IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV 2009-409-000394

BETWEEN	SHIRLEEN SHIA LING SIM Appellant
AND	NEW ZEALAND HOME BONDS LIMITED Respondent

Hearing: 21 September 2009

Counsel: D & S Singh for Appellant
D M Lester for Respondent

Judgment: 29 September 2009

JUDGMENT OF FOGARTY J

Introduction

[1] Ms Sim appeals against a decision of the District Court (Judge J A Farish) granting summary judgment in the sum of $44,000 to New Zealand Home Bonds Limited ("Home Bonds"). On 7 February 2008 Home Bonds had paid that same sum to the solicitors of Hanover Finance Limited who, as assignees from Westpac, in turn an assignee from Winsun Developments Limited, had the benefit of a bond.

[2] By the bond, Home Bonds promised to pay $44,000 to Winsun or its assignee if Ms Sim, a purchaser of three apartments, failed to settle the contract of sale and purchase between her and Winsun as vendor. The relevant clause of the bond is as follows:

Purchaser Default:

8) If the Purchaser fails to settle the Agreement following:

a) expiry of a settlement notice served on the Purchaser on or before the Expiry Date (including any extension thereof); and

b) delivery to NZHB on or before the Expiry Date of a certified copy of the settlement notice and proof of valid service; NZHB will within 7 days pay the amount of the Development Homebond to the Vendor. NZHB will, if requested by the Vendor, delay payment of the amount of the Development Homebond without prejudicing NZHB's obligation to make that payment.

[3] Hanover Finance's solicitors sought payment under the bonds by an email dated 21 January 2008 enclosing copies of a settlement notice they understood had been served on Ms Sim. On the question of proof of service Home Bonds were to seek confirmation from the purchaser's solicitor regarding the same and also invited Home Bonds to check with Wadsworth Ray, a firm of solicitors in Auckland who had been acting for the receivers of Winsun at the time the settlement notices were sent.

[4] The settlement notice is dated 12 September 2007 and was sent by the solicitors for the receivers of Winsun, Wadsworth Ray. A few days later, on 26 September, Wadsworth Ray received a letter from Mr Sam Ngu, solicitor for Ms Sim advising:

> We refer to your letter of 12th September 2007.
>
> Our client advise that the vendor does not has a valid ground in issuing the settlement notice because the above transaction is involved a misrepresentation issue.
>
> Our client also requests the vendor to instruct NZ Home Bond to release the funds to our client.
>
> We look forward to hearing from you.

[5] Moving forward, when Home Bonds received the request for the repayment of the bond on 21 January it in turn made a demand on Ms Sim on 30 January 2008 by way of a letter, the full terms of which I set out:

Re: Development Homebond™ #4621 purchase of Units 304, 504 & 1009 in Winsun Heights (the agreement)

I am writing in regards to the Development Homebond™ #4621 for the amount of $44,000.00 that we have provided to Winsun Developments Limited to satisfy your deposit obligations in regards to your purchase of Units 304, 504 & 1009 in Winsun Heights.

Your Solicitor Sam Ngu received three settlement notices dated 12th September 2007 from Kristine King of Wadsworth Ray who acted for Winsun Heights informing you that you were required to settle Units 304, 504 & 1009. The settlement noticed (sic) has now expired.

Today New Zealand Home Bonds Ltd ("NZHB") received a $44,000.00 claim from Buddle Findlay who acts for Hanover Finance Limited as you have defaulted in your obligations to settle Units 304, 504 & 1009. NZHB has from today 7 days in which to pay Hanover Finance Limited $44,000.00.

You are currently in default with NZHB. When NZHB pay this claim you will be liable to NZHB for $44,000.00 plus any interest and costs incurred by NZHB.

The only circumstances in which NZHB will not make such a payment is if NZHB is in receipt of a copy of a court order or injunction restraining the vendor from enforcing settlement and/or preventing NZHB from paying the deposit to them.

You now have until the Wednesday 5th February 2008 in which to provide NZHB with a court order or injunction.

