

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

CIV 2008-404-007712

BETWEEN STRAND CORPORATION LIMITED
Plaintiff

AND TROY ROBERT HAMMANT, TANYA
LOUISE HAMMANT, REBECCA JOY
HALL AND ANDREW JOHN HALL
First Defendants

AND PETER GENSCH
Second Defendant

AND LAURENCE BOEY KUM WENG
Third Defendant

AND LI LI MA
Fourth Defendant

Hearing: On papers

Counsel: A M Swan for plaintiff

Judgment: 31 August 2009 at 12:30pm

JUDGMENT OF ASSOCIATE JUDGE ABBOTT

*This judgment was delivered by me on 31 August 2009 at 12:30pm,
pursuant to Rule 11.5 of the High Court Rules.*

Registrar/Deputy Registrar

Solicitors:
Steindle Williams, PO Box 47 858, Auckland 1144 for plaintiff

[1] The plaintiff is the developer of residential apartments at 16 Chapman Street, Newton, Auckland. It agreed to sell one of the apartments to the fourth defendant. After the fourth defendant failed to complete the purchase the plaintiff obtained an order for specific performance.

[2] The plaintiff has applied, without notice, for orders discharging the order for specific performance (and related orders) and cancelling the agreement for sale and purchase.

Background

[3] The fourth defendant agreed to purchase unit 6K, 16 Chapman Street, Newton, Auckland from the plaintiff on 16 November 2006. She was due to complete the settlement after construction of the building was complete and a separate unit title had been issued. On that basis settlement was due on 22 October 2008. The plaintiff served a settlement notice after the fourth defendant failed to settle on the settlement date. The notice required her to settle on or before 11 November 2008. She failed to do so, and has still not settled the purchase.

[4] The plaintiff commenced this proceeding on 19 November 2008. The fourth defendant was served on 20 November 2008. She has taken no steps.

[5] On 15 December 2008, by way of summary judgment, the Court made an order for specific performance requiring the fourth defendant to settle the purchase within 7 days. It also ordered her to pay interest and costs in accordance with the terms of the agreement.

[6] The fourth defendant has not complied with the orders. The plaintiff and the fourth defendant have had some discussions about settlement since the judgment, but these have taken the matter no further. The plaintiff filed its present application on 23 June 2009. In effect it accepts that the fourth defendant will not settle the purchase. It wishes to resell the apartment and subsequently pursue a claim against

the fourth defendant for damages (in accordance with a draft statement of claim filed).

Discharge of order and amendment of claim

[7] The Court has power to dissolve the order for specific performance and ask the Court to put an end to the contract, provided it would not be unjust to the other party to do so: *Johnson v Agnew* [1980] AC 367 at 390, 395 (applied in *Chatfield v Jones* [1990] 3 NZLR 285). The underlying principle is that a contract remains in force after an order for specific performance, and specific performance is “a continuance of the contract under control of the court which control involves the power, in certain events, to terminate it”. (*Johnson v Agnew* at 394).

[8] The matter is in the hands of the Court in its equity jurisdiction. The fourth defendant is in continuing breach of the contract by reason of her failure to settle (notwithstanding the settlement notice and the order for specific performance). The plaintiff should be able to resell the property and hence fix the loss it has suffered. I am satisfied that it is appropriate in the circumstances to make the orders sought, and to allow the plaintiff to pursue a claim for damages consequent upon cancellation. There is nothing to suggest that it would be unjust to the fourth defendant to make the orders.

Application without notice

[9] The plaintiff has applied without notice. Given the history of the matter (specifically the fourth defendant’s failure to take steps in this proceeding and to respond to the order for specific performance), I am satisfied that the fourth defendant does not have an interest in completing the purchase and hence will not be prejudiced by proceeding without notice.

Decision

[10] I make the following orders (as sought):

- a) Dissolving the order made on 15 December 2008 that the fourth defendant specifically perform her obligations under the agreement for sale and purchase of unit 6K, 16 Chapman Street, Newton, Auckland dated 16 November 2006, and associated orders as to interest and costs; and
- b) Cancelling the agreement for sale and purchase of unit 6K, 16 Chapman Street, Newton, Auckland dated 16 November 2006.

[11] I reserve costs on this application and the preceding application for summary judgment, for determination at the same time as the substantive claim.

[12] The Registrar is to allocate a first case management conference for the claim against the fourth defendant upon the filing of the amended statement of claim seeking damages.

Associate Judge Abbott