

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

CIV-2008-470-79

BETWEEN	VICTORIA KEY LIMITED Plaintiff
AND	BARRY JOHN BASTIN First Defendant
AND	BARRY JOHN BASTIN AND CLINTON MAURICE BASTIN Second Defendant

Appearances: on papers

Judgment: 4 December 2009 at 11 a.m.

JUDGMENT OF ASSOCIATE JUDGE DOOGUE

Solicitors:

Sharp Tudhope, Private Bag TG12020, Tauranga – by fax: 07 578 5133 (K McLeish)

Copy to defendants

Paul Arnold, 229A Papamoa – email : paul.arnold@eves.co.nz

Barry Bastin, 14 Bucklands Crescent, Papamoa

Clinton Bastin, 225 Minden Road, Tauranga

[1] I am satisfied that the application to dissolve the orders for specific performance has been served on the defendants and that they have not taken any steps to oppose.

[2] It is clear that the Court has power to dissolve an order for specific performance where the purchaser has committed a breach of the agreement which is of a repudiatory character which he has not remedied or if he is refusing to complete: *Johnson v Agnew* [1980] AC367, 390.

[3] *Johnson v Agnew* has been applied in New Zealand by *Chatfield v Jones* [1990] 3 NZLR 285. *Chatfield v Jones* makes it clear that if this course is to follow there must be a cancellation of the contract pursuant to s 7 of the Contractual Remedies Act 1979: see the judgment of Cooke P at page 290. An amended statement of claim was filed and served in *Chatfield v Jones*. The significance of the amended statement of claim in that case was that in filing that document, the plaintiffs made it clear to the purchasers that the plaintiffs no longer intended to be bound by contract. While no amended statement of claim was filed in this proceeding, I am satisfied that the service of the various memoranda will have made clear to the defendants that the plaintiff does not intend to continue with its efforts to enforce the contracts against Mr Barry Bastin and Mr Paul Arnold. But what is significant is that there has been a communication to the defendants of a notice of intention to cancel the contract. In my view that cancellation is justified. Specific performance is no longer a remedy which the plaintiff is seeking and therefore it is appropriate for the orders for specific performance which I made to be dissolved and I make orders to that effect.

[4] Even though these proceedings are in substance undefended, it would be helpful if the plaintiff in due course filed an amended statement of claim which sets out for the information of the Court what damages are being sought against Messrs Bastin and Arnold.

[5] Costs on this application are reserved.

J.P. Doogue
Associate Judge