IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

CIV 2008-419-877

BETWEEN	SHERMAN LIMITED Plaintiff
AND	ROY J HARLOW NANCY JEAN HARLOW Defendants

Hearing: 24-27 August 2009

Counsel: EJ Hudson and DJ Taylor for Plaintiff
Defendants in person

Judgment: 19 November 2009 at 4.00 P.M.

JUDGMENT OF RODNEY HANSEN J

This judgment was delivered by me on 19 November 2009 at 4.00 p.m., pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date: ……

Solicitors: McBreens, P O Box 1542, Hamilton for Plaintiff (Mr C Cochrane)

Introduction

[1] On 6 November 2007 the plaintiff (Sherman), sold the defendants (Mr and Mrs Harlow) a lifestyle property at Raynes Road on the outskirts of Hamilton. Sherman is the trustee of the Sherburn Family Trust, the principal beneficiaries of which are Ivan and Jill Sherburn. Mr Sherburn is a real estate agent who represented Sherman.

[2] The price for the property of $622,300 took into account that settlement would be delayed until 10 April 2008. In a separate agreement, made on 7 November 2007, Sherman agreed to the Harlows immediately occupying the property. They agreed that if they failed to settle they would vacate the property, leaving it in the same condition as they found it.

[3] Mr and Mrs Harlow failed to settle on the due date or in accordance with two settlement notices issued by Sherman. Sherman then gave notice of cancellation. The Harlows refuse to accept the contract is at an end. They say the settlement notices were invalid and they are not obliged to settle. They remain in possession.

[4] Sherman brings this proceeding, seeking an order for vacant possession of the land, a declaration that the agreement was cancelled and either damages for wrongful possession or mesne profits.

[5] The Harlows maintain that the contract remains on foot and counterclaim for damages or compensation arising out of misrepresentations and other defaults by Sherman. If the agreement were cancelled, they seek relief under the Credit Contracts and Consumer Finance Act 2003 and the Property Law Act 1952.

Issues

[6] The issues arising on the pleadings are:

- Whether the settlement notices were valid and the contract validly cancelled.

- Whether Mr and Mrs Harlow are entitled to relief under the Credit Contracts and Consumer Finance Act 2003.

- Whether the Harlows are entitled to relief under the Property Law Act 1952.

Settlement notices

[7] The agreement of 7 November was the second entered into by the parties. It superseded an earlier agreement for a lower price ($595,000) which provided for settlement on 14 December 2007. An extended settlement was sought by the Harlows. The Sherburns agreed, provided interest for delayed settlement was built into the purchase price, hence the increase to $622,300. The agreement was made in contemplation of the issue of title subsequent to the contract and contained a warranty that, following settlement, the boundaries of the land would be changed in accordance with a plan attached to the agreement. The boundary changes extended the area of the land and made it more rectangular in shape.

[8] Shortly before settlement was due to take place on 10 April 2008, differences arose between the parties which became the subject of correspondence between their solicitors. The issue which assumed the greatest significance at the time and remains in contention is a claim that, in the course of pre-contractual discussions, Mr Sherburn misrepresented the potential impact on the property of a proposed roading development known as the Southern Links network. In a letter of 4 April 2008, the Harlows' solicitor indicated that the issue required a reassessment of their clients' situation and sought an agreement that "they have the right to renegotiate a new agreement".

[9] Through their solicitors, the Sherburns rejected the allegations and gave notice that they expected the Harlows to settle in accordance with the contract. On 8 April, the solicitors sent a settlement statement and asked the purchaser's solicitor to make the necessary arrangements for an e-dealing settlement in accordance with New Zealand Law Society guidelines.

