IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2009-404-1050

BETWEEN	THOMAS STUART TUPE AND TAMAHO JOSEPH TUPE Applicants
AND	CHARLES EDWARD TUPE, ERANA NORA TUPE, RAMEKA TUPE AND ARNOLD ROBERT TUPE Respondents

Hearing: 2 June 2009

Appearances: Mr S Judd for applicants
Mr J P Kahukiwa for respondents

Judgment: 19 June 2009 at at 5 p.m.

JUDGMENT OF ASSOCIATE JUDGE DOOGUE

This judgment was delivered by me on
***19.06.09 at 5 pm**, pursuant to*
Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date……..…

Counsel:

Mr S R Judd, P O Box 3320, Auckland

Corban Revell, P O Box 21-180, Waitakere City,

[1] This is a case in which Associate Judge Christiansen directed a urgent hearing of the applicants' application for order for removal of caveat pursuant to s 143 of the Land Transfer Act 1952. Unfortunately the case comes before the Court because the members of the whanau have not been able to agree on what should become of their parents' former home. The applicants have entered into an agreement for sale and purchase of the property and settlement will be overdue on that agreement by the time this judgment has been released.

[2] The respondents are four of 14 siblings in the family and they oppose the course proposed by the applicants, who are the administrators in the parties' mother's estate, to sell the property out of the family. In order to secure their position the respondents filed the caveat that is said to be based upon a contract that the respondents entered into with the applicants on 9 February 2009.

[3] Because of the urgency of the circumstances in which the parties find themselves, I intend that this judgment should be a brief one.

[4] The basic chronology of events is that the parties entered into an agreement for sale and purchase with the respondents agreeing to buy the property for the sum of $430,000. The agreement was subject to finance with the finance date being 20 February 2009 and the amount of finance required $340,000. The respondents did not obtain finance by the latter date as required by clause 8.1 of the agreement for sale and purchase. Clause 8.7 of the agreement for sale and purchase provided:

> 8.7 If this agreement is expressed to be subject either to the above or to any other conditions then in relation to each such condition the following shall apply unless otherwise expressly provided:
>
> (1) The condition shall be a condition subsequent.
>
> (2) The party or parties for whose benefit the condition has been included shall do all things which may reasonably be necessary to enable the condition to be fulfilled by the date for fulfilment.
>
> (3) Time for fulfilment of any condition and any extended time for fulfilment to a fixed date shall be of the essence.
>
> (4) The condition shall be deemed to be not fulfilled until notice of fulfilment has been served by one party on the other party.

> (5) If the condition is not fulfilled by the date for fulfilment, either party may at any time before the condition is fulfilled or waived avoid this agreement by giving notice to the other. Upon avoidance of this agreement the purchaser shall be entitled to the immediate return of the deposit and any other moneys paid by the purchaser under this agreement and neither party shall have any right or claim against the other arising from this agreement or its termination.
>
> (6) At any time before this agreement is avoided the purchaser may waive any finance condition and either party may waive any other condition which is for the sole benefit of that party. Any waiver shall be by notice.

[5] Even though the respondents were not able to raise the required finance within the time period allowed for by the agreement, the vendors were prepared to allow more time. On 1 April 2009 the solicitors for the applicants/vendors wrote to the solicitors acting for the respondents in the following terms:

> …
>
> The Tupes (your clients) have until Wednesday 8 April to confirm that there agreement is unconditional.

[6] The next relevant development was that on 8 April at 4.15 p.m. the solicitors acting for the applicants faxed the respondents' solicitors stating, so far as relevant:

> We regret to advise that due to your client's (sic) failure in satisfying the finance condition, the vendor hereby terminates the above agreement with immediate effect.

[7] The parties' arguments largely centred on the effect of the letter. Mr Kahukiwa, in his helpful submissions, put matters to me on the following basis. He said that the original extension of time that was granted for obtaining finance had not expired at the point where the applicants purported to give notice cancelling the agreement. When I asked Mr Kahukiwa when that time expired, he said it would have been at midnight on 8 April 2009. Therefore, it follows, notice of cancellation was some seven or eight hours premature,.

[8] Mr Judd was not prepared to accept that notice had been given prematurely but in any event it was his submission that there was no possible basis upon which the Court could conclude that the extension of time and allegedly premature notice of cancellation could justify arguments on the part of the applicants that the vendor's

cancellation was invalid. Mr Judd said such arguments could only succeed on the basis that there had been a variation to the contract which was binding on the vendors or, alternatively, they were estopped by operation of the principle of promissory estoppel from relying upon the notice of cancellation. As to the first, Mr Judd said that any variation was not supported by consideration and was therefore not enforceable. That submission must be correct and I accept it. I will deal next with the issue of estoppel.

