreement would not be satisfied until an issued title was available. In this respect the solicitor for the defendant advised the solicitor for the plaintiffs as follows:

> Condition 19.0 makes no reference to the deposit of the subdivision plan. In our opinion to satisfy the condition, your letter would either have needed to enclose a copy of the newly issued title, or to have given notice that a search of the newly issued title was now available. That clause would then link in to the definition of the possession date, which is also by virtue of clause 1.1(20) the settlement date. This definition would have then made 17 October 2008

> as the settlement date, as 10 working days from today's date would be 14 October 2008.
>
> As you have not given us notice of the actual issue of title, and as the deadline in clause 19.0 has passed, we now give you notice cancelling the agreement for the failure of the condition.

[9] On 1 October 2008 the defendants' solicitor received a letter from the plaintiffs' solicitor advising the title had issued and enclosing a copy of the new title which states that the title was issued on 29 September 2008.

[10] In that letter the plaintiffs' solicitor advises the defendants' solicitor that as the title was issued on 29 September 2008 the purported cancellation of the agreement by the defendants is unlawful. The plaintiffs solicitor advised the plaintiffs expected the sale to settle on 17 October 2008 and encloses a settlement statement. The solicitor for the defendants in reply, by letter of 2 October 2008, reconfirmed the defendants' position that as they believed clause 19 had not been satisfied the contract was at an end.

[11] The plaintiffs, on 20 October 2008, issued a settlement notice calling on the defendants to settle the purchase of the property within twelve working days after service of the notice. As the defendants were in default, the plaintiffs issued these proceedings for specific performance and summary judgment.

[12] Following the issue of these proceedings, and in an effort to mitigate their losses, the plaintiffs remarketed the property. They say that following extensive advertising and promotion of the property they were able to negotiate a sale for the sum of $427,000. Consequently, they no longer seek an order for specific performance but are seeking damages totally $120,631.69 being the loss on the resale, interest, maintenance costs, legal fees and real estate agents commission.

Case for defendants

[13] It is submitted on behalf of the defendants that to satisfy clause 19, the plaintiffs had to obtain the issue of a certificate of title that would be available for inspection by the defendants and their solicitors. That title had to be available for

inspection by the defendants' solicitors by 5 pm on 30 September 2008. By that time the only information available to the defendants and their solicitors were the items from LINZ to the effect that the plaintiffs' solicitor had filed documentation that was the subject of a pending transaction. At that time the title had not issued. The title and in particular a search copy could not be accessed by 5 pm on 30 September 2008.

[14] Counsel for the plaintiffs had referred the defendants' counsel to the decision of *Sicilian Estates Limited v Deavoll* [2007] 8 NZCPR 561. In that case the agreement was "subject to and conditional upon deposit of the vendor's plan of subdivision and issue of a separate certificate of title to the property." The agreement also provided that if "the vendor's plan of subdivision was not deposited by 1 December 2005 either party has a right to cancel this agreement."

[15] By agreement, the time for deposit of the vendor's plan of subdivison was extended to 1 May 2006. The vendors lodged the plan on 17 May 2006. On 24 May 2006 the vendors wrote to the purchasers solicitors indicating that the plan would be deposited prior to 31 May 2006 and settlement could be effected thereafter. On 1 June 2006 the purchasers wrote avoiding the agreements. Processing of the dealing was not completed by LINZ until sometime in the afternoon of 9 June 2006 when the "validation key" was pressed by the registrar's delegate. On pressing the validation key the LINZ records retrospectively showed that the subdivision plan was deposited and titles issued on 17 May 2006.

[16] The purchasers claimed to have validly avoided the agreements and brought proceedings for summary judgment including orders confirming their contracts had been avoided and requiring a refund of the deposits. After reviewing the procedure adopted by LINZ on the issue of computer freehold titles and the relevant provisions of the Land Transfer Act, the Court concluded that the vendor had satisfied the condition as to the deposit of the plan and issue of title, and that the vendor, who was the defendant, did have a good defence to the plaintiff's claim to a refund of the deposit and dismissed the application for summary judgment.

[17] Counsel for the defendant attempted to distinguish the facts in the present case from the facts in the *Sicilian Estate Limited* case by emphasising the difference in the wording of the two conditions. In the *Sicilian* case the condition being considered by the Court included a right conferred on either party to cancel the agreement if the vendor's plan had not been deposited by 1 December 2005, that date being extended by consent to 1 June 2006. The condition in the present case does not contain any similar provision. In this respect at paragraph 38 of the decision in *Sicilian Estates Ltd* the Court states:

> Adopting that view of the matter, one can resolve the apparent dichotomy created by the provisions of cl 15.2. By the first sentence of that clause the vendor is required to deposit the plan of subdivision *and* to issue a separate certificate of title. Yet, the second sentence of that clause provides a right of cancellation if (and only if) the plan of subdivision is not deposited within time, ie the right of cancellation does not attach to a failure to issue title

[18] Counsel also emphasised that clause 19 in this case includes reference to the plaintiffs obtaining the issue of a new title. The inclusion of the word "obtain" means the parties must have intended that the title be physically available. Consequently, it is submitted that such condition cannot be satisfied if the title is not physically available by the time specified in the contract.

Case for Plaintiffs

[19] The plaintiffs, relying on the *Sicilian Estates Ltd* case, submitted that clause 19 had been satisfied by the issue of the title on 29 September 2008 notwithstanding the fact that the title was not available for search until after 30 September 2008.

