IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2009-404-664

BETWEEN	STATION PROPERTIES LIMITED (IN RECEIVERSHIP) Plaintiff
AND	SHANE ARTHUR PAGET Defendant

Hearing: 1 July 2009

Counsel: J Cooper and P Jenkins for Plaintiff
P Shamy for Defendant

Judgment: 22 December 2009 at 3 pm

RESERVED JUDGEMENT OF ASSOCIATE JUDGE H SARGISSON
(Application for Summary Judgment)

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*This judgment was delivered by me on **22 December 2009** at **3 pm** pursuant to Rule 11.5 of the High Court Rules*

Registrar/Deputy Registrar

Date .....

Solicitors:
Bell Gully, PO Box 4199 Auckland 1140
Taylor Shaw, PO Box 1123, Christchurch

[1] The plaintiff, now in receivership, is the developer of a residential complex known as Bowen View.

[2] The defendant is a real estate agent from Christchurch.

[3] The plaintiff as the vendor of the property and the defendant as purchaser entered into an agreement for sale and purchase of an apartment on 19 September 2006. The apartment is a unit in the apartment complex known as Bowen View on the corner of Kent Street and Edgar Street, Queenstown and is described in the agreement as principal Unit 20 and accessory unit 20A, Bowen View Apartments.

[4] By a Settlement Notice issued on 10 October 2008, the plaintiff required the defendant to settle the purchase of the property in accordance with the terms of the agreement. The defendant has refused to comply with the settlement notice and the plaintiff contends that he is in breach of his obligations under the agreement.

[5] The plaintiff seeks an order for specific performance requiring the defendant to complete the purchase of the property by payment of the balance of the purchase price, together with interest.

The Sale and Purchase Agreement

[6] The terms of the sale and purchase agreement provided:

a) The defendant, Shane Paget, was the purchaser and he signed the sale and purchase agreement as such;

b) The purchase price of the property was $1,243,125.00 (to which GST of $155,390.63 would be added);

c) Interest for late settlement would be 15% per annum;

d) On the settlement date:

i) the purchaser would pay the balance of the purchase price (together with interest and other moneys owing) to the plaintiff; and

ii) concurrent with the defendant's payment under clause 3.7(1), the plaintiff would hand to the defendant the memorandum of transfer, the instruments of title and all other instruments required to register the memorandum of transfer of the property;

e) A breach of warranty or undertaking would not defer the obligation to settle and settlement was without prejudice to a party's rights in law or equity;

f) If the sale was not settled on the settlement date then either party may issue a settlement notice requiring the other party to complete the settlement;

g) If the defendant as purchaser failed to comply with the terms of the settlement notice, the plaintiff as vendor would be entitled to sue the defendant for specific performance;

h) The "Date of Practical Completion" meant the date on which practical completion was certified by the plaintiff's architect;

i) The date for settlement would be the later of:

i) five working days after the issue of title under the Unit Titles Act 1972;

ii) five working days after the date of practical completion; or

iii) five working days after the issue of a code of compliance certificate;

j) Settlement was required to be effected before 3 pm on the settlement date, with time being of the essence;

k) The defendant as purchaser entered into the sale and purchase agreement in reliance on his own judgment, not any representation or warranty made by the plaintiff, and the sale and purchase agreement was the entire agreement between the parties;

l) Under clause 36.1 the plaintiff way entitled to cancel the contract at any time and the defendant was to have no right to compensation on cancellation.

[7] The agreement also provided a sunset clause at clause 26.1 that allowed either side to cancel in the event the plaintiff was not ready, willing and able to settle by 20 December 2007. Upon cancellation the plaintiff had the right to have the deposit refunded. On or about 20 September 2006 the plaintiff and defendant entered into a written variation of the sale and purchase agreement which extended the date for operation of the sunset clause to 13 March 2009.

The Settlement Notice

[8] On 7 August 2008 the plaintiff's then solicitors wrote to the defendant's solicitors advising that code of compliance and practical completion certificates had been issued and enclosing a copy of the title to the property that had been issued pursuant to the Unit Titles Act. The letter advised that, pursuant to clause 14.1(5) of the sale and purchase agreement, the date for settlement of the purchase would be 14 August 2008.

