IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2008-404-008582

BETWEEN	PETER GRANT TUCKER, VICKI JUNE BAINBRIDGE AND GARY MICHAEL EDWARDS AS TRUSTEES OF THE GRANT TUCKER FAMILY TRUST AND SYLVIA LYNNE TUCKER Plaintiffs
AND	YANXUN SUN Defendant

Hearing: 19 May 2009

Appearances: G Stringer for the Plaintiffs
A Singh for the Defendant

Judgment: 19 May 2009

ORAL JUDGMENT OF
ASSOCIATE JUDGE CHRISTIANSEN

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[1] The plaintiffs seek summary judgment upon their claim against the defendant. The facts are set out in more detail in the judgment of Wylie J dated 28 January 2009 upon the plaintiffs' application for a Mareva injunction. In brief the defendant agreed to purchase the plaintiffs' rural residential property (the property). He paid a deposit but could not complete. The defendant repudiated and so the plaintiffs' cancelled the agreement. The property which the defendant agreed to pay $1,110,000 for was resold for $750,000. The plaintiffs seek to recover their loss on the resale in the sum of $304,500 together with associated incidental expenses in the sum of $45,179.03.

[2] The summary judgment application is opposed. The defendant claims the property was resold at a gross under value and that no adequate steps were taken by the plaintiffs' to mitigate their loss.

[3] Opposition affidavits were filed by the defendant and a Mr A J Hopping a property valuer. These were filed on 24 March and 25 March 2009 respectively.

Background

[4] The defendant first saw the property in August 2007. An agent informed him the vendors were wanting $1,150,000 or more. He made enquiries through a mortgage broker who revealed that 80% finance would be available. Then he submitted an offer of $1,000,000 with a deposit of 5%. The vendors counter-signed at a price of $1,110,000 and the defendant accepted this price.

[5] Possession date was nearly one year later. The deposit of $55,500 was paid. As settlement approached, in August 2008 the defendant contacted his mortgage broker who advised the Westpac Bank would require a valuation. Some time later he received a valuation report from Mr Hopping of Marsh & Irwin who valued the property at $1,050,000. A few days later his mortgage broker advised that Westpac was only prepared to lend 50% of the property value, as the bank's lending policy had changed. Enquiries from other banks faired no better.

[6] Anticipating he would lose his deposit if he did not complete, he contacted his solicitor who, on his instruction wrote to the vendor's solicitor on 8 September 2008. Their response was initially in the form of a settlement statement dated 30 October 2008. On 31 October 2008 a settlement notice was sent and by letter dated 21 November 2008 the vendor cancelled the agreement.

[7] It is apparent from Mr Hopping's affidavit he is an experienced and well-qualified property valuer who specialises in valuations in South Auckland and elsewhere. He has been valuing properties in Karaka (where the subject property is located) since 1994. As at 27 August 2008 he provided a value of $1,050,000 including land value of $850,000. Upon instructions from the defendant's solicitors he undertook to assess the market value of the property as at 10 November 2008 (when settlement was due). For that purpose he re-inspected the property.

[8] He noted from the start of 2008 property prices were retracting with decreased levels of activity and interest. Since August 2008 there had been limited sales in the Karaka locality.

[9] In his assessment the value of the property including chattels as at 10 November 2008 was $1,000,000.

[10] The plaintiffs' claim relies upon clause 9.4(3) of its agreement for sale and purchase with the defendant. That clause provides:

> "The damages claimable by the vendor under sub clause 9.4(1)(b)(ii) shall include all damages claimable at common law or in equity and shall also include (but shall not be limited to) any loss incurred by the vendor on any bona fide resale contracted within one year from the date by which the purchaser should have settled in compliance with the settlement notice…".

[11] The plaintiffs claim to have incurred loss on a bona fide resale within one year of the date by which the defendant should have settled in compliance with the settlement notice.

[12] Its claim for incidental losses includes real estate agent's commission on the resale, legal costs on resale and interest at penalty rates in terms of the agreement for sale and purchase.

[13] The plaintiffs paid to Westpac Bank the sale proceeds in reduction of an amount of $1,040,000 owing on its mortgage to that bank. It claimed therefore the interest on the shortfall it was unable to pay. Those borrowings had been obtained to enable the purchase of a property elsewhere.

[14] Following receipt of the defendant's solicitor's letter dated 8 September 2008 advising the defendant was unable to settle due to financial difficulty, the plaintiffs on 10 September 2008 instructed Harcourts Real Estate Agents to resell the property.