[20] Counsel acknowledged that by virtue of clause 8.7(3) the plaintiff had to satisfy clause 19 by obtaining the issue of the new title by 30 September 2008. Clause 8.7(3) provides as follows:

> Time for fulfilment of any condition and any extended time for fulfilment to a fixed date shall be of the essence.

[21] Consequently, failure on the part of the plaintiffs to obtain the issue of the title by 30 September 2008 entitled the defendants to cancel the contract pursuant to s 7(4)(a) Contractual Remedies Act 1979.

[22] Counsel for the plaintiffs pointed out that clause 8.7 in the present case was in the same terms as clause 8.7 in the contract considered by the Court in the *Sicilian Estates Ltd* case. As a result, time was made of the essence not only with regard to the deposit of the plan but also with regard to the issue of the titles in the *Sicilain Estates Ltd* case.

[23] It was further submitted that the solicitors for the defendants would not be prejudiced in their ability to requisition title because the time fixed for such requisition is contained in clause 5 of the contract and is five working days from the date the plaintiffs have given the defendants notice the new title has issued and a search copy of that title, as defined by section 172A of the Land Transfer Act 1952, is available.

Decision

[24] There are some similarities between the wording of clause 19 in this case and the condition considered by the Court in the *Sicilian Estates Ltd* case. Both clauses fix a time relating to the issue of a certificate of title. I do not consider that the use of the word "obtain" in this case means that the plaintiffs had to physically provide a search copy of the title to the defendants. *The Oxford English Dictionary* defines the verb "obtain" as follows:

> To come into the possession of; to procure; to get, acquire, or secure.

Thus the word "obtain" can include getting possession of the issued title or procuring the issue of the title.

[25] A significant reason relied upon by the Court in the *Sicilian Estates Ltd* case was that once the plan and other documents had been lodged by the vendor the time taken to process those documents before issue of the new title was completely out of the control of the vendor. There are no time limits prescribed for the issue of the title once the documents have been lodged. The process occurs when officers are available to do it. Similarly in this case once the plaintiffs' solicitors have lodged with LINZ all documents required for the issue of a title the time taken to issue the

title is no longer under the control of the plaintiff but is under the control of LINZ. When LINZ issues the title its date of issue is back dated to the date when the documents were lodged by the plaintiffs with LINZ. As stated by the Court in *Sicilian Estates Ltd* at paragraph 41.

> To adopt a contrary view would be to abandon contractual obligations to the vagaries of a process which may after an uncertain period determine (as in this case) that there was nothing wrong with the documents that were deposited.

[26] The defendants' solicitors will not be prejudiced by such an interpretation. Their right to requisition title starts from the time a search copy of the title is available. Indeed, having regard to the decision in *Sicilian Estates Ltd*, had the defendants wanted clause 19 to require the plaintiffs to have the issued title available, then words to that effect could have been included in the clause, or reference could have been made to the title being issued and a search copy obtainable as stated in clause 5.2(2)(b).

[27] Consequently, I conclude that the plaintiffs did provide an issued new title by 30 September 2008 and the defendants had no basis for cancelling the agreement.

[28] Counsel for the defendants did not contest the plaintiffs' claim for losses resulting from the cancellation of the contract, and in particular, it was accepted that subject to liability being established the defendants could have no defence to the plaintiffs claim for damages being the loss on the re-sale purchase price namely $500,000 less $427,000, namely a loss of $73,000.

[29] Counsel for the plaintiffs accepted that the plaintiffs could not recover as damages the legal costs incurred by the plaintiffs in connection with the sale to the defendants and in connection with the resale. The plaintiffs sought legal costs of $6,285 in respect of the sale to the defendants and in addition costs of $2,115 in respect of the resale.

[30] Had the plaintiffs settled the sale of the property to the defendants, the plaintiffs would have incurred the costs of $6,285 without any refund from the defendants. On the other hand, the costs incurred by the plaintiffs on the resale are

additional costs which can be recovered by way of damages from the defendants. However, as the plaintiffs are registered for GST purposes it would not be appropriate for those costs to include the GST component as the plaintiffs will receive a refund of the GST in due course. I therefore fix the costs on resale which can be refunded to the plaintiffs at $1,890.00 being the amount they have claimed less the GST.

[31] I am satisfied that the plaintiffs are also entitled to a refund of the commission, advertising costs and maintenance costs.

[32] In summary, there will be judgment for the plaintiffs against the defendants for the following amounts:

Loss on resale purchase price $500,000 less $427,000	=	$	73,000
Default rate interest from 17 October 2008 to 23 December 2008. Being 68 days at $191.86 per day	=	$	13,046.48
Finance costs on mortgage to ASB bank for period 24 December 2008 to 2 February 2009, forty-one days	=	$	5,026.71
Maintenance costs to David Reid Homes excluding GST	=	$	845
Oaks Law Centre legal costs excluding GST	=	$	1,880
Commission paid to Allens Good Realty Ltd less GST	=	$	16,400

Kirkland Enright legal costs associatecd with second sale of 1/2 Konini St including GST	=	$	..1,136.45
Advertising costs paid to Allens Good Realty Ltd 23 October 2008 less GST	=	$	107
Advertising costs paid to Allens Good Realty 6 November 2008 less GST	=	$	107
Advertising costs paid to Allens Good Realty Ltd 30 October 2008 excluding GST	=	$	214
TOTAL	=	**$**	**111,762.64**

[33] The plaintiff is also entitled to costs assessed on a schedule 2B basis with disbursements as fixed by the registrar.

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Associate Judge Robinson