IN THE HIGH COURT OF NEW ZEALAND
INVERCARGILL REGISTRY

CIV-2009-425-000100

BETWEEN	DEBORAH ALLISON LOVE Plaintiff
AND	WENSLEY DEVELOPMENTS THE MARINA LIMITED Defendant

Hearing: 29 June 2009

Appearances: N H Soper for Plaintiff
J Forsey for Defendant

Judgment: 4 August 2009

RESERVED JUDGMENT OF HON. JUSTICE FRENCH

Introduction

[1] The defendant seeks to set aside an order obtained by the plaintiff on a without notice basis on 6 March 2009.

[2] The application to set aside is made under r7.49 of the High Court Rules. The main grounds of the application are that the plaintiff failed to disclose material evidence to the Court and that there is not a serious question to be tried.

[3] Counsel were agreed I am required to in effect conduct a re-hearing of the plaintiff's application without there being any onus on the defendant to prove the earlier decision was wrong.

[4] As to the basis of that assessment, Mr Forsey for the defendant considered the correct approach was to assess the plaintiff's case in terms of the principles pertaining to interim injunctions. Counsel for the plaintiff Mr Soper however considered the applicable principles were those pertaining to freezing orders which he acknowledged meant his client had to satisfy a slightly higher threshold. In the end, it has not made any difference to the outcome which approach is applied.

Factual background

The without notice application

[5] The plaintiff Ms Deborah Love provided an affidavit in support of her without notice application.

[6] Ms Love deposed that on 31 July 2007, she signed a written agreement to purchase an apartment from the defendant for the sum of $1,299,375. The apartment (Unit No 405) was part of a multi-apartment complex called The Marina Apartments which had been developed by the defendant in Queenstown.

[7] According to Ms Love's evidence, the following pre-contractual statements made to her by the defendant verbally and/or in written promotional material were significant factors in her decision to enter into the agreement:

(a) a management agreement would be entered into with an experienced and reputable manager

(b) the complex would be managed as serviced apartments for overnight or short term rental

(c) the apartments would be sold inclusive of GST and he would able to claim the GST back

(d) there would be guaranteed return of 6% per annum for a period of two years

[8] It is not disputed the statements were made.

[9] Nor is it disputed that at the time Ms Love entered into the agreement, she knew the defendant had not yet appointed a management company. There was no specified date by which the appointment was to be made, but counsel agree it was implicit it would occur on or before the date of settlement.

[10] It was a term of the agreement that the purchaser would pay a deposit of $129,937 to the vendor's solicitors' trust account immediately on signing the agreement, the deposit to be held in the trust account pending settlement. Ms Love (presumably with the defendant's consent) did not in fact pay a deposit to the defendant's solicitors but instead in September 2007, she arranged a bond for payment of the deposit through New Zealand Home Bonds Limited. The bond provides that Home Bonds would pay the deposit to the defendant on settlement.

[11] The sale and purchase agreement also provided for the deposit to be forfeited in the event Ms Love failed to settle.

[12] Settlement under the agreement was to take effect 7 days following issue of title.

[13] In November 2008, Ms Love received two documents from the defendant. She does not specifically say in what order she received the documents but the impression conveyed by the affidavit is that the first document received was a draft management agreement.

[14] The agreement was expressed to be an agreement between the proprietor of Unit 405 and a company called Marina Baches Management Limited (Marina Baches) to manage the letting of the apartment in the event the plaintiff put her apartment in the management pool. It is common ground the agreement did not come with any covering letter or accompanying information about Marina Baches.

[15] The second document was a letter dated 4 November 2008 which Ms Love's affidavit describes as a letter "regarding the management agreement".

