

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

CIV-2008-404-1435

BETWEEN THE DOCKS LIMITED
 Plaintiff

AND HONG WEN LIU
 Defendant

Hearing: 25 June 2009

Appearances: TJG Allan for Plaintiff
 No appearance for Defendant

Judgment: 25 June 2009

JUDGMENT OF ASHER J

Solicitors:
TJG Allan, Grove Darlow & Partners, (tima@grovedarlow.co.nz)

[1] The plaintiff seeks by way of formal proof, judgment in the sum of \$473,281.80.

[2] The judgment arises out of an agreement for sale and purchase of a unit in an apartment. The agreement was dated 21 August 2006. The purchase price was \$589,000. Settlement should have occurred on 16 October 2007. The defendant defaulted and never settled. On 22 February 2008, the plaintiff cancelled the contract. The property was subsequently sold to a different purchaser for the sum of \$580,000. The shortfall, therefore, was relatively modest.

[3] The two central figures in the claim are the amount claimed for interest and an amount paid for an underwrite fee. Interest is calculated in accordance with clauses 1.19, 14.6 and 14.22 of the agreement for sale and purchase. The net result of these clauses is that interest is payable at four times the bill rate. A calculation on this basis means that interest of 34.56 percent ran on the period of just over one-year when the defendant was in default, and prior to the resale. On the face of it this is an extraordinarily high interest rate, and I was concerned that it might have been a penalty. I have since, however, had submissions from Mr Allan, and further evidence has been provided.

[4] The evidence of an actuary, Mr GR Lee, was filed in support of the request for formal proof. He has calculated the internal rate of return of the loans of the plaintiff for the relevant period. Financing was from a number of lenders, including lenders known as second or third tier lenders, who demand very high interest rates. In addition there were financing costs. These included loan application and set-up fees, interest costs and legal costs directly associated with the uplift, maintenance or rollover of the respective loans. On Mr Lee's calculation the actual interest rate paid by the plaintiff was 27.1 percent during the relevant period. In other words, the penalty rate was only approximately 7 percent higher than the actual cost of finance, taking into account all costs.

[5] My initial concern was that interest at such a high rate was a penalty. However, I am satisfied on the principles set out in *Phillips Hong Kong Limited v*

The Attorney General of Hong Kong (1993) 61 BLR 41 (PC), that the amount claimed for interest, although very high, is not a penalty. It is not extravagant or unconscionable. It is relevant in considering whether an interest rate is a penalty, to consider what has actually happened. I have had that evidence from Mr Lee.

[6] I am satisfied in the circumstances that the penalty clause provided an estimate of loss on a reasonable basis, and that the interest claimed should not be reduced because it is a penalty.

[7] The other very high figure that concerned me initially was the underwrite fee. The plaintiff entered into a contract of underwrite. I was concerned to check that the underwriter was a genuine third party and that the very high fee of \$232,000 had been paid. Having received further evidence I am satisfied that the plaintiff was in a very difficult position when the defendant defaulted, and that a genuine underwrite agreement was entered into with a third party. The underwrite fee, although 40 percent of the purchase price, could be seen by the plaintiff reasonably as a better prospect than having to sell at a fire sale with all the attendant costs and fees. I have also been provided with satisfactory affidavit evidence proving that the underwrite fee was paid and is therefore a genuine loss arising from the defendant's default.

[8] I have also had various fees accounts provided and am satisfied that the fees, although high, are also justified. I note that the proceedings were initially defended.

[9] Accordingly, I am prepared to enter judgment by way of formal proof. I enter judgment in the total sum of \$473,281.80 as set out in Schedule 1 of the submissions of Mr Allan dated 22 June 2009. A copy of that Schedule showing the precise calculation, together with the interest schedule on GDP invoices, will be attached to this judgment and also to the order.

Result

[10] Judgment is entered for the plaintiff against the defendant in the sum of \$473,281.80.

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Asher J