[15] The defendant's opposition focuses upon an assertion of a non bone fide sale. That claim must be read in the context of the defendant's knowledge of the resale value which, as I calculate, was about 32.5% less than the price he agreed to pay. It is an assumption understandably drawn particularly when supported by Mr Hopping's evidence of market value at the time. It is an assumption however which is met head-on by the affidavit of Mr Tucker in reply, and the affidavits of Mr P A Migounoff and Mr D P Minogue (both from Harcourts Real Estate), and from Mr J A Janssen (a representative of the subsequent purchaser of the property).

[16] Mr Tucker explains that having entered into an unconditional contract of the sale to the defendants his family trust purchased another property at Waiuku for $655,000. At that time a loan of $1,040,400 was obtained from the Westpac Bank to pay the purchase price and for other purposes. That advance was secured by mortgage over the Waiuku property.

[17] When the defendant advised he would not be settling the transaction, Mr Tucker took urgent steps to re-market the property. The terms of the Westpac Loan expired at the end of October 2008, when settlement from the defendant was expected. When he took steps to resell the subject property he advised Westpac of the situation.

[18] He resold at a price of $750,000 accepting advice Harcourts that that price was realistic in the declining property market at the time.

[19] Mr Migounoff is a licensed real estate sales person. In that capacity he has worked for Harcourts for four years. He also worked for the plaintiffs when they purchased the Waiuku property. He said that throughout 2008 the property market conditions for real estate in the South Auckland area were as bad as he had experienced during his time as a real estate salesperson. He said it was a buyers market in the extreme and the global recession in about October 2008 made selling real estate even harder.

[20] It was decided that both the subject property and the Waiuku property should be listed for sale because the Westpac loan was due for repayment. It was clear an unconditional sale was desirable and that proceeding to an auction was the best option.

[21] A market strategy was agreed. In all the marketing campaign and advertising cost the plaintiffs around $3,000. The marketing campaign included advertising in the New Zealand Herald on four occasions and on four occasions in the Southern Property Press and on one occasion in the Coast and Country brochure. In addition Harcourts produced a flyer that included reference to the subject property. It was headed “bank demands urgent sale”. The flyer was widely distributed.

[22] Harcourts also held open homes on four Sundays leading up to the auction. Their records indicate there were 22 inspections that resulted from these open homes.

[23] The auction was held on 1 November 2008. About 23 – 30 people were in attendance. He said that despite some bids from interested parties the property was passed in at auction and did not sell. The highest bid at auction was $700,000. The reserve price for the property was $950,000.

[24] In discussions with Mr Tucker after the auction it was agreed a fixed price of $795,000 on the property would be listed. A flyer showing the fixed price was distributed after the auction.

[25] Subsequently Harcourts received three offers. The person who had put in the highest bid at the auction offered a reduced sum of $650,000. Another offer in the sum of $750,000 was made but conditional upon sale of the purchaser's property. The final offer was from the Janssens at a negotiated price of $750,000.

[26] Mr Migounoff concludes:

> "There was a proper marketing campaign conducted leading up to the auction, and the timeframe that this was carried out would not be unusual in the circumstances even if there had not been the financial pressures on the plaintiffs. In other words, the fact that the plaintiffs were under financial pressure from Westpac did not mean that any corners were cut in carrying out a proper marketing campaign and an auction, although the overall desire was for an expeditious sale. For example, the best offer for the property at the auction was $700,000. The plaintiffs did not accept this offer and the property was re-listed for sale. Despite the pressure that the plaintiffs were under from Westpac, they didn't sell the property for just whatever they could get, but genuinely sold the property to meet the market at the time."

[27] Mr Janssen deposed that the property was purchased by a family trust. Prior to purchase neither he nor his wife had any prior knowledge of Mr Tucker or any of the other trustees of the plaintiffs.

[28] He said they were genuine purchasers and paid what they believed to be a fair market price. He denies absolutely any suggestion of underhand dealing.

Opposition to grant of summary judgment

[29] In the submissions for the defendant Mr Singh refers to the fact that no sufficient evidence was adduced as to the steps that were taken by plaintiffs to resell the property. Therefore it was open to the defendant to challenge the plaintiffs' claim on the basis that the resale was at an undervalue and that the plaintiffs failed to mitigate their loss.