[9] By letter dated 11 August 2008 the defendant's solicitors, Taylor Shaw, responded that settlement by 14 August 2008 would be impossible saying:

> Our client is endeavouring to sort finance out immediately but would be pleased for an extension of time could please be granted in terms of settlement as settlement this coming Thursday will be impossible [sic].

[10] Taylor Shaw's letter also asked for a copy of the signed sale and purchase agreement, and made enquiries of the plaintiff as follows:

> Our client also needs to know urgently as to how much deposit is actually sitting in your trust account in terms of his arranging finance and therefore if a settlement statement could be forwarded through as a matter of urgency.

[11] The plaintiff's solicitors responded by letter dated 12 August 2008 saying that the plaintiff may agree to an extension of time and asking how much time the defendant would need.

[12] Taylor Shaw replied on 15 August asking for an extension of one month for settlement, saying:

> The issue we have is that until such time as you can supply the writer with a full signed Agreement for Sale and Purchase, the list of furniture included within the Agreement, and a copy of the Management Contract our client is not in a position to arrange finance.

[13] There followed a series of letters from Taylor Shaw seeking a copy of the sale and purchase agreement. On 22 September 2008 Taylor Shaw wrote to the plaintiff's solicitors purporting to cancel the agreement under the sunset date in clause 26.1.

[14] The plaintiff's solicitors responded by letter on the same date advising that pursuant to the variation entered into on 20 September 2006, the sunset date under clause 26.1 was 13 March 2009 and accordingly the purported cancellation was invalid.

[15] On 23 September 2008 the defendant's solicitors wrote to the plaintiff's solicitors saying that their client was unable to settle without a copy of the sale and purchase agreement. The letter went on to say:

> The simple solution is that a copy of the fully signed contract be supplied, our client can then endeavour to try and arrange finance. We would therefore deem that settlement would only be legally enforceable 5 working days after a copy of the fully signed contract is supplied.

[16] On 24 September 2008 the plaintiff's solicitors provided the defendant with an amended and updated settlement statement setting out the balance of the purchase price required to complete, being in total $1,279,206.19.

[17] On receipt of the settlement statement the defendant failed to complete the purchase, or indeed even make arrangements to complete the purchase. Instead, by letter dated 1 October 2008, his solicitors wrote to the plaintiff's solicitors saying that the defendant understood that Mr McEwan, who at the time was a director of the plaintiff, was still hopeful of selling the property to a third party. The letter went on to say:

> It is based on this information that our client has not settled and our client wonders whether your client is still interested in letting the contract roll on in terms of settlement. However, if your client exhausts all opportunities to on sell the units in their totality then obviously our client will be left with no other option but to settle in full.

[18] By letter dated 9 October 2008 the plaintiff's solicitors issued a further settlement statement. In the same letter the plaintiff's solicitors:

a) Advised that they were holding a signed authority for the transfer to the defendant, together with e-dealing authorities from both mortgagees for the partial discharges of the mortgages;

b) Gave their undertaking that upon receipt of the settlement funds into their trust account, they would:

   i) release the transfer and partial discharge of mortgages into the defendant's solicitor's control;

   ii) not to attempt to withdraw or alter those instruments following settlement and release; and

   iii) authorise the release of keys to the defendant.

[19] The defendant failed to complete on receipt of the further settlement statement and, accordingly, on 10 October 2008 the plaintiff's solicitor issued a settlement notice. The settlement notice stated that:

a) The defendant as purchaser had failed to settle as required on the settlement date of 9 October 2008;

b) The plaintiff as vendor was and remained ready, able and willing to proceed to settle; and

c) The defendant was required to settle within twelve working days after service of the notice.

d) The defendant was required to settle within twelve working days after service of the notice.

[20] The defendant failed to settle within the time as required by the settlement notice.

Commencement of Proceedings

[21] The result was that the plaintiff commenced this proceeding and seeks an order by way of summary judgment for specific performance requiring the defendant to complete settlement of the purchase of the property. It contends that the defendant has no genuinely arguable defence. It has filed evidence in the normal way to establish the necessary evidential foundation for its claim, as contemplated in *Auckett v Falvey* HC WN CP 296/86 20 August 1986, Eichlbaum J.

[22] The defendant opposes summary judgment. He contends he has a genuinely arguable defence based chiefly on collateral arrangements which, he says, the plaintiff agreed to, but failed to disclose.