[10] The necessary steps to effect a settlement were not taken. The Harlows reiterated their concerns in relation to the Southern Links issue and, in a letter written to Mr Sherburn's employers, Ray White Real Estate Limited, on the date settlement was due, made further claims of misrepresentation. These included two matters which remain in issue – the frequency and effect of flights from and to the nearby international airport and the registration of three additional covenants over the land. There was a detailed response to these allegations in a letter from the Sherman's solicitors of 16 April 2008 which gave notice that Sherman would enforce its contractual rights. A settlement notice was duly issued on 18 April. The operative part read as follows:

> The Vendor gives notice to the Purchaser that:
>
> 1. Under an agreement for sale and purchase dated 6 November 2007 ("the agreement") the Vendor agreed to sell to the Purchaser the property at 31 Raynes Road, Hamilton, RD 2 and more particularly described as 6,668 square metres more or less being Lot 2 DP 391866 Unique Identifier 368599.
>
> 2. The agreement required settlement of the purchase on 10 April 2008 ("the settlement date").
>
> 3. The Purchaser has failed to settle on the settlement date.
>
> 4. The Vendor was and remains in all material respects ready, able and willing to proceed to settle and has been unable to settle by reason only of the Purchasers' default.
>
> 5. The Purchaser is required to settle the purchase within twelve working days after the date of service of this notice (excluding the day of service) time being of the essence by paying to the Vendor the balance required to settle in full being $577,359.75 as per the attached settlement statement together with interest on the balance purchase price at the interest rate for late settlement specified on the front page of the agreement calculated on a daily basis.
>
> 6. The Vendor considers that the Purchaser's breach is capable of being remedied wholly by payment of the amount owing under the agreement, namely the amount calculated with reference to clause 5.
>
> 7. If the breach is not remedied within the time specified in clause 5, the Vendor may seek to cancel the agreement by either:
>
> (a) Obtaining from a Court an Order for possession of the land (in which case the agreement is cancelled from the making of or from a later time specified for the purpose in the Order, or

(b) By re-entering the land peaceably (and without committing forceable entry under Section 91 of the Crimes Act 1961).

8. In terms of Section 31 of the Property Law Act 2007 this notice does not prevent the Vendor from claiming, or affect the amount which the Vendor may claim by way of, damages for the breach of:

(a) The agreement, or

(b) Any other duty to the Vendor that you may be under independently of the agreement.

9. Section 33 of the Property Law Act 2007 provides that you may apply to a Court for relief against cancellation of the agreement as:

(a) You have (by agreement) entered into the possession of the property, and

(b) The Vendor has served this notice on you but only if:

(c) The Vendor has after service of this notice applied to a Court for an Order for possession of the property or peaceably re-entered the property.

And the Vendor gives notice of the advisability of seeking legal advice on the exercise of that right.

10. If you do not comply with the terms of this settlement notice the Vendor may exercise such of the Vendor's remedies under the agreement at law or in equity as the Vendor may elect.

[11] The Harlows' solicitors questioned the validity of the settlement notice. They claimed the settlement date was not 10 April, as set out in the notice (and provided for in the agreement) but 14 April, which was referred to as the settlement date in the agreement to occupy of 7 November 2007. Sherman's solicitors did not accept that the date specified in the notice was incorrect but, out of an abundance of caution, decided to issue a further settlement notice. It was dated 6 May 2008. The only change from the first notice was to change the settlement date in paragraph 2 from 10 to 14 April. Settlement was required pursuant to para 5 of the notice by 5.00 p.m. on 22 May.

[12] All the necessary preparations for an electronic settlement were put in place. Sherman's solicitors wrote to the Harlows' solicitors advising that settlement would proceed if the funds were received by 5.00 p.m. on 22 May. 5.00 p.m. came and went. The Sherman's solicitors heard nothing more and, at about 5.10 p.m., sent a facsimile letter to the Harlows' solicitors cancelling the contract.

[13] It emerged in evidence that the Harlows had made attempts to obtain mortgage finance. On the day for settlement (though after 5.00 p.m.), they received a loan offer which, if the necessary documentation had been expedited, might have permitted settlement three or four days later. There were without prejudice discussions between the parties but no solution emerged. Sherman continues to rely on the notice of cancellation which the Harlows maintain was ineffective.