In the event of such circumstances NZHB will not make payment to the vendor until the earliest of the order or injunction lapsing, the parties agreeing or the court instructing.

In any event you are now in default with NZHB – see attached clause #28 from the Application Form

"Immediately the Purchaser first defaults or fails in settling the Agreement, or any Applicant defaults under the terms of this document (and not with standing that at that time clause 27 may not have been complied with) the Applicant shall pay to NZHB (without the need for notice or demand) the Amount paid or to be paid (as determined by NZHB) by NZHB under the Development Homebond including the Amount held or subject to a Court order or injunction".

We demand that you immediately pay the sum of $44,000.00 into the account of our solicitors, Grant Cameron & Associates. Their trust account details are as follows;

ANZ – Christchurch Branch. 010797:0270605:02

As we have previously stated you may have a legitimate reason why you have not settled Units 304, 504 & 1009 in Winsun Heights. Payment of the deposit does not imply that you agree with the settlement notice nor does it interfere with your other legal rights. It simply means that you have met

> your deposit obligations and are in the same position as having paid your deposit in cash but you must at least pay the deposit.
>
> All bonds issued by NZHB are underwritten by Lumley General Insurance (N.Z.) Limited.
>
> When we are required to pay a claim as is the present case, the terms of the Underwrite Agreement with Lumley require that NZHB pursue recovery of any payment, interest and costs even if this comes to filling bankruptcy proceedings against you and enforcing a mortgagee sale over the properties that you have offered up as security.
>
> Lumley insist that these claims be pursued vigorously and regardless of the legal expense involved so please be assured that this problem is only going to get worse.
>
> Costs can quickly mount up and payment now will save you money in the long run.
>
> **This requires your urgent attention. Our solicitors are instructed to instigate immediate summary judgment proceedings and start the mortgagee sale process should payment not be received before the 5th February 2008.**

[6] On 4 February Mr Singh wrote two letters, one to the solicitors for Hanover Finance, the assignee of the bond, and to Winsun, the vendor and the second to Home Bonds. In both letters he asserted that the settlement notice was invalid as the contract was at an end, having been cancelled. Nonetheless on 7 February Home Bonds paid Hanover Finance the $44,000.

The decision of the District Court

[7] In the District Court Judge Farish considered that the question of whether or not Ms Sim was obliged to perform the Winsun contract in February 2008 was irrelevant. She held that Ms Sim's liability to pay under the bond was due simply to the fact that she had failed to pay the amount sought in the settlement notice issued on 12 September previously.

[8] She reached this result by finding that a High Court judgment: *New Zealand Home Bonds Ltd v Singh* HC CHCH CIV 2008-409-584 4 September 2008, Associate Judge Christiansen, was directly on point.

[9] In *Singh* Home Bonds were seeking summary judgment against Mr Singh, solicitor for relatives of Ms Sim, who had likewise agreed to buy a number of apartments from Winsun. They also had elected to meet their obligation to pay a deposit by way of a home bond. To get the home bond they had provided another Mt Albert property as collateral security. They later refinanced that property and as part of that process a sum of $73,000, being the amount of the deposit, was held by their solicitor, Mr Singh, who gave an undertaking to pay it to Home Bonds, as and when the liability of the bond holder fell due.

[10] Mr Singh resisted paying that money to Home Bonds on the grounds that Ms Yiin and Mr Lau had cancelled the Winsun contracts in May of 2006. The vendors did not accept that cancellation. Later when the vendors had gone into liquidation, its liquidators purported to cancel the contract before selling the apartments in question to a third party. Clause 27 of the home bond provides:

> 27. Following **failure** by a Purchaser to settle an Agreement, the Purchaser acknowledges that the Vendor may, before the last day of the Anticipated bond Period (as extended) deliver to NZHB a written demand which (a) confirms the failure of the Purchaser to settle the Agreement and (b) attaches a certified copy of an expired settlement notice and proof of valid service on the Purchaser. The Purchaser further acknowledges that NZHB will within 7 days of receipt of a claim pay the amount of the Development Homebond ("the Amount") to the Vendor. NZHB may, if requested by the Vendor, delay payment of the Amount without prejudicing NZHB's obligation to make that payment.
>
> (Emphasis added)

[11] Home Bonds argued that it was obliged to pay out on the bond following a failure by Ms Yiin and Mr Lau to pay on the settlement notice issued by the liquidators, whether or not Ms Yiin and Mr Lau as purchasers had good grounds to dispute liability to the liquidator of the vendor company.