[23] Factual circumstances the defendant relies on in support can be stated briefly. The defendant says he came to know Mr Daniel McEwan, through his attendance at a property investment seminar run by Mr McEwan, and that he

approached Mr McEwan with a view to investing in one of his products. His uncontroverted evidence is that:

a) Mr McEwan proposed that he invest in the Bowen View development; and

b) He was in part influenced by a desire to secure real estate work from Mr McEwan; and

c) He agreed to enter into what he calls the agreement for sale and purchase essentially as an "underwrite" arrangement to enable the plaintiff to obtain finance for the development.

[24] The defendant also points to two letters from Mr McEwan. The first is 19 June 2006 in which Mr McEwan, on behalf of the plaintiff, wrote to the defendant promising to pay him an underwrite fee of $62,156.25 in consideration of his entering into a sale and purchase agreement, with the monies to be payable on the plaintiff drawing down on funding.

[25] The second letter dated 27 July 2006, is also written by Mr McEwen, but on this occasion on behalf of Bowen View Construction Limited. In this letter Mr McEwen promised that in consideration for entering into a sale and purchase agreement with the plaintiff, Bowen View Construction would pay the defendant $124,312.50 on settling the purchase in full.

Relevant legal principles

Summary Judgement

[26] The plaintiff's application for summary judgment is made pursuant to r 12.2 of the High Court Rules on the grounds that there is no defence to the claim.

[27] The principles to be applied by the Court in an application for summary judgment are well established. In *Pemberton v Chappell* [1987] 1 NZLR 1 the Court of Appeal confirmed that the onus is on the plaintiff to satisfy the Court that there is

no defence to the claim. In other words, the plaintiff must show that there is no real question to be tried.

[28] If a defendant wishes to resist an application for summary judgment, he must give reasonable particulars of the matters, which he claims ought to be in issue (*Pemberton,* per Somers J at 3). The defendant cannot escape liability by raising a false, hypothetical or frivolous "defence" in order to argue that the Court cannot be satisfied that it has no defence: *MacLean v Stewart* (1997) 11 PRNZ 66 (CA).

[29] In *Eng Mee Young v Letchumanan* [1980] AC 331 at 341 the Court held that a Judge will not be bound to:

> …accept uncritically, as raising a dispute of fact which calls for further investigation, every statement on an affidavit, however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself it may be.

[30] A recent and succinct summary of the principles was made by the Court of Appeal with respect to summary judgment sought on the plaintiff's application in *Krukziener v Hanover Finance Ltd* [2008] NZCA 187. The Court said the question on a summary judgment application is whether the defendant has no defence to the claim. That is, that there is no real question to be tried: *Pemberton v Chappell*. The Court must be left without any real doubt or uncertainty. The onus remains on the plaintiff throughout and summary judgment will be denied if on the hearing of the application it appears there is an issue to be tried. But where the plaintiff's evidence is sufficient to show there is no defence, the defendant will have to respond if the application is to be defeated: *MacLean v Stewart*. While the Court need not accept uncritically evidence that is inherently lacking in creditability, it will not normally resolve material conflicts of evidence or assess the credibility of deponents: *Eng Mee Young v Letchumanan*.

Specific performance of an agreement for sale and purchase

[31] In *Rutherford v Acton-Adams* [1915] AC 866, the Privy Council held that a vendor is entitled to specific performance of an agreement for sale and purchase, saying at 869-870:

> If a vendor sues and is in a position to convey substantially what the purchaser has contracted to get, the Court will decree specific performance with compensation for any small and immaterial deficiency, provided that the vendor has not, by misrepresentation or otherwise, disentitled himself to his remedy.

Discussion

[32] The defendant, through his counsel, acknowledged that he was aware the plaintiff had the right to call on him to settle the agreement for sale and purchase if it did not exercise its right to elect to pull out of the sale. But that right, counsel submitted, does not put paid to the defence based on collateral arrangements because in the collateral arrangements, which the plaintiff failed to disclose, there was an underwrite arrangement and the sale and purchase agreement must be interpreted in the light of that agreement. On that approach, he contended, the agreement for sale and purchase must arguably contain an implied term that the plaintiff would use its best endeavours to find other buyers before calling on the defendant to settle. He submitted that the plaintiff has not given evidence to show it did use its best endeavours and is therefore arguably in breach.