[30] Mr Singh challenges the adequacy of the marketing strategy undertaken on behalf of the plaintiffs. He submitted that strategy had a detrimental effect on the price the plaintiffs were able to achieve on resale. He criticises the fact that advertisement stated "bank demands urgent sale". He said there was no evidence the bank made any such demand. In any event it would have had the effect reducing the

level at which prospective purchasers would have been prepared to consider purchasing the property. The advertisements would have given the impression the property was being sold by the bank as mortgagee. He submits that judicial notice ought to be taken of the fact that in a mortgagee sale the true market value of the property is not achieved because of the very fact that prospective purchasers, despite extensive marketing, are not prepared to offer "top dollar" for the property. He reiterates what Mr Hopping stated in his report namely "on a willing buyer willing seller basis, and if the property had been marketed adequately, we would have expected the property to sell for $1,000,000 as at 10 November 2008".

[31] Mr Singh submits that in some circumstances where damages are claimed for breach of contract, it may be appropriate for a court to refuse to allow the innocent party to exercise his or her contractual rights in full on equitable grounds. As Lloyd J stated in the Alaskan Trader: *Clea Shipping Corporation v Bulk Oil International Ltd* [1984] 1All ER 127, 13 at 136:

> "… there comes a point at which the Court will cease, on general equitable principles, to allow the innocent party to enforce its contract according to its strict legal terms. How one defines that point is obviously a matter of some difficulty, for it involves drawing a line between conduct which is merely unreasonable… and conduct which is wholly unreasonable… But however difficult it may be to define the point, that there is such a point seems to me to have been accepted…"

[32] Mr Singh submits the plaintiffs need establish that the defendant does not have an arguable or bona fide defence. Further, that summary judgment is not suitable if there are factual disputes which the Court cannot resolve on affidavit evidence. He refers me to the decision of the full Court in *Renwick v Churtonleigh Retirement Home Ltd* (High Court, Wellington), AP239/98, 12 February 1999, wherein the Court stated:

> "Although the Court is to take a robust approach in dealing with an application for summary judgment, the procedure shall not be permitted to operate in an oppressive manner, so as to shut out a defendant with a bona fide and real defence capable of being established at trial. Thus, while a summary judgment procedure is designed to avoid oppression … it must not be used to create oppression."

[33] It is submitted for the defendant that the plaintiffs have not proved the defendant is incapable of establishing at trial that the plaintiffs had not taken all

reasonable steps to advertise and promote the resale of the property so as to encourage a sale. In particular the strategy of advertising a property as though it was subject to a mortgagee sale pressure is not an enquiry the Court can determine in the context of a summary judgment application. Moreover the resale price needs to be evaluated in light of available valuation evidence.

Considerations

[34] In *McMorland Sale of Land* at page 466 the Learned Author states:

> "Provided the resale price can be seen to be a reasonable figure for the property as at the appropriate assessment date, the price will usually be accepted as evidence of the value of the land recovered by the vendor. But that figure can also be challenged by other evidence as to the value of the property at the relevant time and as to the reasons for the amount of the purchase price in the resale contract, for example that the resale was at a gross undervalue being a failure by the vendor to mitigate the loss. The onus of proof of establishing failure to observe the duty lies on the purchaser."

[35] Then at page 468 it is noted that under the REI-ADLS Agreement the general law measure of damages following a resale is modified by express provision:

> "Clause 9.4(3) provides that following a resale, the general measure of damages includes, but is not limited to, any loss incurred on a bona fide resale within one year of the settlement date specified in the vendor's settlement notice given under the broken contract. This makes it unnecessary to prove that the resale price represents the market value at the appropriate date, though it remains open to the purchaser to show that the resale was not bona fide. "Loss" in this context refers not merely to resale at a lower price, but to the net loss to the vendor on the situation the vendor should have been in had the contract been performed after all proper allowances had been made to the purchaser."

[36] Arguably clause 9.4(3) makes the obtaining of market value evidence irrelevant in the circumstances. The requirements being that the vendor must obtain a bona fide resale contracted within one year from the date by which the purchaser should have settled in compliance with the settlement notice. Provided a vendor meets those requirements it is entitled to claim damages for any loss on resale.

[37] Although the REI-ADLS makes it unnecessary to prove that the resale price represents the market value at the appropriate date, it remains open to the purchaser to show that the resale was not bona fide.

