IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2009-404-001069

BETWEEN	KAI ZHANG Plaintiff
AND	XIABEN LIU, PRACTISING AS BEN LIU & CO Defendant

Hearing: 11 August 2009

Appearances: K Quinn for the Plaintiff
M Ritchie for the Defendant

Judgment: 11 August 2009

ORAL JUDGMENT OF
ASSOCIATE JUDGE CHRISTIANSEN

Solicitor/Counsel:
K Quinn, Barrister, Auckland - Fax: (09) 309 0908 kelly.quinn@ihug.co.nz
M Ritchie, Kennedys, Auckland - Fax: (09) 379 9025 m.ritchie@kennedys-law.co.nz

[1] This hearing concerns two applications by the defendant namely:

a) An application for leave to join a third party.

b) An application for a decision on a preliminary question.

[2] Both applications are opposed.

[3] Some background is needed.

The proceeding

[4] The plaintiff's claim is against the lawyer who acted for him when on 30 September 2005 and following the plaintiff agreed to purchase two lots (lots 18 and 19) of a subdivision at Glen Eden Road.

[5] The vendor was Waikikamukau Limited (WL).

[6] Earlier in 2005 WL purchased the land that comprises lots 18 and 19 from Mr V S Wharton. At the time of that purchase, the land was comprised in one title (lot 9). On or about June 2005 Mr Wharton and WL entered into a deed of covenant in which provided "the transferee… agrees to erect on the property a single dwelling house". That covenant was registered against the title to lot 9 on or about 14 June 2005. After that WL subdivided lot 9 into lots 18 and 19.

[7] It appears from the chronology provided that before WL purchased from Mr Wharton, WL intended to subdivide lot 9 into two lots. A subdivision plan was drawn up. Subsequently Mr Wharton and WL entered into the deed of covenant registered against lot 9.

[8] At that time McBreens Solicitors (McBreens) acted for both WL and Mr Wharton. When lot 9 was subdivided into lots 18 and 19 the covenant was registered against the titles of both subdivided lots.

[9] Following purchase of lots 18 and 19 on 30 September 2005, the plaintiff by deed, nominated two others to purchase lot 19, he remaining purchaser of lot 18.

[10] Settlement of those purchases was required once titles issued. Those titles issued two years later on 3 September 2007. Thereafter and before settlement occurred on 9 October 2007 third party neighbours objected to construction taking place on the separate lots. They claimed the benefit apparently afforded them by the covenant which they believed restricted the building of one dwelling upon lots 18 and 19 combined.

[11] When the defendant wrote to McBreens seeking clarification they responded by letter dated 13 September 2007:

> "The intention of the land covenants was that each title would contain one single dwelling house. We therefore advise that there is nothing entered into by either of our clients which may prevent construction on lot … 18 and 19."

[12] By letter dated 18 July 2008 Websters Law acting for the third party neighbours wrote stating that only one dwelling house could be built between lots 18 and 19. The letter said the neighbours would take such steps as is necessary to enforce the covenant.

[13] Thereafter the plaintiff sought separate legal advice, and this proceeding subsequently issued.

[14] The plaintiff claims the sum of $276,651.59 plus interest and costs. He says that because he is unable to build on lot 18 he would have to purchase another section at an estimated cost of $250,000. Also he seeks to recover the costs of obtaining reports and various consents, rates and conveyancing costs.

[15] The claim against the defendant is for breach of contract and in negligence. The claim in contract and in negligence alleges a failure to make proper enquiries as to the effect and interpretation of the covenant; to advise the plaintiff of the covenant terms; and in failing to requisition title or to sufficiently protect the plaintiff's interests.