[14] The grounds on which the Harlows challenge the validity of the settlement notice are set out as follows in para 11 of the statement of defence and counterclaim:

> 11.1 the notice was a second notice that the plaintiff was not entitled to serve;
>
> 11.2 the figure for settlement was $333.56 more than the defendants were obliged to pay under the agreement;
>
> 11.3 the plaintiff was not ready, able and willing to settle the agreement, since the plaintiff was not in a position to provide title to the property as agreed, and in particular had varied covenants on the title without the consent of or prior notice to the defendants, and did not intend to transfer title to the property in accordance with boundary adjustments shown in the plan attached to the sales brochure, and there were issues as regards access and water rights;
>
> 11.4 the settlement notice made reference to the Property Law Act 2007;
>
> 11.5 the defendant relied on the implied representation that the notice was being given under s 29 of the Property Law Act 2007, and not otherwise;
>
> 11.6 the notice did not attach a settlement statement as it purported to do by clause 5;
>
> 11.7 the notice was not served in accordance with s 359 of the Property Law Act 2007.

Ready, willing and able

[15] It is convenient to first consider the allegation that Sherman was not ready, able and willing to settle the agreement. At common law a precondition to the issue of a notice making time of the essence is that the giver of the notice is ready, willing and able to perform their obligations – DW McMorland, *Sale of Land* (2nd ed 2000) at 12.09. It is specifically provided for in the agreement for sale and purchase (which is the standard form approved by the Real Estate Institute of New Zealand

and the Auckland District Law Society, Eighth Edition 2006) which relevantly provides:

> 9.1 (1) If the sale is not settled on the settlement date either party may at any time thereafter serve on the other party a settlement notice; but
>
> (2) The settlement notice shall be effective only if the party serving it is at the time of service either in all material respects ready able and willing to proceed to settle in accordance with the notice or is not so ready able and willing to settle only by reason of the default or omission of the other party.
>
> (3) If the purchaser is in possession a settlement notice may incorporate or be given with a notice under section 50 of the Property Law Act 1952.
>
> 9.2 Upon service of the settlement notice the party on whom the notice is served shall settle:
>
> (1) on or before the twelfth working day after the date of service of the notice; or
>
> (2) on the first working day after the 13th day of January if the period of twelve working days expires during the period commencing on the 6th day of January and ending on the 13th day of January, both days inclusive –
>
> time being of the essence, but without prejudice to any intermediate right or cancellation by either party.
>
> ...
>
> 9.4 If the purchaser does not comply with the terms of the settlement notice served by the vendor then:
>
> (1) Without prejudice to any other rights or remedies available to the vendor at law or in equity the vendor may:
>
> (a) sue the purchaser for specific performance; or
>
> (b) cancel this agreement by notice and pursue either or both of the following remedies namely:
>
> (i) forfeit and retain for the vendor's own benefit the deposit paid by the purchaser, but not exceeding in all 10% of the purchase price; and/or
>
> (ii) sue the purchaser for damages.

[16] The allegation in para 11.3 of the statement of defence and counterclaim as to the variation of covenants is to three covenants that were added by Sherman to the title which, as earlier noted, it was agreed would issue after the agreement was entered into. Those covenants provided that the registered proprietors of all three lots in the subdivision would not:

> (a) Shoot any wildlife other than for the eradication of pests such as rabbits, possums and suchlike;
>
> (b) Permit or allow motorcycling or go-cart recreation or other noisome activity on the land, but this covenant shall not extend to the use of motor bikes, mowers, weedeaters or suchlike for the use in farming or gardening operations;
>
> (c) Keep or permit to be kept on the land more than two dogs of a greater age than 3 months but this does not preclude the ownership of additional dogs for working purposes.

[17] The Harlows accept that the proposal to register a covenant prohibiting shooting was discussed before they signed the agreement. They also acknowledge that in the course of the discussion the issue of noisy vehicles and dogs on the land was mentioned. They are adamant that there was no proposal to control noise by covenant.

[18] I am satisfied the proposal to create the three new covenants was raised by Mr Sherburn, although I acknowledge the possibility that the Harlows may not have fully understood the implications of what was being proposed. However, the extent of their understanding is academic. Clause 5.2(2) of the agreement provides:

> If a plan has been or is to be submitted to LINZ for deposit in respect of the property, then in respect of objections or requisitions arising out of the plan, the purchaser is deemed to have accepted the title except as to such objections or requisitions which the purchaser is entitled to make and notice of which the purchaser serves on the vendor on or before the fifth working day following the date the vendor has given the purchaser:
>
> (a) notice that the plan has been deposited; or
>
> (b) notice that (where a new title is to issue for the property) the title has issued and a search copy of it as defined in section 172A of the Land Transfer Act is obtainable.

