IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2008-485-1979

	BETWEEN	GARTON HOLDINGS LIMITED Plaintiff
	AND	THE NGAHINA TRUST Defendant

Hearing: 23 February 2009

Appearances: D.J.S. Parker for the Plaintiff
J.W. Tizard for the Defendant

Judgment: 30 April 2009 at 4.00 pm

JUDGMENT OF ASSOCIATE JUDGE D.I. GENDALL

This judgment was delivered by Associate Judge Gendall on 30 April 2009 at 4.00 p.m. pursuant to r 540(4) of the High Court Rules 1985.

Solicitors: Parker & Associates, Solicitors, PO Box 23270, Wellington
Oakley Moran, Solicitors, PO Box 241, Wellington

Introduction

[1] The defendant, ("the Trust") applies to strike out the plaintiff's ("Garton Holdings") claim in this proceeding pursuant to rule 15.1(1)(a) of the High Court Rules. That claim seeks specific performance as purchaser of a contract under an option to purchase a parcel of land at Paraparumu in favour of Garton Holdings.

[2] The present strike-out application is opposed by Garton Holdings.

Background Facts

[3] On 18 July 1991 the parties entered into an Agreement for Sale and Purchase ("the Agreement") of two parcels of Mäori freehold land being Lots 1 and 3 DP72985. Clause 14(8) of the Agreement contained an option to purchase Lot 2 DP 72985, containing 9.6370 hectares ("Lot 2") exercisable after 20 November 1993 ("the option") in the following terms:

> "14.8 This contract has been entered into on the understanding shared by the vendors (the Trust) and the purchaser (Garton Holdings) that it is probably the intention of either Tranzit New Zealand or the Kapiti Coast District Council to acquire the areas shown as Lots 2, 4 and 5 of the plan of subdivision referred to in paragraph 1 of this clause 14 under the Public Works Act 1981 but if these areas are not so acquired or agreed to be so acquired by the 20th day of November 1993, being the date or expiry of the lease registered number 603328.1 then either the vendor or the purchaser hereunder may by Notice either require the other party hereto to take all such steps as may be necessary to have Lot 2 on the said plan conveyed to the purchaser or his nominee at and for a consideration of $60,000.00, being the same price per hectares as the price offered for Lots 1 and 3 on the said Plan having regard to special conditions 2 and 3 hereof, or else to negotiate a new agreement in respect of the said Lot 2."

[4] The Trust is an ahu whenua trust pursuant to s. 215 Te Ture Whenua Mäori Act 1993 (the "1993 Act").

[5] On 1 July 1993 the 1993 Act came into force, repealing and replacing the Mäori Affairs Act 1953 (the "1953 Act").

[6] On 14 January 1994 Garton Holdings says it gave the Trust notice that it exercised the option to purchase lot 2. On 2 August 1994 Garton Holdings lodged a caveat over lot 2.

[7] On 20 March 2008 solicitors for the Trust wrote to solicitors acting for Garton Holdings stating that the option to purchase lot 2 was unenforcable. On 14 June 2008 Garton Holdings' Solicitors replied confirming the exercise of the option to purchase

lot 2 and stating that the Trust was required to take all steps necessary to have lot 2 transferred to Garton Holdings for the stated consideration of $60,000.

[8] In May 2008 Garton Holdings received a notice from Land Information New Zealand that the Trust had applied for the caveat to lapse. Garton Holdings then applied to the High Court for an order that the caveat not lapse. On 28 July 2008 I made an order that the caveat not lapse subject to Garton Holdings commencing proceedings seeking specific performance to enforce the alleged obligations on the part of the Trust with respect to the option. That has occurred and is the subject of the present proceeding.

[9] Garton Holdings' claim in its statement of claim alleges:

a) It had, by reason of the agreement, an option to purchase Lot 2 from the Trust;

b) It gave notice to the Trust on 14 January 1994 of the exercise of that option; and

c) The Trust has refused to acknowledge the option and failed to transfer Lot 2 to it.

[10] The relief Garton Holdings seeks is that the Trust:

a) Execute a transfer of Lot 2 in favour of it;

b) Take all steps to obtain confirmation of the sale by the Mäori Land Court; and

c) Provide its consent to an order under r 111 of the Mäori Land Court Rules dispensing with the special valuation required under s. 158 of the Te Ture Whenua Act 1993.

