

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

CIV 2008-404-006573

BETWEEN CASHMERE CAPITAL LIMITED
Plaintiff

AND HEMANT PATEL AND RAHNE NAND,
BOTH SOLICITORS TRADING IN
PARTNERSHIP AS PATEL NAND
LEGAL
Defendant

Hearing: 8 June 2009

Appearances: P Sills for Plaintiff
A Challis/R Scott for Defendants

Judgment: 18 June 2009

JUDGMENT OF ASSOCIATE JUDGE ROBINSON

This judgment was delivered by me on 18 June 2009 at 4.30 pm,
Pursuant to Rule 11.5 of the High Court Rules

Registrar/Deputy Registrar

Date.....

Solicitors: Malley & Co, PO Box 1202, Christchurch
McElroys, PO Box 835, Auckland

[1] On 9 July 2007, Cashmere Capital Limited (Cashmere) agreed to advance \$586,000 to Zurvan Investments Limited (Zurvan). The advance was to be secured by a registered second mortgage over property situated at 26-28 Auckland Road, St Heliers and a joint and several guarantee by Minoos Arsiwalla and Parizad Dantreera. The property was owned by Zurvan. The advance was subject to a condition precedent namely confirmation from Zurvan's solicitor that the agreement for sale of the property at 26-28 Auckland Road to McIsaac Nominee Ltd (McIsaac) for \$4,200,000 dated 2 July 2007 was unconditional in all respects and a deposit of \$210,000 had been paid. According to Cashmere its advance to Zurvan was short term bridging finance to be paid in full from the proceeds of the sale to McIsaac.

[2] The principal sum secured by the advance was payable on demand. Pending demand, Zurvan was to pay interest at 15% per annum monthly and to repay the remaining balance of principal and interest on or before 28 September 2007. Zurvan had arranged the advance through a broker, Axis Finance Limited. Prior to agreeing to the advance Zurvan had provided Cashmere with evidence of the sale of Zurvan's property at 26-28 Auckland Road to McIsaac or nominee for \$4,200,000. The agreement provided for a deposit of \$210,000, the balance to be payable on settlement, namely 28 September 2007.

[3] The agreement for sale of the property to McIsaac was conditional upon McIsaac being satisfied in all respects that the property was suitable for its purposes within fifteen working days after execution of the agreement. The agreement was executed on 2 July 2007. The loan agreement was executed by Zurvan and its directors on 17 July 2007. The defendants are the solicitors for Zurvan and attended on execution of the loan documents by Zurvan.

[4] On 27 July 2007, the solicitors acting for McIsaac advised the defendants that McIsaac was not satisfied with the property at Auckland Road and consequently was avoiding the agreement. On 31 July 2007, Zurvan entered into another agreement for the sale of the Auckland Road property to DQ Trust Co Limited for \$4,200,000. The agreement provided for a deposit of \$210,000. Settlement was to take place on 27

September 2007. The agreement was unconditional. However, on the same day DQ Trust Co Limited agreed to sell to Zurvan Investments Limited a property at 562 Remuera Road for \$3,200,000. The agreement provided for a deposit of \$160,000. Settlement was to take place on 27 September 2007.

[5] Although the two agreements entered into by Zurvan Investments Limited were not expressed to be conditional on each other, it was clearly envisaged that settlement would take place contemporaneously, and as a consequence Zurvan would receive in cash from the transactions the difference between the sale price of Auckland Road at \$4,200,000 and the purchase price of Remuera Road, namely \$1 million. Confirmation that contemporaneous settlement would occur is provided by the fact that the deposit eventually paid to Zurvan was \$50,000. That figure represented the difference between the deposit to be paid by DQ Trust Co Limited of \$210,000 and a deposit to be paid by Zurvan of \$160,000.

[6] At the time of these transactions Zurvan's property at 26-28 Auckland Road was subject to a first mortgage to the ANZ National Bank of New Zealand ("the bank"). Prior to payment of the advance the solicitors for Cashmere requested the bank to consent to registration of Cashmere's second mortgage. In an email from the bank to the defendants the bank advised the defendants it required its priority to be increased from \$2.638 million to \$3 million.

[7] Consequently, if the bank insisted on payment of \$3 million for which it had priority, Zurvan's cash position on settlement of the sale of the Auckland Road property and purchase of Remuera Road would be as follows:

Amount to be received from sale of Auckland Road		\$4200 000
Less amount to be paid to purchase Remuera Road	\$3,200,000	
Less mortgage to the bank	\$3,000,000	
Deficit		<u>\$2000.000</u>
	<u>\$6200 000</u>	<u>\$6200 000</u>

[8] On 13 August 2007 the defendants referred to Cashmere's solicitors the facsimile received from the bank where the bank stated:

Good afternoon Hemant. My colleague Cameron White has just discussed your fax of this afternoon with me. I understand that the below requirements of his e-mail of earlier today are acceptable to the company.