[19] The title issued on 7 December 2007. A copy was sent to the Harlows' solicitor on 20 December. No objections or requisitions were notified in accordance

with cl 5.2(2). The Harlows are deemed to have accepted the title, including the new covenants.

[20] No other issues of substance are raised by para 11.3 of the defendant's pleadings. The intentions of Sherman as to the transfer of title incorporating the boundary adjustments were irrelevant to their ability to deliver title on the settlement date. Sherman's warranty was to give effect to the agreed boundary adjustments after the agreed settlement date. In any event, there is nothing to suggest it was unwilling to perform its obligations in that regard.

[21] I will consider later the issues of access and water rights raised by the Harlows. I find there is no basis for their concerns. Had there been, they also should have been the subject of an objection or requisition under cl 5.2(2).

Second notice

[22] The defence argument that Sherman was not entitled to serve a second notice is ironic, given that it was issued to meet the Harlows' contention that the settlement date in the first notice was wrong. For what it is worth, I take the view that Sherman's solicitors were right in the first place. The settlement date was as specified in the agreement. It was not varied by the licence to occupy. The licence simply recorded the settlement date incorrectly.

[23] Be that as it may, the reference to an incorrect date in the second, and operative, settlement notice does not invalidate it. There is no prescribed form of notice to make time of the essence under the general law or the agreement, although certain basic requirements are dictated by the function and purpose of the notice and by the terms of the agreement – see generally *McMorland* at 12.20. The notice must:

a) Make it sufficiently clear that settlement in accordance with the agreement is required.

b) Specify the period for compliance.

c) State the consequences of failure to comply.

[24] The issue of the second notice does not run counter to any of these requirements. As Mr Hudson submitted, it effectively extended the time for settlement, a course expressly sanctioned by cl 9.6 of the agreement which provides:

> The party serving the settlement notice may extend the term of the notice for one or more specifically stated periods of time and thereupon the term of the settlement notice shall be deemed to expire on the last day of the extended period or periods and it shall operate as though this clause stipulated the extended period(s) of notice in lieu of the period otherwise applicable; and time shall be of the essence accordingly. An extension may be given either before or after the expiry of the period of the notice.

Settlement figure

[25] The amount required to settle referred to in the settlement notices was overstated by $333.56. The Harlows had paid the rates on the property for the first quarter of 2008. Sherman's solicitor, unaware of this, failed to make allowance for it in the settlement statement.

[26] An error in the amount claimed in the settlement notice does not relieve the purchaser of the obligation to settle unless, in all the circumstances, the vendor evinces an intention not to settle – *Stewart v Davis* [1995] 3 NZLR 604 at 608. See also the discussion in *Johal v Stariha* (2005) 6 NZCPR 230 at [22] - [33]. The reference to an incorrect sum in the settlement notices did not affect the Harlows' duty to tender the correct sum on settlement.

Settlement statement not attached

[27] There is no factual basis for a finding that a settlement statement was not in fact attached to both settlement notices. There was no challenge to the evidence of Sherman's solicitor, James Cochrane, that a settlement statement accompanied both settlement notices. However, even if statements had not been attached, the validity of the notices would not be affected. The amount required to settle was stated in the notices themselves. The basic requirements of the notices would still have been met.

Property Law Act 2007

[28] The notices purport to be issued under the Property Law Act 2007. That was an error. The Property Law Act 1952 applied by virtue of s 367(3) and (4) of the 2007 Act which provides:

> (3) No alteration in the law made by this Act affects—
>
> (a) a right, interest, title, immunity, or duty, or a status or capacity, existing under the law so altered and immediately before 1 January 2008; or
>
> (b) the validity, invalidity, effect, or consequences of—
>
> (i) an instrument of the kind to which this Act applies and that came into operation before 1 January 2008; or
>
> (ii) anything done or suffered before that date.
>
> (4) All instruments of the kind to which this Act applies and that came into operation before 1 January 2008 must, to give effect to subsection (3), be read and construed as if the law existing immediately before 1 January 2008 continued to have effect, and must be given only the effect and consequences that they would have had under that law.