[11] The Trust's response and the essence of its present strike-out application is:

a) Garton Holdings does not have an enforceable contract;

b) This Court has no jurisdiction to order the relief sought or to enforce such rights, if any, Garton Holdings may have unless and until the agreement for which the Plaintiff contends has the consent of at least 75% of the beneficial owners of the land, is confirmed by the Mäori

Land Court and there is no member of the preferred class of alienees willing to buy the land at the price offered by Garton Holdings; and

c) Such rights, if any, which Garton Holdings has cannot be perfected so as to create an enforceable contract in view of the resolution of owners declining to consent to the alleged contract outlined in the affidavit of Fraser Donald Finlayson dated 19 December 2008.

The Present Strike-Out Application

[12] The Trust brings the present application to strike out Garton Holdings claim pursuant to r 186(a) of the old High Court Rules. This rule was replaced by r 15.1(1)(a) on 1 February 2009, which is now the applicable provision: Judicature (High Court Rules) Amendment Act 2008, section 9. This r 15.1(1)(a) states:

> **"15.1 Dismissing or staying all or part of proceeding**
> (1) The court may strike out all or part of a pleading if it—
> (a) discloses no reasonably arguable cause of action, defence, or case appropriate to the nature of the pleading
> …".

[13] Strike-out applications are to proceed on the assumption that the facts pleaded in the plaintiff's statement of claim are true, unless the pleaded allegations are entirely speculative and without foundation: *Attorney-General v Prince and Gardner* [1998] 1 NZLR 262 (CA); *Collier v Pankhurst* CA136/97 6 September 1999. To strike out the proceeding, the Court must be satisfied the causes of action are so clearly untenable that they could not possibly succeed: *Attorney-General v Prince and Gardner*; *Couch v Attorney-General* [2008] NZSC 45.

[14] The Court of Appeal in *Attorney-General v Prince and Gardner* clarified that the strike out jurisdiction is to be exercised sparingly and only in a clear case where the Court is satisfied it has the requisite material. This was endorsed by the Supreme Court in *Couch v Attorney-General*. However, the mere fact that applications to strike out raise difficult questions of law and require extensive argument does not exclude jurisdiction: *Gartside v Sheffield, Young & Ellis* [1983] NZLR 37, 45.

[15] On a strike-out application, the standard of proof required of the applicant "is made deliberately difficult to attain": *Adams v Joseph Banks Trusts Ltd* HC Wellington CP224/91 4 March 1992 per Master Williams QC at 2. This is appropriate "so as not to stifle the right of recourse to the Courts for the resolution of disputes and so as not to stifle the orderly development of the law".

Te Ture Whenua Mäori Act 1993

[16] As I have noted, the defendant Trust is an ahu whenua trust, pursuant to section 215 of the 1993 Act and Lot 2 is Mäori freehold land. The 1993 Act contains requirements which must be fulfilled before such a trust can validly alienate Mäori freehold land. The Trust contends that the option to purchase lot 2 is not valid, because the following requirements of the 1993 Act have not, and cannot be fulfilled:

- Section 150A of the 1993 Act requires the consent of at least three-quarters of the owners, if no owner has a defined share in the land, or the consent of the persons who together own at least 75% of the beneficial freehold interest in the land, before the trustees of the Trust can alienate Mäori freehold land vested in them as trustees; and
- Section 147A of the 1993 Act requires a right of first refusal to be given to prospective purchasers or donees who belong to 1 or more of the preferred classes of alienees, ahead of those who do not belong to any of those classes; and
- Furthermore, the Trust submits that the Mäori Land Court will not confirm the alienation amongst other things due to the perceived inadequacy of the consideration.

[17] In response Garton Holdings argues that the 1953 Act is the relevant Act applying to the Agreement and the option, and the 1993 Act has no application here. As such, the above requirements are not applicable and the option to purchase is valid and enforcable. Determining which Act applies is primarily a matter of interpreting the transitional provision in the 1993 Act which provides:

> **"355 Provision for completion of sales and subdivisions**
> Where, before the commencement of this Act, an unconditional agreement has been entered into for the sale of any Maori freehold land or consent has been obtained to the subdivision of any Maori freehold land, the sale may be completed and the subdivision may take place as if this Act had not been passed and any enactment repealed by this Act shall, notwithstanding its repeal, continue and be in force for the purpose of continuing and perfecting under such repealed enactment the sale or subdivision."

[18] According to this transitional provision, the 1953 Act will apply to an unconditional agreement for sale. Garton Holdings argues that the option to purchase does amount to an unconditional agreement. It says that it was an

irrevocable grant of an option to purchase Lot 2 as an essential component of the unconditional 1991 Sale Agreement for Lots 1 and 3 DP72985 and a part of the consideration for that bargain. The Trust maintains that the option is a conditional agreement, and as such, the 1993 Act applies.