[12] Associate Judge Christiansen responded to this issue as follows:

> [48] I am satisfied that these matters, and indeed others raised by Mr Riach, regarding the inadequacy of evidence do not weaken the plaintiffs' case. It is only through submissions these matters have been raised at all. What those various objections really focus upon are whether or not there was, in terms of the Application Form and Contract, an obligation upon the plaintiff because of "a failure of the purchaser to settle the

> agreement". Mr Singh's clients would argue the deposit would be refundable because their contract of purchase did not settle. I think the correct interpretation is to look upon the obligation of honouring the bond being limited to an inquiry about whether a settlement occurred. It does not involve an inquiry about knowledge of differences between vendor and purchaser, or an examination of the rights and wrongs of their respective claims. The plaintiff was not a party to their contract. Their contract is a matter between them and should not impact upon the plaintiff. Otherwise, it puts the plaintiff in an uncertain position. Therefore, to interpret the plaintiff's obligations in terms of whether or not a settlement has occurred, and nothing more, does, as Mr Lester submits, create certainty and leaves the parties knowing exactly where they are. Also, and as Mr Lester submits, it would leave the parties in the position they would have been in had a cash deposit been paid at the outset. For, in that situation a purchaser would have to seek recovery of the deposit from the vendor.

[13] As is apparent from the last two sentences of paragraph [48] Associate Judge Christiansen regarded the payment of the bond as establishing the cash deposit in the hands of the vendors. He went on to observe:

> [51] The fact is that the purchaser's assertion of a right to cancel the contract did not affect the plaintiff's obligation to the vendor. A purchaser's right to reclaim a deposit is a matter for the purchaser to pursue with the vendor. It is not a matter which was intended ever to be a condition of an obligation to pay a deposit on behalf of the purchaser.

He summarised his reasoning in paragraph [53]:

> [53] The plaintiff's obligation to deliver payment of the bond to the vendor was not subject to any dispute raised by Ms Yiin and Mr Lau regarding its obligation to settle with the vendor. That obligation was subject only to the vendor providing proof it had delivered a settlement notice which was not complied with.

[14] After the judgment of Judge Farish the Court of Appeal confirmed the judgment of the High Court: *Singh v New Zealand Home Bonds Limited* [2009] NZCA 103. The relevant reasoning comes from part of paragraph [39] and all of paragraphs [40] and [41] set out as follows:

> [39] …Alternatively, in the event that the purchasers failed to settle, upon service by the vendor to NZHBL of a formal written demand confirming the purchaser's failure to settle and attaching a copy of an expired settlement notice, and proof of its valid service on the purchaser. NZHBL would then be obliged to make payment to the vendor within 7 days.
>
> [40] Under the agreement for sale and purchase, the option of a home bond was available to purchasers as an alternative to a cash deposit. In respect of this issue, and concluding that NZHBL had established a sufficient case for summary judgment, Associate Judge Christiansen said

> that interpreting NZHBL's obligations in terms of an apparently valid settlement notice would put the parties in the position they would have been in if a cash deposit had been paid. That would provide the same degree of certainty as if a cash deposit had been paid.
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> [41] The terms of the contract as a whole make it clear that dealings and disputes between the vendor and the purchasers are not relevant to the issue of whether or not NZHBL was right to pay out the $73,000 and whether Mr Singh in turn was obliged to pay that sum to NZHBL. Either upon settlement of the agreement or upon valid service by the vendor of, and non-compliance by the purchasers with, a demand for settlement, NZHBL was entitled to demand the $73,000 from Mr Singh.

