

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

**CIV 2008-404-002616**

BETWEEN AAA DEVELOPMENT (ORMISTON)  
LIMITED  
Plaintiff

AND ORMISTON GROUP LIMITED  
Defendant

Hearing: 23 November 2009

Appearances: L Lim/Wang for Defendant  
I Williams for Plaintiff

Judgment: 2 December 2009 at 12

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**JUDGMENT OF ASSOCIATE JUDGE ROBINSON**

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This judgment was delivered by me on 2 December 2009 at 11 am,  
Pursuant to Rule 11.5 of the High Court Rules

Registrar/Deputy Registrar

Date.....

Solicitors: Forest Harrison, PO Box 828, Shortland St, Auckland  
Kemps Weir Lawyers, PO box 62566, Auckland

[1] The defendant applies for an order that the plaintiff provide further and better discovery of documents relating to:

a) The steps taken by the plaintiff for the funding of the purchase of the property under the agreement.

i) The financial position at the time:

a. The parties entered into the agreement

b. The plaintiff sought specific performance; and

c. The plaintiff purported to elect to cancel the agreement

[2] The plaintiff in opposing the application acknowledges such documents exist and are in its possession but opposes discovery on the ground the documents are not relevant as the documents sought by the defendant do not relate to a matter in question in the proceedings.

### **Background**

[3] On 28 February 2006 the parties entered into an agreement in writing in which the defendant agreed to sell its property at 125 Ormiston Road, Flatbush, Auckland to the plaintiff for \$5,977,400 plus GST subsequently varied to \$935 per square metre plus GST with possession on 1 December 2007 or ten working days after the issue of the title whichever was the later.

[4] The agreement was conditional on the defendant obtaining from the Manukau City Council consent under the Resource Management Act 1991 for the subdivision on terms and conditions reasonably satisfactory to the defendant by 31 January 2008. As such consent was not obtained the defendant's solicitors by letter dated 10 March 2008 wrote to the plaintiff's solicitors cancelling the agreement.

[5] Because the plaintiff contended that the defendant's conduct resulted in the breach of the subdivision and resource consent conditions contained in the agreement the plaintiff commenced these proceedings in May 2008 seeking inter alia an order requiring the defendant to specifically perform the agreement by selling the property to the plaintiff. In its statement of defence dated 4 June 2008 the defendant claimed to be entitled to cancel the agreement but stated it would nevertheless perform the agreement.

[6] The plaintiff duly paid a deposit of \$1,942,655 to the defendant's solicitors which was held in their trust account in an interest bearing deposit. The plaintiff now claims to have cancelled the agreement because of the defendant's alleged breach of the subdivision and reserve consent conditions. The deposit money with interest amounting to \$2,062,377.26 was returned by the defendant's solicitors to the plaintiff's solicitors and is held by the plaintiff's solicitors subject to competing claims by the parties.

[7] The plaintiff in its amended statement of claim no longer seeks to enforce the agreement by specific performance and now seeks:

- a) Declarations that the plaintiff lawfully avoided the agreement either on 24 July 2008 or subsequently on 21 January 2009.
- b) A direction authorising the release of the deposit money and interest accrued thereon to the plaintiff.
- c) An inquiry then an award of damages for the plaintiff's losses as pleaded in the statement of claim.

[8] The defendant denies being in breach of its obligations under the agreement. The defendant also claims that on 8 July 2008 the local council issued resource consent for the subdivision. Pursuant to the terms of this consent the defendant claims to have spent \$1,596,000 on roading and other work to qualify for s 224(c) certificate for a subdivision to enable the sale to the plaintiff to proceed. The defendant claims the agreement is now unconditional and that the plaintiff has

unjustly refused to complete its purchase of the property. The defendant now claims the plaintiff has refused to settle the purchase and in its counter claim seeks:

- a) A declaration authorising the release of the deposit money and interest accrued thereon to the defendant.
- b) An inquiry into an award of damages for the defendant's loss as a result of the plaintiff's breach of the agreement.
- c) Interest on the judgment sum.
- d) Costs.

### **Case for the Defendant**

[9] The documents the defendant seeks by way of discovery from the plaintiff relate to the plaintiff's financial ability to complete the settlement of its purchase at the time it entered into the agreement, the time it sought specific performance and the time it elected to cancel the agreement. The evidence adduced by the defendant in support of its application for further discovery is to the effect that the plaintiff is a shelf company established by Stephen Wong. A search of the company establishes that Stephen Wong holds all 100 shares in the company and is the sole director.

[10] It is also claimed on behalf of the defendant that initially Mr Wong was to personally purchase the properties. The purchase price of the property is over \$6 million and the plaintiff has never indicated to the defendant as to how it intended to finance the purchase.

[11] There is also evidence produced by the defendant to the effect that in discussions with Mr Wong in early 2009, Mr Wong mentioned the plaintiff's company's circumstances had changed and that the plaintiff was experiencing difficulty in borrowing money to fund the purchase under the agreement.

[12] It is therefore claimed that the documents are relevant in that if the plaintiff was at the relevant time financially unable to settle the purchase of the defendant's property then the defendant would have been successful in resisting the plaintiff's claim for specific performance.

### **Case for the Plaintiff**

[13] The plaintiff contends that its financial position is not relevant to the issues before the Court. In this respect it is pointed out that prior to the plaintiff's proceedings for specific performance the defendant had cancelled the contract. Relying on *Monigatti v Minchen* [1937] NZLR 49, it is submitted that the defendant in cancelling the contract has waived the necessity for the plaintiff to prove it was ready and able to settle when the plaintiff decided to cancel the contract.