[16] The letter was in the following terms:

> Dear Deborah
>
> Due to the changing market conditions we have been investigating different options for optimizing the income stream for the Marina Baches.
>
> Because of the tremendous growth in population of the region and the tougher consent rules constricting the development industry, it was becoming apparent that permanent rentals were becoming a more attractive proposition.
>
> We have met with the local rental agencies who are excited about the possibility of involvement with such a high quality new complex like the Marina. They are confident that they will have 100% occupancy in a very short time with high quality tenants as the demand is high for this type of product in Queenstown.
>
> Therefore we have decided that instead of operating the baches as short term visitor's accommodation (serviced apartments) they will be operated as long term rentals with permanent tenants. This means that the Baches are no longer serviced apartments.
>
> Any management agreements you may have received in draft form from us in the past no longer required. The guaranteed return that is detailed in your Sale and Purchase Agreement will now be provided by way of a two year lease which we will forward to you for signing at time of settlement.
>
> If you have any concerns or queries regarding this please call either myself or Greg Wensley in our head office or Christine Anderson our sales manager in Queenstown.

[17] Ms Love says:

> 13. I became concerned about the content of the letter, as it was contrary to the marketing material upon which I had relied in entering into the Sale & Purchase Agreement. I undertook inquiries and ascertained that Marina Baches Management Ltd had only been incorporated in October 2008, and therefore did not possess extensive, quality marketing experience, or the necessary network, expertise and brand recognition to market The Marina both nationally and internationally as had been promised. Annexed and marked with the letter 'G' is a copy of the Companies Office details for Marina Baches Management Ltd.
>
> 14. If The Marina apartments are to be let as long-term rentals, I believe the effect on purchasers would be:
>
> i. That they would be unable to claim a GST refund in respect of the purchase, as was represented. In my case this amounts to a loss of $144,375.00.

ii. That the anticipated returns for long-term rentals are likely to be considerably less than for short-term serviced apartment accommodation.

iii. That the apartments will not be available for personal use.

…

16. I then ascertained that Wensley Developments Ltd was also the sole shareholder in Wensley Developments The Shore Ltd and was advised by apartment owners in that development that there had been problems and delays in guaranteed return payments in respect to apartments in that complex. Annexed and marked with the letter "I" are details from the Companies Office as to Wensley Developments Ltd The Shore and marked with the letter "J" is a letter from Wayne Bowen, an Apartment owner at The Shore, confirming difficulties with Guaranteed Return payments.

...

18. Given that:

i. The company appointed to manage does not have a proven track record and extensive quality marketing experience or the necessary network, booking systems and expertise to market The Marina Baches nationally and internationally.

ii. There is considerable uncertainty as to whether the apartments will remain as short-term serviced accommodation in the future.

iii. The uncertainty as to whether The Marina will be let on a short or long-term basis creates confusion within the market which can only be detrimental to the value of the properties.

iv. If the apartments were going to be let as long-term rentals they would not be available for use by myself or my family.

v. If the apartments were going to be let as long-term rentals I would be unable to claim a GST refund in respect of the purchase.

vi. The anticipated returns for long-term rentals are considerably less than the returns for short-term serviced apartment accommodation.

vii. There are serious concerns as to the ability of the Defendant to comply with the guaranteed return for a 2 year period.

I believe that the Defendant has significantly altered the substance of the contract to my detriment from the time that the Sale & Purchase Agreement was signed such that it is now fundamentally different. The Defendant has failed to comply with assurances and representations that it had provided and which induced me to enter

> into the Sale & Purchase Agreement, and the benefit to me of purchasing the apartment has considerably diminished.

[18] Ms Love's affidavit goes on to state that the defendant's solicitors provided her with a settlement notice requiring her to settle the transaction on 22 January 2009. However, instead of settling, on 22 January 2009, her solicitors wrote to the defendant giving notice of cancellation of the agreement on the grounds of repudiation and fundamental breach:

> The appointment of recently incorporated Marina Baches Management Ltd to operate as manager of the Marina Apartments, and the apparent unilateral variation as to the nature of the letting operation, constitute a fundamental breach of representations which induced our client to enter into the purchase.
>
> Marina Baches Management Ltd does not have the "proven track record" nor the "extensive, quality marketing experience" that you represented to our client that the appointed management company would have. In addition, we have received advice that the complex will be managed by Marina Baches Management Ltd as long term rental properties. This is clearly contrary to the representations provided prior to the agreement having being [sic] entered into that the complex would be run as short term serviced apartments.
>
> The appointment of the manger [sic] and the altered nature of the letting operation are substantial breaches of the implied Collateral Agreement attaching to the Agreement for Sale & Purchase. These breaches amount to a repudiation entitling our client to cancel the Agreement.
>
> We understand that the Agreement in respect of Apartment 405 has been issued a Settlement Notice. We hereby formally provide notice that the Agreement is cancelled on the basis of Wensley Developments repudiation and fundamental breach. Please arrange for the Homebond securing the deposit to be cancelled releasing our clients liability immediately.
>
> If steps are taken by Wensley Developments to obtain the deposit, Interim Injunction proceedings to prevent such will be commenced without further notice.

[19] On 28 January 2009, the defendant 's solicitors wrote denying there had been any repudiation or fundamental breach and stating inter alia:

> 5. … The material provided to your client at the outset confirmed that the Wensley Development Group had not appointed a Management Company to manage The Marina Baches at that stage. In the event, Wensley Development Group set up its own Management Company, based on its own proven track record and extensive, quality marketing experience to help ensure good rental returns for investors…
>
> …

> 7. In terms of the management as long term rental properties, whilst our client was reviewing this at one stage, your clients will be aware from the management agreements they received in late November 2008 that the apartments in the complex are being managed as short term serviced apartments and are available as such. There is an on-site manager and management team in place and the apartments are rented on an nightly basis…

[20] The next thing that happened according to Ms Love's affidavit was that she received a letter from Home Bonds on 4 March 2009. The letter advised that because the defendant's solicitors had made demand for payment of the deposit, Home Bonds intended to make payment on 11 March 2009 unless Ms Love obtained a court order or injunction.

[21] Ms Love then filed an application for a freezing order, Ms Love deposing she had:

> 23. … very serious concerns, given my understanding as to the Defendant's precarious financial position, that if the deposit is paid by Home Bonds to the Defendant it will be transferred, disbursed, allocated or otherwise dissipated so that it would be subsequently irrecoverable. I base my concerns on the following:
>
> i. I understand that only three of the 27 Sale & Purchase Agreements in respect to apartments at The Marina have to date settled. Annexed and marked with the letter 'N' are details from the Land Registry Office confirming that 24 of the 27 apartments in the complex remain in the Defendant's name.
>
> ii. That Wensley Developments The Club Ltd, which is related to the Plaintiff and has the same sole shareholder, has gone into liquidation.
>
> iii. The difficulties other purchasers have experienced in obtaining guaranteed return payments from Wensley Developments The Shore Ltd, which is related to the Plaintiff and has the same sole shareholder.
>
> …
>
> 25. I believe that to protect my position until such time as matters in respect to cancellation of the Sale & Purchase Agreement have been resolved, the deposit should be retained by Home Bonds or paid in to Court until further order of the Court.

[22] On 6 March 2009, I granted Ms Love's application and ordered that until further order of the Court, Home Bonds was not to release the deposit to the defendant.

[23] Ms Love's application was one of four applications made by purchasers of apartments in the Marina complex, all purporting to cancel their agreements on the same grounds and all seeking interim orders on a without notice basis to prevent payment of their respective deposits to the defendant. Of the other applications for interim orders, two were successful. A third application failed because the deposit had already been paid to the defendant's bank account and the money applied by the bank in reduction of the defendant's mortgage (the Bowen application).

[24] The defendant has applied to set aside the interim orders obtained by the other purchasers as well as Ms Love. By consent, all the applications were heard together.

Information not disclosed to the Court

[25] It is well established that a party who applies on a without notice basis must make full disclosure to the Court of all material facts. Counsel for the defendant, Mr Forsey submits that in breach of this obligation, the plaintiff failed to disclose critical items of evidence:

(i) communications between the parties in November 2008 about obtaining finance for the purchase, Ms Love advising she was struggling with settlement but could manage with some vendor funding and delayed payment of the GST component

(ii) correspondence between the parties' respective solicitors in December 2008 and January 2009 regarding settlement, the plaintiff's solicitors on 22 December 2008 advising it had no instructions with regards settlement and making no mention of any alleged misrepresentations

(iii) email communications between the parties in February 2009 which suggest Ms Love still wishes to settle and is exploring finance options

(iv) the existence and content of disclaimer clauses in the marketing material including a clause that recommended prospective purchasers undertake their own inquiries.