[16] The defendant's statement of defence was filed on 24 June 2009. On 20 July 2009 the defendant filed the two applications which are for determination by me at this time. The first applies to join McBreens as a third party. The second is an application for a decision on a preliminary question about the interpretation of the covenant and whether it restricts the building of a single dwelling house on the land comprising lots 18 and 19. The latter question is at the core of matters in dispute between the plaintiff and the defendant for if the covenant does not prevent a single dwelling house being erected on each of lots 18 and 19 then little if anything will remain of the plaintiff's claim against the defendant. I will say more about this later.

[17] As to the application to join McBreens it is founded upon advice provided by McBreens prior to settlement of the purchase of lots 18 and 19. The defendant's claim against McBreens is that if he should be liable to the defendant then he is entitled to indemnity and/or contribution pursuant to the provisions of the Law Reform Act 1936.

[18] The third party joinder application is opposed. The plaintiff claims:

a) The defendant is not entitled to rely upon the advice of McBreens as to the intention of the parties who entered into the covenant, in order to avoid liability for negligence and breach of contract.

b) The interpretation of the covenant is not an issue between the plaintiff and the defendant. Rather a reasonable and prudent lawyer would have advised his client not to complete settlement when aware there was an issue regarding interpretation of the covenant.

c) The issues between the parties are not the same.

d) The claim against the third party is weak because the intention of the parties has limited relevance in determining the construction of the covenant.

e) Joinder would unnecessarily delay the plaintiff's claim.

[19] The application for a separate question to be tried is opposed because:

a) The plaintiff says that question would not finally resolve the issues between the parties because they include whether the defendant was negligent or in breach of a contract of retainer in the provision of advice regarding the covenant attaching to the land.

b) Prior to settlement the plaintiff and defendant were aware of third party objections.

c) A reasonable and prudent lawyer would have advised his client to cancel and not to complete settlement or to take further steps to protect the plaintiff's position.

d) The construction of the covenant is not relevant to the issue of quantum if the defendant is found to be liable.

Plaintiff's submissions in opposition

[20] Ms Quinn submits that the question of a separate issue is not relevant to issues between the parties. Also, that the construction of the covenant does not affect only the parties to the litigation but the adjoining owners including those who have previously threatened to issue injunction proceedings, claiming they are entitled to the benefit of the covenant which they say restricts the right of the development of lots 18 and 19.

[21] Ms Quinn submits the Court should be focussed on what a prudent and reasonable solicitor should have done knowing about the issues involving an interpretation of the covenant, and because "affected" neighbours were concerned. She said a reasonable and prudent solicitor "should have taken steps to protect the plaintiff's position" … including "cancelling the agreement to purchase under the Contractual Mistakes Act or under the Contractual Remedies Act, or extending the time for settlement until the issue had been satisfactorily resolved or some other step".

[22] Ms Quinn submits that by claiming that there is an issue of interpretation the defendant is effectively admitting liability of the plaintiff's claim of breach i.e. because he was prepared to accept without more the advice he received from McBreens regarding the meaning of the covenant. Ms Quinn submits that a reasonable and prudent solicitor should know that the intention of the parties to a contract does not necessarily determine it.

[23] Ms Quinn submits that the Court may make findings of fact between the plaintiff and the defendant which may impact on other parties i.e. the neighbours who are not parties to this proceeding; that a finding that a dwelling house could be built on both lots 18 and 19 would not be binding on the neighbours. Although it could be proved there was no negligence by the defendant the plaintiff could still be faced with defending injunction proceedings brought by the neighbours. Therefore Ms Quinn submits that all neighbour owners referred to in the covenant (as dominant tenants) would need to be joined, and new pleadings drafted before the matter could be determined at much greater expense and delay and for no benefit to the plaintiff.

[24] Concerning the joinder application, Ms Quinn submits the defendant is not entitled to rely on advice from McBreens as to the parties' intentions when advising the plaintiff as to the construction of the covenant. She submits the claim as pleaded does not establish that McBreens owed a duty of care to the plaintiff or to the defendant; that there is no pleading by which the defendant claims to be entitled to rely on McBreens' letter as to the intentions of their clients.