Which Act Applies?

[19] The question of whether the 1953 Act or the 1993 Act applies to the option essentially depends on whether or not the option is an "unconditional agreement entered into for the sale of any Mäori freehold land" for the purpose of section 355 of the 1993 Act.

[20] Mr Tizard for the Trust argued that the option was conditional, as pursuant to its terms, it could not be exercised until after 20 November 1993 (which was after the 1993 Act came into force). He contended that it is wrong to construe an option as a contract, stating that an option does not mature into a contract until the option is exercised. He described clause 14(8) in the Agreement as containing a "put and call" option, not exercisable unless and until the condition of exercise (that either Tranzit New Zealand or the Kapiti Coast District Council had not acquired or agreed to acquire lots 2, 4 and 5 by 20 November 1993) occurred.

[21] Mr Tizard further stated that this does not mean that the option cannot be exercised; it simply means that as there was no unconditional contract before the date the 1993 Act came into force, the provisions of the 1993 Act discussed above now apply.

[22] Mr Tizard for the Trust referred me to and relied upon the decision of Cooke J, as he then was, in *Murray v Scott* [1976] 1 NZLR 643. In that case the trustees of Mäori freehold land had granted the respondent a lease with an option to purchase. At page 653 Cooke J held that an option to purchase cannot be regarded as an agreement for sale and purchase, since the option holder has not agreed to purchase. It is only if and when "the option is valid and is validly exercised, an agreement for sale and purchase will come into being as a result of that exercise." (pg 654).

[23] There is no doubt that the Agreement (entered into on 18 July 1991) was an unconditional agreement for the sale and purchase of lots 1 and 3 DP72985. As I have noted, Mr Parker for Garton Holdings submitted that the grant of the option was an essential component of that Agreement, and a part of the consideration for

the bargain. He highlighted the fact the Trust was irrevocably bound to alienate the land should the plaintiff exercise the option: *Gustav & Co Ltd v MacField* [2008] NZSC 47, para 10. Mr Parker argued also that the attempt by the Trust to sever the option with regard to lot 2 from the rest of the Agreement is entirely artificial. He stated that from the parties' perspective, the Trust had committed to selling the lot 2 land when it granted the option in 1991. As such, Garton Holdings' position is that the option amounted to an unconditional contract for the sale of lot 2.

[24] Mr Parker noted the reference in the option itself to the fact that Tranzit New Zealand or the Kapiti Coast District Council may attempt to acquire the land under the Public Works Act. He argues that this factor does not make the agreement conditional, as the possibility of acquisition of land under the Public Works Act is always present. If this factor were found to make this agreement conditional, Mr Parker submits that all agreements for the sale and purchase of land are then conditional.

[25] Mr Parker suggested that *Murray v Scott* could be partially distinguished, as the analysis surrounding the nature of an option in that case was tied into the requirement of confirmation from the Mäori Land Court. Confirmation relies on alienation of the land, whereas s. 355 of the 1993 Act is concerned only with an agreement to sell, not to alienate.

[26] Mr Parker accepted that a strict "black letter" approach to s. 355 of the 1993 Act could be found to support the Trust's argument that the option was not an unconditional contract and hence not covered by s. 355. But, he argued that established principles of interpretation, and policy considerations weigh in favour of an alternative interpretation.

[27] He noted that it is a well-established principle of statutory interpretation involving repeal of legislation that transactions which have passed and closed are not disturbed by the passing of a later Act: *Wellington Diocesan Board of Trustees v Wairarapa Market Buildings Ltd* [1974] 2 NZLR 562, 569. This principle was enshrined in section 20 of the Acts Interpretation Act 1924 which was in force at the time of the repeal of the 1953 Act. As such, Garton Holdings' position is that rights which accrued to it under the 1953 Act cannot be unenforceable now by reason of provisions in the 1993 Act.

[28] Garton Holdings also argues on policy grounds against the interpretation favoured by the Trust, as it notes the Trust has enjoyed the benefit of the original paid purchase price for Lots 1 and 3 DP72985 which included consideration for the option to purchase Lot 2. It is submitted that it would be unjust to allow the Trust to resile now from an agreement which has been part performed to its benefit so that the Trust can simply sell Lot 2 to a third party for a higher purchase price.