[26] The missing material is now before the Court, exhibited in an affidavit sworn by one of the defendant's directors, Ms Jack. Ms Jack expresses the belief that the plaintiff's real reason for cancelling the contract was because of lack of finance and not because of any misrepresentations. Ms Jack denies there have been any misrepresentations and confirms the following explanations given in the solicitors' letter of 28 January 2009:

(a) the context of the 4 November 2008 letter was that at the request of some purchasers, the defendant was reviewing the option of operating the complex as long term rentals with permanent tenants. However, that option was never pursued and the original intention as represented to Ms Love is being implemented. The complex is currently being marketed as short term serviced apartments, something the draft management agreement received by Ms Love in November 2008 would also have made clear

(b) the appointment of Marina Baches is only an interim measure until such time as a suitable external management company can be identified. Further, while it is correct Marina Baches is a new company, its shareholder (Wensley Group Limited) and directorate have the relevant expertise

(c) there is an onsite management team in place and the apartments are being rented on a nightly basis

Discussion

[27] I agree with Mr Forsey that, while there was no deliberate intention to deceive or mislead the Court, most of this additional information was relevant and material. It should have been disclosed to the Court.

[28] According to some authorities, that conclusion in itself should result in the interim order being automatically set aside: *Republic of Peru v Dreyfus* (1887) 55 LT 802 at 803; *Simpson v Murphy* [1947] GLR 411 (CA) at 415, 417; *United People's Organisation (Worldwide) Inc v Rakino Farms Ltd* (No 1) [1964] NZLR 737; *Lala v Preliminary Proceedings Committee* (1993) 7 PRNZ 101 at 105.

[29] However, given that this is a hearing de novo, my preference is to follow a more liberal approach which holds that the Court has a discretion and should review the merits of the plaintiff's application in light of all the evidence that is now before it: *Lazard Brothers v Midlands Bank* [1993] AC 289 at 307; *Ellinger v Guinness Mahon & Co* [1939] 4 All ER 16 at 25; *D B Baverstock Ltd v Haycock* [1986] 1 NZLR 342.

Whether there is a serious question to be tried/good arguable case

[30] The statement of claim pleads that the representations constituted "collateral terms" of the agreement for sale and purchase, and that the collateral terms were unilaterally varied by the defendant when it advised the apartments would be let as long term rental accomodation and when it appointed Marina Baches to manage the property. The statement of claim goes on to allege that the defendant's unilateral variation of the terms entitled the plaintiff to cancel the sale and purchase agreement pursuant to section 7(2) and (3) of the Contractual Remedies Act 1979.

[31] Section 7 (2) and (3) provide:

> (2) Subject to this Act, a party to a contract may cancel it if, by words or conduct, another party repudiates the contract by making it clear that he does not intend to perform his obligations under it or, as the case may be, to complete such performance.
>
> (3) Subject to this Act, but without prejudice to subsection (2) of this section, a party to a contract may cancel it if—

(a) He has been induced to enter into it by a misrepresentation, whether innocent or fraudulent, made by or on behalf of another party to that contract; or

(b) A term in the contract is broken by another party to that contract; or

(c) It is clear that a term in the contract will be broken by another party to that contract.

[32] The claim as currently pleaded would require the plaintiff to establish that:

(i) in so far as the statements constituted statements of future intent, they were made with contractual intent

(ii) in so far as they were representations in the strict legal sense (i.e. statements of existing fact) they induced Mr Fagg to enter into the contract

(iii) one or more of the statutory grounds for cancellation under s7 of the Contractual Remedies Act existed

(iv) the plaintiff did not with full knowledge of the repudiation or misrepresentation or breach affirm the contract: s7(5) Contractual Remedies Act.