Considerations

[25] An application to issue third party notices is governed by Rule 4.4 of the High Court Rules. By Rule 4.8 the Court should have regard to all the relevant circumstances, including delay to the plaintiff.

[26] I am satisfied the application for joinder should be granted. The proceeding is a new one. The application is made at a relatively early stage. It will be convenient and cost effective to have McBreens joined as a party. They acted for Mr Wharton and for WL. They drafted the covenant. They acted for WL when a

subdivision plan was presented and when the covenant was registered over lots 18 and 19. They acted for WL when both those lots were separately sold to the plaintiff. However one might want to read the advice they provided in response to the defendant's request for clarification, it is clear their client and they processed the subdivision for separate sale and in order to enable separate dwellings to be built on each.

[27] The defendant's proposed statement of defence does not clearly describe the legal basis for a claim but that can be rectified. In her submissions Ms Ritchie advised the claims against McBreens will be expanded to include negligent misstatement, and a Fair Trading Act claim. The fact is that even without McBreens as a party this litigation would inevitably also focus upon the events surrounding the purchase of lots 18 and 19. It is best those events are subject to a single proceeding rather than to separate proceedings. In that context the claim of a right to indemnity could properly be examined. I accept that the purpose behind the third party claim is to determine who should ultimately bear the loss, if there is any, and there must certainly be a question regarding whether any loss has occurred to the plaintiff. It is rather simplistic to claim that a reasonable solicitor would have advised his client to cancel a contract for purchase. Even a claim that the purchase should have been delayed pending resolution of covenant issues would unlikely have dissuaded WL from seeking to enforce its rights. It is reasonable to consider that WL undertook the subdivision because it believed it had a right of subdivision by which the owners of the two lots would be permitted to build separate dwellings on those lots.

[28] The plaintiff was going to face difficulties in this case whatever approach was taken. It was not going to be any easier for him, I suspect, because he purported to cancel a contract or for other reason to delay settlement.

[29] The fact is that the issue of interpretation of the covenant is central to determination of the plaintiff's claim of negligence or breach of contract. If the covenant means both lots can separately be built upon then the defendant would not be negligent and McBreens' advice, assuming they stand by it, would have been vindicated.

[30] An application for leave for joinder is not the appropriate place to be examining in detail the merits of an application for joinder. Certainly both the plaintiff and the third party will be involved in matters with which they are not directly connected but any degree of prejudice caused by that is acceptable in this case.

[31] The application for determination of a preliminary question is made pursuant to Rule 10.15. In this case an interpretation of the covenant could significantly shorten the litigation and may indeed bring an end to the plaintiff's claim against the defendant. If the covenant does not prevent the ability to erect dwelling houses on each of lots 18 and 19 then the claim against the defendant is at an end.

[32] The need for a trial at all may be obviated. In this case the interpretation of the covenant is a discreet issue. Likely it will involve evidence. Extrinsic evidence may have to be called of the parties to the covenant and the solicitor that acted for them both. Of course it will be for the Court to determine what, if any value may be provided by that evidence. Nonetheless I perceive that a hearing on the separate question could be arranged promptly.

[33] Ms Quinn raised the spectre of non-parties' rights being affected. But, those rights are no greater than now provided by the documents here relied upon. To deal with this, a Judge may consider making an order that those parties be served in order to provide an opportunity for their participation. On the other hand the rights of those parties may be limited to claims against that person or body they say gave assurances which were not adequately protected by the covenant between Mr Wharton and WL.

Result

[34] The application for leave for joinder is granted.

[35] Likewise, the application for determination of a separate question is granted. That question is "whether the covenant registered on the titles of lots 18 and 19

means that one dwelling house can be built on lot 18 and one dwelling house can be built on lot 19".

[36] Costs on the separate question are fixed on a category 2B basis to be payable to the defendant upon determination of the substantive proceeding. No award of costs is made upon the joinder application.

Associate Judge Christiansen