[29] Further, Garton Holdings contends that the interpretation proposed by it is consistent with the 1993 Act. For example, section 194 of the 1993 Act states explicitly that options to purchase in lease agreements are unenforceable if executed on or after 8 November 1974. The plaintiff submits that this provision implies that where Parliament intended the 1993 Act to apply retrospectively this would have been stated explicitly.

[30] In response to these submissions, Mr Tizard for the Trust suggested that accrued rights are not interfered with by application of the 1993 Act. He noted that Garton Holdings still has the right to exercise the option, but it is only the consequences of doing so now which are different under the new statutory regime. He stated further that the Trust is not resiling from the Agreement. Rather, he submits, the reality is that there was no agreement for the sale and purchase of lot 2 until the option was properly exercised.

[31] In response to the claim by Mr. Parker for Garton Holdings that *Murray v Scott* is partially distinguishable, as it is so tied up with the issue of confirmation, Mr Tizard argued that the whole point of the 1993 Act revolves around confirmation.

[32] Mr Tizard maintained that to construe the option as an unconditional agreement for sale would do violence to the language of the option and the language of the legislation. The test of whether there is a "sale" is whether an order for specific performance would be available. Before the option was exercised, such an order would not be available because the circumstances for the exercise of the option had not yet arisen. Further, it is clear from the wording of clause 14(8) of the Agreement setting out the option that the parties *expected* Tranzit New Zealand or the local authority to acquire the land. Rather than an unconditional agreement to sell, the option clearly provided a simple fall-back position. It also contemplated in

the last line of the clause the final possibility post November 1993 of "negotiating a new agreement in respect of the said Lot 2."

Garton Holdings' Alternative Argument – Compliance with the 1993 Act

[33] Garton Holdings argued in the alternative that if the 1993 Act does apply, it still has a reasonably arguable cause of action on the grounds that the requirements of the 1993 Act in force at the date of exercising the option, have been fulfilled.

[34] The requirement in s. 150A of the 1993 Act for consent of three quarters of the owners to the transaction was contained in s. 228 at the time the option was exercised. S. 228 was worded slightly differently to the current provision. The historical provision referred to the trustees "power to sell" and required the "proposal to sell" to have the consent of three-quarters of the owners. The current provision refers to not alienating Mäori freehold land by sale unless *the sale* has the consent of three quarters of the owners.

[35] Garton Holdings submits that even if the 1993 Act applies, the proposal to sell and the grant of the option to sell were consented to by the then owners in 1991. The plaintiff points to exhibit "CA2" attached to the affidavit dated 2 February 2009 of Campbell William Andrews, sole director and shareholder of Garton Holdings. This exhibit contains a minute of the Trust's Annual Meeting dated 19 May 1990 in which a motion to enter further negotiation for a sale of land was passed. Further correspondence suggests that the beneficiaries of the Trust were consulted and agreed at this meeting to pursue a sale. Mr. Tizard for the Trust, however, points out that in this same exhibit there is evidence that certain beneficiaries of the Trust were opposed to the sale and that the trustees acted without consent, as is confirmed in the affidavit of Maikara Kararaina Tapuke dated 15 November 1991.

[36] But, before me, as I understand the position, Mr. Parker for Garton Holdings made no submission with regard to the requirement in s. 147A of the 1993 Act that a right of first refusal be given to prospective purchasers who belong to 1 or more of the preferred classes of alienees.

[37] And, as to the likelihood of confirmation by the Mäori Land Court, Mr. Parker argued that confirmation can only take place after performance of the contract by the Trust. As performance of the contract and subsequent confirmation of the Mäori Land Court are separate issues, Mr. Parker contends that confirmation should not be

considered in specific performance proceedings or in the present strike-out application. He suggests that there is no basis for the Mäori Land Court to refuse to confirm the alienation, at least if the 1953 Act applies.

[38] In response, Mr. Tizard for the Trust contends that there is simply no prospect of approval here by the Mäori Land Court. Assuming that the 1993 Act applies, section 152(1)(c) requires the Mäori Land Court to take into account the adequacy of consideration. The consideration pursuant to exercise of the option which is contended for by Garton Holdings is $60,000. The consideration in the contract with Kapiti Coast District Council for lots 2, 4 and 5, which it appears the beneficial owners of the Trust have approved, is $6,270,000 plus GST. Mr Tizard, notes that, while it is not for this Court to determine the adequacy of consideration, the obvious inadequacies in this case show that there is simply no prospect of approval by the Mäori Land Court, making it appropriate to strike out Garton Holdings' claim. The Trust notes further that this dispute arises in the context of Garton Holdings submitting its instrument of alienation to the Court in 2009 for a transaction that occurred in 1991, where it has not taken any steps until recently and then only in response to the Trust's attempt to remove Garton Holdings' caveat.