[33] Mr Forsey argued that the communications in November, December, January and February which were not disclosed to me are inconsistent with the claims now being made about the fundamental importance of the statements to the plaintiff. By the end of November 2008, Ms Love had become aware of the defendant's 4 November 2008 circular proposing long term rentals and the appointment of Marina Baches. Yet, not only did her solicitors say nothing about either matter in their letter of 22 December 2008, Ms Love was still wanting to settle even after cancellation. Mr Forsey accepted that a change from short term serviced apartments to long term rentals with permanent tenants would have been grounds for cancellation but the fact is the change never happened. It was only ever proposed.

[34] For his part, counsel for the plaintiff Mr Soper pointed to the fact that according to Ms Jack's affidavit, the returns currently being received are significantly less than what was represented to the plaintiff. Mr Soper also stressed that when assessing the correspondence relied upon by the defendant it was important for me to consider the context. These were high-end exclusive apartments purchased primarily for investment purposes and for a lifestyle option of 30 days access. As a result, the purchasers were paying "top dollar." In his submission, on-going dialogue in those circumstances between a vendor and purchaser is only to be expected and a number of matters may arise pre and post cancellation but the issue is cancellation looked at standing alone.

[35] I do not accept the communications can be isolated in quite that way. Some of the matters raised by Mr Forsey about Ms Love's conduct must for example detract from her claims about the importance of the representations and give rise to possible arguments about affirmation.

[36] On the other hand, I do not accept the defendant's 4 November 2008 circular can properly be characterised as only a proposal as Mr Forsey suggests. It was couched in much more emphatic and unequivocal terms than that. It amounted to the announcement of a decision.

[37] Nor do I consider it a conclusive answer for the defendant to say Ms Love received the draft management contract which would have made the position clear to her. Apart from anything else, it seems from her affidavit that she received the management contract *before* she received the 4 November letter. Therefore receipt of the management agreement could not possibly have disabused her of the message conveyed by the circular which was announcing a change. Significantly, there is no evidence of any communication to purchasers expressly advising them that the 4 November 2008 decision had been revoked. At best for the defendant, their conduct could be said to have created uncertainty and confusion over what in my view was a fundamental issue.

[38] I would make the further point that the evidence does not establish exactly when in November 2008 Ms Love's communications about finance and so on took

place, in particular whether they were made *after* she had come into possession of the November circular or before.

[39] Nor do I consider the fact the defendant never actually implemented long term rentals to be necessarily conclusive. The plaintiff gave notice of cancellation before being formally advised of the change back to short stay serviced apartments. Further, in any event, an arguable analysis is that the defendant's conduct had been such that the plaintiff was entitled not to feel confident about the defendant's willingness and/or ability to comply with its obligations.

[40] The long term rental/short stay serviced apartment issue needs to be viewed in combination with the defendant's conduct in incorporating a new company and then appointing it as manager without divulging any information about the new company to the purchasers. In my view, it is highly arguable that was a breach of the promise that had been made. What was contemplated by both parties was the appointment on settlement of an existing, reputable and experienced external marketing consultant. The fact the defendant itself describes the current situation as an "interim" measure confirms that. In my view, the plaintiff is also entitled to point to the precarious financial position of the Wensley Group of companies as another justification for its concerns about the appointment of Marina Baches. It cannot be an answer to say Ms Love knew by the end of November that Marina Baches had been appointed and could have searched the companies office registry then. She had no reason to do that, not least of all because the defendant never provided any details to its purchasers about Marina Baches. In any event, it is of course well established that the fact a representee could have made his or her own inquiries and discovered the true state of affairs does not afford a defence.

[41] Some care also needs to be taken in relation to Ms Love's post cancellation communications in February 2009. They were preceded by a letter from her solicitor dated 4 February 2009 in which he sought information about what he describes as "the proposals being advanced by the vendor for settlement" adding the information was sought "without prejudice to cancellation of our client's contract on 22 January 2009." In those circumstances, I would be reluctant at this interim stage to attach too much weight to the February discussions.