[9] Both parties agreed that the law was to similar effect to the statements to be found at page 495 in *Equity and Trusts in New Zealand* (Ed A Butler, Wellington 2003) as follows:

> **16.2 Invoking modern equitable estoppel doctrine: elements**
>
> Although the modern approach is "to depart from strict criteria and to direct attention to overall unconscionable behaviour" it is nevertheless clear that the party alleging an estoppel must show that:
>
> (a) A belief or expectation has been created or encouraged through some action, representation, or omission to act by the party against whom the estoppel is alleged;
>
> (b) The belief or expectation has been relied on by the party alleging the estoppel;
>
> (c) Detriment will be suffered if the belief or expectation is departed from; and
>
> (d) It would be unconscionable for the party against whom the estoppel is alleged to depart from the belief or expectation. [Footnotes ommitted]

[10] I do not believe that the various elements which are listed in the above quotation are present. Viewing matters overall, I am not prepared to conclude that the conduct of the applicants in cancelling the agreement at 4.17 p.m. on 8 April 2009 amounted to unconscionable behaviour. My reasons are as follows.

[11] In this case obtaining of finance was apparently being managed by the parties themselves and not by the solicitor. There is doubt that the respondents even knew of the extension of time that was granted by the letter sent to the solicitor on 1 April 2009. Ms Erana Tupe for the respondents has deposed:

> 27. As I now understand it on the 1 April 2009, a letter was faxed at 15.57 p.m. from Davies & Co, the solicitors for [the applicants] to our former lawyers at Thomas & Co, advising that we had until the 8 April 2009 to confirm that our contract was unconditional.

[12] However, In a later affidavit Mr Tupe said that she was advised on 1 April 2009 at 4.30 p.m. by email from her solicitors that:

> We only had another five days to confirm our finance …

[13] She went on to say:

> 5. So even though we had been told we had another week, I was sure that we would get there. I was not distressed because we were getting there and time extensions were permitted in the past. However I was grateful for the extra time and to complete the Sovereign approval we needed it.

[14] Mr Judd was critical of this change in Ms Tupe's evidence: he described the evidence, with some justification as inconsistent. But for the purposes of this application I am prepared to accept that Ms Tupe's second deposition may be accepted. It may be that the earlier deposition at paragraph 27 of her first affidavit which I have already dealt with was simply concerned with the question of the timing of exchanges between the two firms of solicitors, rather than the relaying of the information to her by her own solicitor.

[15] To continue, it would appear that the respondents did make real efforts to get finance. They commissioned a registered valuer to prepare a valuation on 3 April 2009 and that valuation came to hand on 7 April 2009.

[16] Just how far matters have proceeded from that point is left unclear by the affidavits of Ms Tupe. She says nothing about where negotiations for finance have got up to on 7 April and what she did that day or the following day. Her affidavit narrative 'skips' to 17 April 2009 at which time she said her mortgage broker advised them that a loan had been obtained.

[17] In summary, the complaint by the respondents, putting it at its highest, is that the applicants gave notice of cancellation of the contract several hours too early. However, as I suggested to Mr Kahukiwa when he was making his submissions to

me the respondents' case is a very technical one. I asked him what detriment in substance the respondents had suffered from this alleged departure from the undertaking they had given which was to allow the respondents until midnight on 8 April 2009 to obtain finance. He was not able to give me a satisfactory answer on this point. The concerns which I put to Mr Kahukiwa stem from the fact that the notice of cancellation was given ¾ of an hour before the close of business for the day on 8 April 2009. It seems most unlikely that had the applicants adhered to the terms of the representation that they had made to the respondents, that that would have made any difference to the respondents' obtaining finance on 8 April 2009. I am simply unable to accept that even if the extension of time was until midnight on 8 April 2009 that the respondent suffered any detriment from the applicants departing from their promise and giving a notice some seven or so hours prematurely.

[18] It is instructive to enquire into what relief the applicants seek and then to work back from that point to enquire of what basis there would be for granting the relief sought.

[19] The usual form of relief in a claim based upon promissory etoppel would result in the respondents being relieved from the consequences that followed from the vendors' cancelling the contract. But the grounds for giving such relief would only arise if the respondents were able to establish that in reliance on the vendors' promises and believing they had several more hours in which to obtain finance, refrained from taking further steps that day to look for finance; and that if they had not so desisted, it is likely that they would have found finance. Neither of these elements has been proved. Indeed, it must be said that it would be far-fetched to suggest that either of those contingencies were remotely possible. Had the respondents been able to advance some evidence that the course of action just outlined was the likely one that would have ensued, then the relief that the Court would have granted in all probability would have been to ignore the purported cancellation when ruling on the parties relative rights and liabilities under the contract. But because of an absence of relevant evidence, that stage would be very unlikely to be reached. If the respondents were unable on the promissory estoppel ground to persuade the Court to ignore the purported cancellation, then no other ground seems to be available to them which would enable them to persuade the

Court not to give effect to the vendors cancellation. Certainly, given that the time for raising finance had expired, the vendors were in a position where they were entitled to cancel.

[20] To conclude, in my view the respondents have not shown that they suffered any detriment from the premature cancellation of the contract which occurred at an earlier time than that which the vendors promised it would and accordingly there is no basis for the Court ignoring the fact that the vendors effectively cancelled the contract.

[21] For all of those reasons I am unable to accept that the actions of the vendors caused detriment to the respondents.

[22] In my view the respondent's caveat cannot be justified. I make an order in terms of paragraph 1(a) of the applicant's Notice of Application dated 18 May 2009. I would expect that the parties should be able to agree on the question of costs. If they cannot, I will arrange for counsel to appear to argue the matter at 9 a.m. at a future date.

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J.P. Doogue
Associate Judge