Accordingly, we will forward instructions to your office to:

(i) have the Bank's mortgage priority amount increased from \$2,638M to \$3,000M under the Bank's mortgage no. 7025859.2 (property 26-28 Auckland Road, St Heliers, Auckland) and

(ii) have the company enter into an all obligations guarantee in favour of The Arsiwalla Family Trust.

On the basis that the Bank is firstly repaid the amount owing by the company (as at today \$2.310M + accruing interest), secondly Cashmere Capital Limited are repaid the amount of up to \$620,000 (including interest/fees), the Bank will agree to Matrix Mortgages Limited being repaid from the balance of the proceeds available from the sale of the company's Auckland Road properties, expected to settle 28 September 2007, subject to and conditional upon the following:

(a)(I) and (ii) above are completed prior to execution by the trustees of the Arsiwalla Family Trust "the trust" of the second charge mortgage in favour of Matrix Mortgages Limited, over the trust's property situated at 2/25a Yattendon Road, St Heliers and

(b) the second mortgage amount owing to Matrix Mortgages Limited by the trust will be no more than say \$120,000 + \$5,000 (to cover interest/costs) and

(c) confirmation of (c) below is firstly provided to the Bank and

(d) a letter from the company, signed by its directors, under (d) below is firstly provided to the Bank

Please advise when we may expect to receive the balance of the deposit funds for the sale of the Auckland Road properties.

[9] The defendants did not at that time bring to the notice of Cashmere's solicitors the fact that the agreement for sale to McIsaak was not proceeding, that Zurvan had entered into another sale to DQ Trust Co and that contemporaneously with that sale to DQ Trust Co Limited Zurvan had agreed to purchase a property from DQ Trust Co Limited. Consequently, Cashmere was unaware of the fact that on settlement of the sale of Auckland Road and repayment to the bank of the full amount of \$3 million for which the bank claim priority, there would be a substantial

deficit and in particular, no funds from which Zurvan could repay Cashmere's advances.

[10] According to the defendants, it was anticipated that Zurvan would receive finance from Dominion Finance Limited which would be sufficient to repay the advances by Cashmere. The defendants had some verbal assurance of such an advance. In a letter to the solicitors for Cashmere dated 1 August 2007, the defendants advised:

Our client has entered into an unconditional agreement for the sale of the property at 26-28 Auckland Road. The deposit payment is being held by the purchaser's solicitor and we have requested the solicitor to attend to payment to our trust account forthwith.

The letter concludes with:

Settlement of our client's refinance is now urgent. We would appreciate deposit of the loan funds to our trust account as soon as possible.

Confirmation of the above was required before the advance could be made.

[11] On 16 August 2007 the solicitors for the plaintiff requested confirmation from the defendant that:

- a) The purchase price for the property under the unconditional agreement is \$4.2 million; and
- b) The deposit has been paid.

Confirmation of the above was required before the advance could be made.

[12] On 16 August 2007 the defendants confirmed that the purchase price for the sale of the Auckland Road property under the unconditional agreement was \$4.2 million. They also advised that the deposit had been paid and referred to an attached letter dated 14 August 2007 from Bayleys Real Estate. The attached letter stated:

Subject: Zurvan Investments Limited – DQ Trustco Limited 26-28 Auckland Road

Dear Mr Patel

I confirm that the deposit of \$50,000 is being held in the Trust Account of the Purchaser's solicitor, Carson & Co.

[13] Following confirmation of the unconditional agreement referred to in the correspondence of 16 August 2007. The plaintiff advanced the agreed sum of \$586,000 to Zurban.

[14] The sales did not proceed. Because Zurvan was in default of its obligations under the mortgage to the bank, the bank in exercise of its power of sale arranged for the Auckland Road property to be sold for \$2,650,000. After payment of the bank's advances, there was insufficient available from the proceeds of sale to pay anything in reduction of the advances by Cashmere to Zurvan. Zurvan has no assets. The guarantors of the advance to Cashmere have now been adjudicated bankrupt and have no assets.

[15] Cashmere brings these proceedings against the defendants who are the solicitors for Zurban under s 9 Fair Trading Act 1986. They claim that the defendants, who at all material times engaged in trade within the meaning of the Fair Trading Act, knew or ought to have known that the advance by the plaintiff was based on the unconditional agreement for sale of the property to McIsaac Nominee Limited and that the defendants engaged in misleading and deceptive conduct. Broadly, in that they failed to advise the plaintiff that the agreement for sale to McIsaac Nominee Limited was not proceeding, that there had been another agreement to DQ Trust Co Limited which resulted in an exchange of properties which reduced the funds from the sale of the Auckland Road property.