[38] Referring to the predecessor of clause 9.4(3) of Somers J in *Sullivan v Darkin* [1986] 1NZLR 214 at 222 – 224 stated:

> "Under cl 8.4 of the contract in this case however the only damages strictly relating to the loss of the bargain are those measured by the result of a resale. There is here adequate scope for the normal principles of mitigation of loss by a plaintiff. If it be asked what reasonable steps a vendor acting under such a clause may take there is I think only one answer. He must take such steps as are reasonable in the circumstances, including those in which he is placed by the purchaser's default, to obtain a proper price. In assessing what is reasonable the conduct of the vendor is not to be weighed in nice scales."

[39] In the summary judgment context a defendant must bear some responsibility to establish that a resale is not "bona fide". Arguably that burden is an onerous one if it is to challenge a plaintiffs claim that all reasonable steps have been taken to mitigate loss.

[40] In this case the plaintiffs' contractual obligations require them only to take steps that are reasonable. I accept Mr Stringer's submission that the standard of reasonableness is not high, as it is the defendant who was the wrongdoer for he failed to complete his contract as required. In every case it is a question of fact to determine if the plaintiff has set aside the standard and has acted reasonably (see *Civil Remedies in New Zealand*, Blanchard at p76).

[41] As Lord MacMillan in the *Banco de Portugal v Waterlow & Sons Limited* [1932] AC 452 at 506 observed:

> "… It is often easy after an emergency has passed to criticize the steps which have been taken to meet it, but such criticism does not come well from those who have themselves created the emergency. The law is satisfied if the party placed in a difficult situation by reason of the breach of a duty owed to him has acted reasonably in the adoption of remedial measures, and he will not be held disentitled to recover the cost of such measures merely because the party in breach can suggest that other measures less burdensome to him might have been taken…"

[42] The issues in this case are not difficult. The defendant has acknowledged his breach of the contract. His default has created the situation which the plaintiffs were, urgently required to deal with. It is in that context the Court should assess the reasonableness of the plaintiffs' actions in answer to the defendant's claim that a duty to mitigate was not met.

[43] The defendant's case is based on a claim of resale at gross undervalue; that inadequate steps were taken to mitigate; and that the resale was not to a genuine purchaser. In short the defendant contends there was no bona fide resale.

[44] I do not accept that submission. The affidavit evidence offered on behalf of the plaintiffs in response to the defendant's claims established conclusively that the plaintiffs have taken reasonable steps in circumstances in which they were placed by the defendant's default. A reputable real estate company was engaged. An extensive marketing campaign was carried out which included advertising in different publications, and the holding of open homes. The auction process was properly conducted and after that failed further marketing was done before three offers were obtained. The best of those was accepted from a person who had no knowledge at all of the plaintiffs.

[45] In that summary of things, and not withstanding criticism of the marketing strategy and even in the face of a valuation report suggesting significantly greater value, it cannot be said the plaintiffs have acted unreasonably or that they have failed to mitigate their losses.

[46] It is even arguable that a market value established by a registered valuer has no relevance as to whether the plaintiffs carried out the bona fide resale. The provisions of clause 9.4(3) make it unnecessary to prove that the resale price represents the market value at the appropriate date. Of greater importance in assessing whether a plaintiff has acted reasonably is the Court's assessment of whether a bona fide resale has occurred.

[47] Dealing with the onus upon a plaintiff to exclude a defendant's reasonable prospect of an arguable defence I consider that if the evidence of the plaintiff is of sufficient strength such that the Court can be assured the defendant's evidence to the contrary cannot displace it, then the Court is entitled to say there is no arguable defence that could advance to trial.

[48] In conclusion:

a) A plaintiff is required to take reasonable steps to mitigate loss but the standard is not as high if it is the defendant who is the wrongdoer and whose actions impose a requirement for prompt action by a plaintiff who otherwise faces a risk of considerable loss.

b) In the face of clause 9.4(3) the onus of proof on the issue of mitigation is on the defendant and it is a significant onus to discharge.

c) Whether the plaintiff has acted "bona fide" imports little more than a consideration of whether the plaintiff has acted reasonably on the resale. That assessment invites an overall view rather than hindsight criticism of particular aspects undertaken.

Judgment

[49] Judgment shall be entered for the plaintiffs against the defendant in the sum of **$304,500** being the balance of the plaintiffs' loss on resale. Also, the plaintiffs shall be entitled to its claim for incidental losses in the amount claimed less the sum of $529.07 claimed for interest on the shortfall and repayment of the Westpac Mortgage.

[50] The defendant shall pay the plaintiffs' costs on a **category 2B** basis together with disbursements as fixed by the Registrar.

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Associate Judge Christiansen