[33] The only other defence that was pursued was one based on the defendant's right to call for arbitration.

[34] The plaintiff accepts for the purpose of the application, that the agreement for sale and purchase itself, at clause 36.1, contained an underwrite aspect that allows the plaintiff seek another purchaser and cancel the agreement. But it says there cannot be implied a term in the agreement for sale and purchase of the kind the defendant contends.

[35] He argued that it is significant there is no assertion that there was an express arrangement that required the plaintiff to use best endeavours to find another buyer (collateral or otherwise). I agree. I also agree with the plaintiff's submissions that:

a) There is no room to imply a term into the agreement for sale and purchase that the plaintiff would use its best endeavours to sell the property the defendant so plainly contracted to buy unless the plaintiff

demonstrates it has used best endeavours to find other buyers before calling on him to settle;

b) To imply such a term would be at odds with the plain provisions of the agreement. It would also run directly counter to the entire agreement clause in the agreement for sale and purchase and the tenor of the parties' correspondence about settlement. That correspondence demonstrates the defendant well understood his obligation to settle;

c) Had the parties intended to include a term of such importance, they would not have left it to be merely inferred or implied in the circumstances;

d) To the extent that there was an underwrite arrangement, what was important to the parties was that the plaintiff had to have an agreement that was binding on the defendant in order to obtain finance. The ability to pull out, should there be a more lucrative sale, rested solely with the plaintiff, and the defendant took and was paid a fee for the risk he took that he would be called upon to settle.

[36] I am satisfied that the terms of the sale and purchase agreement are plain and cannot be disputed. The defendant agreed to purchase the property for the price of $1,243,125.00 (plus GST). Pursuant to the agreement the defendant was obliged to complete his purchase on the settlement date. It is not disputed that the defendant failed to settle on the settlement date. Nor is it disputed that the defendant failed to complete his purchase on service of the settlement notice. It is in short, beyond dispute that the defendant is bound by the sale and purchase agreement and obliged to settle in accordance with its terms.

[37] Accordingly, save for any impediment that might arise from an obligation to arbitrate, I accept that pursuant to clause 9.4 the plaintiff is entitled to specific performance of the sale and purchase agreement.

[38] I am satisfied the arbitration point (the defendant's only other point) is no impediment to summary judgment because:

a) In terms of the agreement for sale and purchase, arbitration is only required on questions concerning the construction of works or the application of clauses. The present case does not raise questions about works or about the application of the express clauses of the agreement, which the counsel concedes, requires the defendant to settle. The question raised is whether there is to be implied an additional clause;

b) There is no evidence arbitration was ever called for and the defendant has not objected to this Court's jurisdiction or sought a stay in order to arbitrate*;*

c) Furthermore, as the decision in *Royal Oak Mall Ltd v Savory Holdings Ltd* CA 106/89, Richardson P, Casey & Bisson JJ (which defence counsel relied on) shows, even if there is a stay application the Court is not prevented from dealing with the summary judgment application. There, the Court of Appeal noted the logic of applying the same threshold test in summary judgment proceedings to an application for a stay, for the purpose of determining whether there is a 'dispute' in the circumstances. That is, the party seeking arbitration must be able to point to some material showing that there is a real issue to be tried, while the party opposing arbitration has the onus of satisfying the Court there is no arguable defence to his claim. *Royal Oak* refers to s 5 of the 1908 Arbitration Act but, as counsel accepted, it remains apposite for the purposes of clause 8(1) of the Arbitration Act 1996.

d) The remedy of specific performance is not only appropriate in the circumstances of the case but is in fact a remedy which the parties themselves agreed should apply.

[39] As there is no arguable or bona fide defence to the plaintiff's claim the plaintiff has discharged the onus on it to show there is no arguable defence to the orders it seeks by way of summary judgment.

Result

[40] The plaintiff is entitled to:

a) An order for specific performance to be complied with by 22 January 2010 requiring the defendant to complete settlement of the purchase by paying the balance of the purchase price in the sum of $1,279,025.56 together with interest at the rate of 15% per annum (or $525.62) per day from 9 October 2008;

b) An order for costs on the application for summary judgment on a 2B basis plus disbursements as fixed by the Registrar.

[41] I order accordingly.

[42] Leave is reserved to seek further orders if required. For that purpose a memorandum may be filed and served on two days notice.

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Associate Judge Sargisson