The agreement for sale and purchase is an instrument under the 2007 Act. The definition in s 4 includes an agreement that creates legal or equitable rights and includes any instrument defined in s 2 of the Land Transfer Act 1952. The definition covers any printed or written document relating to the transfer of or other dealing with land.

[29] Although the references in the settlement notices to the 2007 Act were, accordingly, incorrect, they were not material to the effectiveness and validity of the notices. They did not affect its main purpose and, in advising that the notices did not affect the vendor's right to claim damages and the purchasers' right to seek relief as purchasers in possession, they were a correct statement of the law under the 1952 Act as well as the 2007 Act.

Service

[30] The settlement notices were served at the office of the Harlows' solicitor. That complied with cl 1.2 of the agreement which provides for service by personal delivery, mail, facsimile or email on a party's solicitor. The agreement prevails over the service requirement in s 152 of the Property Law Act which, by subs (7), applies only if and so far as a contrary intention is not expressed in the applicable instrument.

Conclusion

[31] The notices were valid and effective and validly served. The second notice was effective to require settlement by 5.00 p.m. on 22 May 2008.

Credit Contracts and Consumer Finance Act 2003

[32] At 5.10 p.m. on 22 May Mr Cochrane sent by facsimile a letter giving notice cancelling the agreement. That will have been effective to cancel the agreement pursuant to cl 9.4 (quoted in [15] above). However, the purchasers claim that they are entitled to relief under the Credit Contracts and Consumer Finance Act 2003 (in this section called the Act). The essential argument, paraphrasing what is set out in the statement of defence, is:

> (a) The agreement is a consumer credit contract within the meaning of s 11 of the Credit Contracts Act.
>
> (b) Sherman failed to make disclosure as required by s 17 of the Act. Accordingly, by s 99, Sherman cannot enforce the agreement or its right to repossession or any security interest under the agreement.
>
> (c) Sherman has acted oppressively under the agreement or in inducing the Harlows to enter into the agreement and the Court may reopen the agreement and make such orders as it thinks necessary to remedy the acts of oppression.

[33] I am reliant on the pleading for the grounds on which it is contended that the agreement is a consumer credit contract as Mr Harlow, who took responsibility for arguing the defendants' case, did not make any submissions on the issue (or, for that

matter, on any legal question). The statement of defence alleges that the agreement falls within the Act because part of the price consists of consideration for occupancy prior to settlement.

[34] A credit contract is defined under s 7 of the Act as follows:

> **Meaning of credit contract**
>
> (1) In this Act, unless the context otherwise requires, **credit contract** means a contract under which credit is or may be provided.
>
> (2) If, because of any contract or contracts (none of which by itself constitutes a credit contract) or any arrangement, there is a transaction that is in substance or effect a credit contract, the contract, contracts, or arrangement must, for the purposes of this Act, be treated as a credit contract made at the time when the contract, or the last of those contracts, or the arrangement, was made, as the case may be.

[35] Credit is defined in s 6 as follows:

> **Meaning of credit**
>
> In this Act, unless the context otherwise requires, **credit** is provided under a contract if a right is granted by a person to another person to—
>
> (a) defer payment of a debt; or
>
> (b) incur a debt and defer its payment; or
>
> (c) purchase property or services and defer payment for that purchase (in whole or in part).

[36] Mr Hudson submitted, rightly it seems to me, that the agreement in this case is not a credit contract because no credit is provided. No debt is incurred under the contract until the purchasers are obliged to settle. There is therefore no provision for payment to be deferred. This is confirmed by cl 2.2.1(b) of the contract which provides:

> The parties agree that:
>
> ...
>
> (b) The sale price is the "cash price" as defined by section 5 of the Credit Contracts and Consumer Finance Act 2003.

Cash price is defined by s 5 as:

... in relation to property sold or leased, or to services provided under a contract, means—

(a) the lowest price at which a person could have purchased that property or those services from the vendor, lessor, or provider on the basis of payment in full at the time the contract was made; or

(b) if there is no price in accordance with paragraph (a), the fair market value of that property or those services at the time the contract was made.

The parties have effectively agreed that the agreement is not a credit contract.