[42] As regards the disclaimers in the marketing material, I do not consider that properly construed they would provide a defence to the claim and to be fair to Mr Forsey he did not seek to argue they would.

[43] My conclusion on the issue of whether there is a serious question is therefore as follows. The additional evidence adduced by the defendant suggests the plaintiff's case is weaker than it appeared when it first came before me in March 2009. However, for the reasons traversed above, I consider there is still sufficient to meet the threshold of a serious question to be tried. To adopt the words of Lush J in *Henry Roach (Petroleum) Pty limited v Credit House (Victim) Pty Limited* [1976] VR 309 at 311, approved in *Klissers Farmhouse Bakeries Limited v Harvest Bakeries Limited* [1985] 2 NZLR 129 (CA), there is a tenable combination of resolutions of the issues of fact and law on which the plaintiff could succeed.

[44] For completeness, I should add that if the correct test is the slightly higher threshold of "a good arguable case" as Mr Soper suggested given the application was for the purpose of preserving an asset, then I consider it has been satisfied.

Balance of convenience

[45] In addition to Ms Love's affidavit, the plaintiff also sought to rely on additional evidence contained in a new affidavit filed in May about the financial position of the defendant, its directorate and associated companies.

[46] Mr Forsey disputed the plaintiff's right to adduce any new evidence and submitted the plaintiff's case had to stand or fall on the evidence she had provided in February in support of her without notice application.

[47] Rule 7.49 is silent about the right of the plaintiff to adduce any new evidence. However, given that this evidence was in the nature of updating information, I considered it should be admitted but taking into account Mr Forsey's further point that he had had insufficient time to take instructions.

[48] According to the new affidavit,

(i) a number of statutory demands have been served on Wensley Developments Limited (the defendant's shareholder) and liquidation proceedings are being prepared

(ii) as at 27 May 2009, only three of the 28 apartments at The Marina have settled

(iii) in March 2009 the Inland Revenue Department obtained summary judgments against the defendant's directors

[49] Having regard to this new evidence as well as Ms Love's affidavit and the fate of the Bowen application, Mr Soper submits there is a real risk the deposit monies will be dissipated and lost forever to the plaintiff unless the interim order is maintained. In his submission, damages would not be an adequate remedy as argued by Mr Forsey because realistically given the defendant's precarious financial position, there is little prospect of the plaintiff obtaining damages in the event she succeeds in the substantive proceeding.

[50] There was no evidence the interim order has caused the defendant hardship, prevented it from discharging a genuine pre-existing debt and /or jeopardised its financial position and Mr Forsey did not seek to argue it had.

[51] In the circumstances, I consider the balance of convenience must favour the plaintiff.

Overall justice

[52] Under this head, Mr Forsey relied on the plaintiff's breach of its disclosure obligations as well as the striking similarities between the claims made by Ms Love and the claims made by the other purchasers. Mr Forsey submitted the similarities were such they suggested a systematic approach by a group of purchasers who were unable to settle due to the global recession and trying to protect their deposits by raising allegations of misrepresentation after the expiry of their settlement notices.

[53] That is certainly one possible construction. Another is that a group of purchasers were concerned about the quality of their investment and any similarity in the wording of the affidavits is due to the fact they share the same concerns and have the same firm of solicitors acting for them.

[54] While I have concerns about the plaintiff's failure to disclose all of the material facts, I remain of the view that the overall interests of justice favour the order remaining in place.

Outcome of hearing

[55] The defendant's application is dismissed and the interim order made on 6 March 2009 is confirmed.

[56] As regards costs, my provisional view is that although the plaintiff has succeeded, costs should lie where they fall on account of the plaintiff's failure to disclose all material facts.

[57] That view is only provisional because the parties have had no opportunity to be heard on costs. In the event the parties are unable to agree and require me to make a ruling, then submissions of no more than five pages in length are to be filed within 20 working days.

Solicitors:
Anderson Lloyd, Queenstown
Duncan Cotterill, Christchurch