[14] In *Monigatti v Minchen* the vendor obtained judgment against the purchaser for the deposit. After receiving judgment the vendor sold the property without notice to the purchaser and commenced a second action against the purchaser claiming damages for breach of contract. Ostler J concluded that to succeed the vendor had to establish:

- a) That he was ready and willing to perform the contract; and
- b) That it was not performed because of a breach of contract on the purchaser's part.

As neither had been proved the vendor could not succeed. In particular there was no evidence of any breach of contract on the purchaser's part after the extension of time for its performance and no evidence that the vendor was ready and willing to perform the contract.

[15] Counsel for the vendor attempted to persuade the Court that there was express or implied waiver by the purchaser of the requirement that the vendor should prove to be ready and willing. It was contended that the original repudiation of the contract by the purchaser in failing to pay the deposit was an implied waiver. The

Court held that it would have been if the conduct was accepted by the vendor as a waiver. However, the vendor elected not to treat breach of the contract in failing to pay the deposit as a waiver but to keep the contract on foot.

[16] On the basis of this principle enunciated in *Monigatti v Minchen* it is submitted that the defendant's cancellation of the contract prior to settlement makes it unnecessary for the plaintiff to establish it was or would be at the date of settlement financially able to complete the purchase.

[17] It is submitted that the question before the Court involves:

- a) Whether the plaintiff is correct in claiming it had cancelled the contract because of the defendant's breach before the time for settlement.
- b) Whether the defendant is correct in claiming the plaintiff without justification has failed to settle on due date.

Neither of these issues requires a consideration as to whether the plaintiff was ready and able to settle.

## **Decision**

[18] The test to be applied in determining whether a document is discoverable was laid down by Brett L J in *Compagnie Financiere Commerciale du Pacific v Peruvian Guano Co* (1882), 11 QBD, 55 at 63 where he stated:

It seems to me that every document relates to matters in question in the action which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which may – not which must – either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary.. a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary if it is a document which may fairly lead him to a train of inquiry which may have either of these two consequences.

[19] The relief sought by the plaintiff includes a declaration that the plaintiff has lawfully cancelled the agreement. That involves consideration of sections 7 to 9 Contractual Remedies Act 1979.

[20] As pointed out by the learned authors of “*Law of Contract in New Zealand*” (3<sup>rd</sup> Ed), Burrows, Finn & Todd, at page 592, paragraph 18.3.3:

...there is some authority at common law that if a party wishes to cancel a contract at common law for the other’s breach, the cancelling party must likewise be ready and willing to perform.

[21] In *Noble Investments Ltd v Keenan* (2005) 6 NZCPR, 433, the Court of Appeal made the following comments as to whether a party must be ready, willing and able to proceed to completion in order to validly cancel a contract:

[44] A series of cases, however, have assumed, albeit with little discussion, that, despite the Contractual Remedies Act, a party must be ready, willing and able to proceed to completion in order to be able validly to cancel a contract – see *Lenart v Murray* (1988) ANZ Conv R 180 at 182 (HC); *Karangahape Road International Village Ltd v Holloway* [1989] 1 NZLR 83 at 105 (HC); *Chatfield v Jones* [1990] 3 NZLR 285 at 297 (CA); *Kumar & Anor v Bahramitash* CA 51/04, 8 November 2004 (CA). See also the judgment of the Supreme Court granting leave to appeal in *Bahramitash v Kumar and Kumar* [2005] NZSC 8. For what seems to be a contrary position, see *Thompson v Vincent* [2001] 3 NZLR 355 where this Court appears to assume that a party could cancel, even though it had been guilty of a misrepresentation which was held to justify a repudiation by the other party. See also the discussion in Burrows, Finn & Todd, *Law of Contract in New Zealand* (2ed 2002) at [18.3.3]

[45] We are inclined to the view that the rule was in force in New Zealand at common law and that it has survived the introduction of the Contractual Remedies Act, at least with regard to contracts where damages are not a sufficient remedy and where one party wishes the contract to continue (and of course this latter requirement was not met in *Thompson v Vincent*).

[22] It is significant that s 9 Contractual Remedies Act 1979 contains the following provision:

**9. Power of Court to grant relief-**(1) When a contract is cancelled by any party, the Court, in any proceedings or on application made for the purpose, may from time to time if it is just and practicable to do so, make an order or orders granting relief under this section....

(4) In considering whether to make an order under this section, and in considering the terms of any order it proposes to make, the Court shall have regard to-

...(b) The extent to which any party to the contract was or would have been able to perform it in whole or in part; and

[23] Consequently, the plaintiff's ability to perform the contract at the times it claims to have cancelled the contract must be relevant. Furthermore, where following the plaintiff's claim for specific performance, the defendant, expecting the plaintiff to be in a position to settle the purchase claims to have spent substantial sums in proceedings with a subdivision, the ability of the plaintiff to purchase the property at that time must be relevant. If at that time the plaintiff was not in a financial position to complete settlement then such evidence is relevant as to the remedies available to the defendant.

[24] For the reasons I have given therefore I am satisfied that the defendant is entitled to discovery of the documents referred to in its application. Accordingly there will be orders in terms of paragraphs a, b and c of the application. I direct that discovery of such documents shall be made within twenty working days of the date of service of the order on the plaintiff.

[25] As the defendant has been successful in its application, the defendant is entitled to costs which I assess on a 2B basis with disbursements as fixed by the registrar.

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**Associate Judge Robinson**