[37] Even if the agreement was a credit contract, it is not a consumer credit contract which is defined by s 11 as:

Meaning of consumer credit contract

(1) A credit contract is a consumer credit contract if—

(a) the debtor is a natural person; and

(b) the debtor enters into the contract primarily for personal, domestic, or household purposes; and

(c) 1 or more of the following applies:

(i) interest charges are or may be payable under the contract:

(ii) credit fees are or may be payable under the contract:

(iii) a security interest is or may be taken under the contract; and

(d) when the contract is entered into, 1 or more of the following applies:

(i) the creditor, or one of the creditors, carries on a business of providing credit (whether or not the business is the creditor's only business or the creditor's principal business):

(ii) the creditor, or one of the creditors, makes a practice of providing credit in the course of a business carried on by the creditor:

(iii) the creditor, or one of the creditors, makes a practice of entering into credit contracts in the creditor's own name as creditor on behalf of, or as trustee or nominee for, any other person:

(iv) the contract results from an introduction of one party to another party by a paid adviser or broker.

(2) This section is subject to sections 14 and 15.

[38] In terms of s 11(1)(c), there are no interest charges, credit fees or security interest arising under the contract and none of the conditions set out in s 11(1)(d) apply. The disclosure requirements under the Act apply only to consumer credit contracts. Accordingly, the relief sought by the Harlows under s 99 is not available.

[39] Relief against oppressive conduct is available if the agreement is a credit contract. Although I have decided that the agreement is not a credit contract, I will nevertheless consider the matters relied on as constituting oppression. It provides an opportunity to address the merits of the complaints levelled against Mr Sherburn by Mr and Mrs Harlow. Those matters, again paraphrasing what is pleaded, are:

a) That Mr Sherburn, as agent for Sherman, represented to the Harlows that:

i) Title to the property would be conveyed in accordance with road access and boundaries shown on a survey plan annexed to the sales brochure;

ii) The property offered "country tranquillity" as stated in the sales brochure;

iii) A future realignment of State Highway 3 was the only roading issue to affect the property and it would not directly affect the property and that a Southern Link Bypass development was a future proposal that was not likely to proceed;

iv) The property was not in the airport flyover;

v) A water right would be granted; and

vi) A "shared access" lane was available to the purchasers for access to the inner portions of the property.

b) Sherman refused to settle and cancelled the contract when the reason for the delay in settlement was a bereavement of the purchasers' mortgage broker.

[40] The circumstances in which the Court may reopen a credit contract on the grounds of oppression are set out in s 120 of the Act which provides:

> **Reopening of credit contracts, consumer leases, and buy-back transactions**
>
> The Court may reopen a credit contract, a consumer lease, or a buy-back transaction if, in any proceedings (whether or not brought under this Act), it considers that—
>
> (a) the contract, lease, or transaction is oppressive; or
>
> (b) a party has exercised, or intends to exercise, a right or power conferred by the contract, lease, or transaction in an oppressive manner; or
>
> (c) a party has induced another party to enter into the contract, lease, or transaction by oppressive means.

[41] Oppressive is defined in s 118 as meaning:

> ... oppressive, harsh, unjustly burdensome, unconscionable, or in breach of reasonable standards of commercial practice.

Boundaries

[42] When Mrs Harlow was shown the property for the first time (not the second viewing as pleaded), she said Mr Sherburn drew lines on a survey plan to show the proposed realignment of the boundaries of the property. The boundary changes that the parties actually agreed to differed. In my view, the differences were inconsequential, but that is not the issue. The Harlows agreed to the boundary changes depicted in the plan annexed to the agreement, and cannot say they were induced to enter into the agreement by a freehand drawing that showed something

else. In any event, I find that Mr Sherburn's drawing of the proposed boundaries was done in good faith and without any intention to mislead.

Country Tranquillity

[43] I heard nothing to indicate that that this description of the property amounted to a misrepresentation.

Road realignment

[44] Mrs Harlow said that in the course of the first viewing of the property (which she went to alone), Mr Sherburn told her a realignment of State Highway 3 was scheduled some time in the near future but that would not directly affect the property. Mr Harlow said the topic was also discussed at a meeting with Mr and Mrs Sherburn at their house on 5 November before the second agreement was signed. He said Mr Sherburn spoke then of a proposed new arterial route called the Southern Link. He indicated that any new route would be at least 600-700 metres away from the property.