[16] The defendants apply for summary judgment claiming that the plaintiff's case cannot succeed.

[17] It is claimed the defendants conduct was deceptive and misleading in that they failed to advise Cashmere that the McIsaac agreement was not proceedings, that there had been another agreement to DQ Trust Co Ltd which resulted in an exchange of properties reducing the net funds available from the sale of the Auckland Road property.

[18] The defendants claim there is no evidence of misleading or deceptive conduct on their part. Their counsel points out that at the time the advance was made by Cashmere the defendants had correctly advised Cashmere's solicitors that Zurvan had entered into an unconditional agreement for the sale of the Auckland Road property and that the copy of the facsimile they received from Bayleys Real Estate which they forwarded to Cashmere's solicitors on 16 August 2007 just before Cashmere advanced the funds to Zurvan disclosed the agreement was the sale to DQ Trustees Ltd and not McIsaak with a deposit of \$50,000.

[19] To obtain summary judgment the defendants must satisfy the Court that none of the causes of action in Cashmere's statement of claim can succeed. The defendants must show a clear answer to Cashmere's claim which cannot be contradicted.

[20] Cashmere in opposing the application for summary judgment emphasises there is evidence of misleading conduct by the defendants because at no time did the defendants specifically advise Cashmere or its solicitors that the McIsaak agreement was not proceeding and that following the cancellation of the McIsaak agreement the unconditional agreement referred to by the defendants in their correspondence related to a new agreement which involved a swap of properties. It is further submitted Cashmere was misled by the defendants conduct and in all the circumstances it was reasonable for Cashmere to have been misled.

[21] In determining this application I must decide whether on the facts as acknowledged by Cashmere, Cashmere's claim has no chance of success. In a situation where there is a conflict of fact and the theoretical possibility of a finding of fact which could result in Cashmere's claim succeeding the defendants are not entitled to summary judgment, see *Jones v Attorney-General* [2004] 1 NZLR 433.

[22] For Cashmere's claim under s 9 The Fair Trading Act to succeed Cashmere must establish:

- a) Evidence of conduct on the part of the defendants capable of being misleading.

- b) Whether Cashmere was misled by that conduct.
- c) Whether in all the circumstances it was reasonable for Cashmere to have been so misled, see *AMP Finance NZ Ltd v Heaven* (1997) TCLR 144, (1998) 6 NZBLC 102, 414.

[23] In the circumstances of this case, I am not satisfied the claim by Cashmere that there is conduct by the defendants that satisfies the definition of deceptive conduct set forth in *AMP Finance NZ Ltd v Heaven* cannot succeed. In this respect there is evidence the defendants were aware the advance by Cashmere to Zurvan was a temporary advance to be repaid from the proceeds of the sale of the Auckland Road property. Cashmere made it clear it had agreed to the advance on the basis of the sale of the property to McIsaak which was expected to settle on 28 September 2007 becoming unconditional. Furthermore, statements made by the defendants in correspondence to the solicitors for Cashmere of 1 August 2007 and 16 August 2007 to Zurvan entering into an unconditional agreement for the sale of the Auckland Road property could be misleading in that there was no disclosure that the McIsaak agreement was not proceeding. Thus it could be held that Cashmere and its solicitors were misled by the defendants into believing the agreement for sale to McIsaak was proceeding when the defendants knew the agreement had been cancelled.

[24] Even if the defendants' disclosure in the copy of the facsimile of 16 August 2007 from Bayleys Real Estate that the unconditional contract related to a sale to DQ Trust Co and not McIsaak with payment of a deposit of \$50,000 and not \$210,000 their failure to disclose the collateral agreement for Zurvan to purchase a property from DQ Trustee for \$3,200,000.00 to be settled at the same time as the sale of the Auckland Road property was and could reasonably be regarded as misleading because Cashmere would believe there would be sufficient from the proceeds of sale to repay their advance when, as the defendants well knew, that would not be the case.

[25] It must follow therefore that the defendants application for summary judgment cannot succeed and must be dismissed. In the circumstances and following *NZI Bank Ltd v Philpott* [1990] 2 NZLR 403 costs will be reserved. The registrar

should arrange a judicial case management conference by telephone for the purpose of making appropriate directions with regard to setting these proceedings down for hearing, arranging a date of hearing and if appropriate arranging a judicial settlement conference.

Associate Judge Robinson