Discussion

[39] I do not consider that the option to purchase Lot 2, contained in the Agreement (which related essentially to the sale and purchase of Lots 1 and 3 DP 72985), can be construed as an unconditional contract here. The parties accept that the option was not exercised before 14 January 1994 at the earliest and that it could not in any event have been exercised on its terms until after 20 November 1993. As recognised in *Murray v Scott*, an option does not mature into an Agreement for Sale and Purchase until it is exercised.

[40] As the option to purchase was not "an unconditional contract for the sale of Mäori freehold land", the 1993 Act which came into force on 1 July 1993 must apply to its purported exercise in accordance with the plain words of s. 355 of the 1993 Act. The statutory interpretation arguments put forward by Mr. Parker for Garton Holdings in my view cannot displace the clear meaning of these words.

[41] Garton Holdings' argument in the alternative that it can meet or has met the requirements of the 1993 Act in force at the time that the option was exercised in my view are untenable.

[42] Although I remind myself that the application before the Court is one for strike out and that normally a Court will not consider evidence inconsistent with the plaintiff's pleading as a strike-out application is to be dealt with on the footing that the pleaded facts can be proved (*Attorney General v McVeagh* [1995] 1 NZLR 558 and *Pharmacy Care Systems Limited v Attorney-General* (2001) 15 PRNZ 465 (CA) a Court is entitled to consider affidavit evidence on a strike-out application in a proper case, especially where an essential factual allegation is so demonstrably contrary to indisputable fact that a matter ought not to be allowed to proceed further – *AG v McVeagh*. Here, as the affidavits of Fraser Donald Findlayson dated 19 December 2008 and 12 January 2009 filed in support of the strike-out application confirm, a special meeting of the Trust was held on 6 December 2008 and there, owners or beneficial owners of not less than 94% of the beneficial freehold interest in Lot 2 have declined to consent to a sale of Lot 2 at $60,000.00 to Garton Holdings. Instead, those owners confirmed their consent to a sale of this Lot 2 together with Lots 4 and 5 DP72985 to the Kapiti Coast District Council at a purchase price of $6,270,000.00 plus GST (if any). As I see the position it is beyond doubt that the requirement in s. 150A of the 1993 Act for consent of three quarters of the beneficial owners to the sale transaction with Garton Holdings following its purported exercise of the option cannot be met.

[43] Further, it seems to me unquestionable that in terms of s. 147A of the 1993 Act, the right of first refusal which is required to be given to prospective purchasers who belong to one or more of the preferred classes of alienees has not been provided and, in any event, this would certainly result here in a sale of Lot 2 to another party in priority to Garton Holdings.

[44] Finally, appreciating that it is for the Mäori Land Court and not this Court to determine the adequacy of the consideration for the suggested sale of Lot 2 to Garton Holdings, nevertheless this $60,000 consideration would appear to be so manifestly inadequate given the Sale Agreement approved by the beneficial owners for this and adjoining land with the Kapiti Coast District Council at $6,270,000.00 plus GST that

I see no realistic prospect that the Mäori Land Court would, in fact, confirm the sale having regard to s. 152(1)(d) of the 1993 Act.

[45] I am satisfied here that the claim by Garton Holdings is incapable of amendment to constitute an arguable or tenable cause of action against the Trust. There can be no doubt that the 1993 Act applies to the option and the Trust has no power to transfer Lot 2 to the plaintiff except in accordance with the requirements of the 1993 Act - on this see s. 146 of the 1993 Act. That Act imposes limitations on the power of trustees to alienate land which are set out in s. 150A, and 147A of the 1993 Act. There was no sale agreement in place for Lot 2 with Garton Holdings until the option was exercised and then, when exercised, that agreement required consent of the beneficial owners and confirmation. That was not, and was never going to be, forthcoming.

[46] Although the present strike out jurisdiction is one to be exercised sparingly, for the reasons I have outlined above, I am satisfied that the required material is before the Court and it establishes that Garton Holdings' causes of action here are so clearly untenable that they could not possibly succeed.

Result

[47] The defendant's strike-out application therefore succeeds. An order is made striking out Garton Holdings' claim here.

[48] As to costs, the defendant Trust has been successful in bringing this application and is entitled to an award of costs. Costs on this strike-out application are therefore awarded to the Trust on a category 2B basis together with disbursements as fixed by the Registrar.

'Associate Judge D.I. Gendall'