[45] The matter was not raised again until the subject came up in the course of a community watch meeting on 18 January 2008 attended by both Mr Sherburn and Mr and Mrs Harlow. Mr Harlow said the Southern Link was discussed and they overheard Mr Sherburn say it was just a concept and would not happen for ten years or maybe never. At a meeting between the parties on 14 February 2008, the matter was raised again. Mr Harlow said Mr Sherburn repeated that the Southern Link was a future proposal unlikely to proceed and that the Harlows need not be concerned about it.

[46] Mr Sherburn agreed that he talked to Mr and Mrs Harlow about the roading issue at the meeting on 5 November. He told them that there was a proposal to realign State Highway 3 and that land had been purchased for this purpose. Mr Sherburn said he explained the proposal for the Southern Link which would have resulted in two major arterial routes side by side which, in his opinion, made no

sense. Mr Sherburn agreed that the matter was raised in the course of the neighbourhood watch meeting and he expressed the view that the Southern Link proposal would not eventuate.

[47] The Harlows are convinced that Mr Sherburn failed to disclose everything he knew about the proposed roading development and misled them as to the risk it posed to the property. They claimed to have been induced to enter into the agreement on the understanding that the roading plans would not threaten the bucolic character of the locality.

[48] I heard from Barry Dowsett, a civil engineer who is the transport planning manager, Hamilton, for the New Zealand Transport Agency which is a merger of what was previously Land Transport New Zealand and Transit New Zealand. He explained the development of the Southern Links proposals which originated in 1969 and a variation to the proposal, known as the Peacocke Structure Plan 2007, for which scoping work was undertaken in 2006/2007. The outcome of that work was publicly notified in September 2007 as Variation 14 to the Hamilton City Council's District Plan. As Mr Sherburn had said, it would take the Southern Link's route close to State Highway 3.

[49] Mr Dowsett detailed the steps that would need to be taken before plans for the route were finalised. He did not think designation would be confirmed until 2012 or 2013 and the earliest that construction would commence would be in 15 years time. He said it is more likely to be at least 20 years away.

[50] A valuer called by Sherman, Mr Wynne Dymock, confirmed the conditional nature of the Peacocke Structure Plan which he said requires the purchasing of a large number of valuable lifestyle properties and is physically a much more difficult route than the alternative. He believes any concern about the plan to be premature. He said that valuation evidence shows that the Peacocke Structure Plan has not had any impact on the market value of residential properties in the area. The proposed widening and realignment of State Highway 3 would also have no impact on the market value of properties. John Sweeney, a valuer called by the defence, agreed

that, given the uncertainties associated with the Southern Link proposal, it would have no significant impact on property values in the area.

[51] In my view, the disclosure made by Mr Sherburn was appropriate. It was open to the Harlows to make further enquiry if they had wished. In my view, there was nothing oppressive in Sherman's conduct in relation to this issue. In any event, the roading proposals are so uncertain that I have no hesitation in accepting the valuation evidence that they have no current impact on property values.

Airport flyover

[52] Mr and Mrs Harlow said that on 22 October 2007, when they were inspecting the property for a second time, they heard a plane fly over and asked Mr Sherburn whether the property was in the flyover area for the airport. He answered, "No". Mr Sherburn said he was asked whether the property was on the flight path to the airport and he answered, "No, but you get aircraft flying around sometimes and they don't bother us". In cross-examination both Mr and Mrs Harlow acknowledged that the term "flight path" as distinct from "flyover" might have been used when they were asking about air traffic in the area.

[53] Mr and Mrs Harlow maintained that Mr Sherburn's answer was misleading as there is a lot of air traffic over the property which interferes with their enjoyment of it. I received no information as to the frequency of flights over the property, although I accept that, due to its proximity to the airport, air traffic is at a higher level than more distant locations. However, Mr Sherburn answered the question honestly and accurately. The flight paths of the airport do not intrude over the property. There can be no question of oppression.

[54] This is another issue on which it was incumbent on the Harlows to make further enquiries if they were concerned about the likely level of air traffic. They knew the airport was three or four kilometres away and there would be a greater level of air traffic as a result. In any event, I accept Mr Dymock's evidence that the value of properties in the area is not affected by their proximity to the airport. He said that, if anything, their slight elevation enhances their value.

Water right

[55] Mr Harlow claimed that Mr Sherburn had told them water would be supplied from Sherman's property for $300 per annum and the supply would be secured by an easement. I am satisfied no such promise was made by Mr Sherburn. Water is supplied to the property by a former lessee, Sunfruit Limited, which has the right to take water from the adjacent property occupied by Mr and Mrs Sherburn.

Access

[56] Access from the road to the land owned by Mr and Mrs Harlow is over a narrow strip of land which runs parallel to the road. Sherman retained ownership of the strip in order to preserve access to an area of land to the east of the land sold to the Harlows. There is a right-of-way over that strip of land to provide access to the Harlows' property from the road.

[57] Mr and Mrs Harlow have two complaints in relation to access, as I understand it. The first is that they were to have "control" of access to their property rather than access being achieved by way of a right-of-way. The second is that, in addition to access by way of the designated right-of-way, they would be entitled to use part of Sherman's strip of land to gain access to rear portions of their land.

[58] I am satisfied that Sherman could not have contemplated any access arrangement other than by the right-of-way which was provided for in the agreement and the attached plan. I am also satisfied that there was no agreement to provide access by any other means, although I acknowledge that Mr and Mrs Harlow may have misunderstood precisely what rights of access they were being given. In any event, the Harlows could achieve access to the rear of their land without traversing Sherman's land by removing a few old fruit trees. The evidence of Mr Dymock established this.

Delay in settlement

[59] The Harlows' mortgage broker suffered a family bereavement shortly before settlement was due. As a result, loan approval was not obtained until after the deadline for settlement. The mortgage broker said that would have been forthcoming earlier if he had been available. On my understanding of the evidence, there still would have been a delay past the time for settlement before funds would have been available. Whether or not this is so, Sherman was entitled to cancel as soon as the time for settlement passed. It was not required to enquire into the reasons. It could not be oppressive for it to assert its rights to cancel under the contract.

Conclusion

[60] Even if the agreement had been a credit contract and Mr and Mrs Harlow had been able to avail themselves of the remedies available under the Credit Contracts Act, there was no oppressive conduct by Sherman which would have entitled them to relief.

Relief under the Property Law Act

[61] Mr and Mrs Harlow seek relief against cancellation under the Property Law Act. Relief may be available to them if they are purchasers in possession. Mr Hudson submitted that they were not purchasers in possession as they are in possession pursuant to a licence to occupy which does not create an interest giving rise to a right to possession under s 50 of the Property Law Act 1952. He relied on *Westpac Banking Corporation v Bhana* (2003) 5 NZCPR 73, where Master Lang (as he then was) found that a mortgagor holding over who had purchased at auction and subsequently defaulted, was not a purchaser in possession pursuant to the agreement for sale and purchase.

[62] In the present case, unlike in *Bhana*, there is a link between the agreement for sale and purchase and Mr and Mrs Harlow's possession of the land, albeit through a

licence to occupy. It is unnecessary for me to decide whether that provides a relevant point of distinction because it is clear that in the circumstances of this case, where the Harlows are in breach of an essential condition as to time giving rise to a contractual right of termination, and there is no issue of harsh or unconscionable conduct, they could never obtain an order for specific performance or be entitled to relief against the cancellation of their rights as purchaser – see *Union Eagle Limited v Golden Achievement Limited* [1997] AC 515 (PC) at 250 per Lord Hoffman and *Location Properties v GH Lincoln Properties Limited* [1998] 1 NZLR 307.

Result

[63] The plaintiff succeeds. It is entitled to the declaration it seeks that the contract of 6 November 2007 was cancelled with effect from 22 May 2008 and an order for vacant possession of the land at 31 Raynes Road, Hamilton. It is also entitled to damages. At the request of counsel, the Registrar should convene a telephone conference in order to address any issues arising out of the relief sought by the Sherman.