Issues on appeal

[15] There are two issues:

1. Is the decision in *Singh* on all fours with this case, so that the decision of the Court of Appeal binds this Court and disposes of the case in favour of Home Bonds?

2. If not, was Home Bonds sufficiently upon notice of a contract dispute such that it should have enquired into the merit of the question of whether or not any payment was due by the purchaser to the vendor?

First issue: Whether the decision of *Singh* determines this case

[16] Mr Singh (the same Mr Singh), this time as counsel, submitted that the material facts between this case and *Singh* are different so as to distinguish *Singh*. He argued that in *Singh* there was no evidence before the Court that Home Bonds were under notice before payment that the purchaser considered the contract cancelled prior to paying out under the bond. Whereas, in this case, Home Bonds and indeed Hanover Finance and Winsun's liquidators were so on notice.

[17] In *Singh* in the Court of Appeal Mr Singh had built an argument relying on the inadequacy of the evidence provided by Home Bonds to support summary judgment. He submitted that Home Bonds had not produced for summary judgment evidence as to whether or not Home Bonds had made enquiry as to the status of the

agreement between the purchaser and the vendor. Mr Lester's submissions for Home Bonds were summarised by the Court of Appeal in paragraph [29]:

> [29] In respect of the alleged dispute between the vendor and Ms Yiin and Mr Lau over whether the contract in fact became unconditional, **Mr Lester submits that NZHBL was not given notice of any such dispute and was not obliged to make enquiry.** In respect of the alleged failure of the parties to settle, he contends that this amounts to the claim by Mr Singh that NZHBL should have accepted and acted upon the purchaser's mere assertion that the contract was cancelled and not paid out the $73,000.
>
> (Emphasis added)

[18] Elaborating on the distinction between the cases Mr Singh submitted before me that in the earlier case he had failed to respond to the summary judgment application by providing the sort of correspondence that he has arranged to be filed in this case showing that Home Bonds was on notice that there was a dispute.

[19] In paragraph [40] of the Court of Appeal's reasons the phrase "*apparently valid settlement notice*" fits with the facts that were before Associate Judge Christiansen and the Court of Appeal, namely that Home Bonds had not been under any notice that there was a dispute. However, paragraph [41] reads:

> … [D]ealings and disputes between the vendor and the purchaser are not relevant … .

I have a doubt as to whether the Court of Appeal intended dealings and disputes to always be irrelevant. In paragraph [42] they said:

> [42] It is unfortunate that Mr Miller's evidence (see, particularly, [9] above) was so skeletal. Importantly, however, that evidence was not meaningfully challenged by Mr Singh. **Mr Miller asserted in his affidavit that the settlement notice was valid**, and that cl 27 was complied with. Mr Singh did not provide a satisfactory evidential challenge to that assertion before Associate Judge Christiansen.
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> (Emphasis added)

[20] I conclude that the decision of *Singh v New Zealand Home Bonds* is not a binding authority on this Court in situations where Home Bonds is on prior notice of a disputed liability to pay prior to answering the bond by payment to the holder of the benefit of it.

Issue 2: Was Home Bonds sufficiently upon notice of a contract dispute such that it should have enquired into the merit of the question of whether or not any payment was due by the purchaser to the vendor?

[21] In *Tennant v Gore Street Trustee Ltd and Anor* HC AK CIV 2007-404-1095 6 March 2007, Courtney J was considering an application from Mr and Mrs Tennant seeking an injunction preventing Home Bonds from paying out to Gore Street Trustee Limited. Mr and Mrs Tennant argued that the agreement for sale and purchase had been validly cancelled and therefore the deposit was not owing. The vendors did not agree and issued a settlement notice and made a demand on Home Bonds for payment. The issues were for the purpose of interim injunction and as to whether the question was seriously arguable. Again it turned on the proper interpretation of cl 27. Courtney J reasoned:

> [6] Mr and Mrs Tennant say that they have validly cancelled the agreement for sale and purchase and that, having done so, they cannot be said to have failed to settle the agreement for the purposes of cl 27 of the Homebond agreement. Their argument is that the proper interpretation of cl 27 requires the purchaser to fail to settle when they are required to do so. Since the sale and purchase agreement has been cancelled there is no obligation on them to settle and therefore they cannot be said to have "failed" to do so.
>
> [7] NZHB claims that the agreement is binding and that it has no choice but to make a payment to Gore Street Trustee Limited as it is required to do under cl 27. Presumably this is because it interprets the word "failure" in cl 27 as having the more neutral meaning of simply not settling, regardless of the reason.
>
> [8] I consider that there is room for the interpretation contended for by Mr and Mrs Tennant. Such an interpretation would accord with common dictionary definitions. It would also be logical, since there could be no reason for payment to be made where an agreement has been validly cancelled. On the other hand, the intention may have been to ensure that NZHB did not become caught up in an argument over whether an agreement has, in fact, been validly cancelled. Given the time constraints and the fact that the defendants have not been heard on this point I can do no more than express the view that there is some basis for the plaintiffs' interpretation.

She went on to provide interim relief.

[22] It will be recalled that Home Bonds letter to Ms Sim dated 30 January gave her an opportunity to seek interim relief from the Court.

[23] As Courtney J observed, the word "*failure*" in common dictionary definitions includes the concept of fault, as in a default. But failure can be used in a non-pejorative fashion being one word for the alternative of saying that something simply did not happen. Normally, however, it is associated with a degree of blame on the part of the person who did not do something.

[24] Mr Lester, who has been in all the cases, argues that if this ordinary meaning of the word failure is given effect Home Bonds would be in an impossible situation as there would be no certainty as to its obligations.

[25] Bonds in their simplest form promise the payment of a sum certain at a future date or at a date to be fixed. Problems arise when the paradigm bond is departed from by setting vague or ambiguous criteria to fix the due date of payment. There is an argument that vague criteria should be read '*contra proferentem*'.

[26] In support of preferring a neutral reading of "*failure*" Mr Lester argues that the economic function of these bonds is to be a substitute for the deposit. Where a purchaser seeks to cancel the contract and the vendor does not agree the purchaser still has the problem of recovering the deposit from the vendor.

[27] Mr Lester argues that there is no commercial mischief in enabling the bonds to function under a simple test of non-payment of a settlement demand, on proof of service and expiry of the date, as that will essentially place the purchaser in the same position the purchaser would have been in, had the purchaser paid the deposit in the first place. This argument plainly appealed to Associate Judge Christiansen. It also appealed to the Court of Appeal, see paragraph [40].

[28] I think Mr Lester oversimplifies the consequences when he contends that there is no commercial mischief. There can be at least three categories of circumstances whereby a purchaser will not settle on a settlement notice:

1. Because there has been a prior cancellation of the contract, which removes liability to make any payment.

2. There is a dispute as to whether or not there is still an obligation to settle.

3. The purchaser cannot assemble the funds to settle.

Depending on the terms of cancellation, and/or the resale of the properties (which occurred here) the vendor may or may not be entitled to retain the deposit, if it has been paid. Second, where there is a valid dispute the vendor is not entitled to treat the deposit as not being repayable some time in the future. Further, the fact of the matter is that in this contract the vendor did not obtain a cash deposit but accepted a bond. Although the bond was in lieu it is nonetheless different from a deposit. Mr Singh argued that in this case a consequence of Ms Sim having to pursue recovery of a sum equivalent to the deposit, was that she would be pursuing an insolvent vendor. So the purchaser's position upon enforcement of the bond can be drastically weakened even though the insolvent vendor may not have been able to enforce the contract.

[29] I am also far from convinced that purchasers would sign up to these Home Bonds contracts were they aware that they were obliged to pay the demand by the bond holder, simply by reason of non-payment of a settlement notice, whether or not they were liable to pay the vendor. It seems to me these home bonds appeal to purchasers who do not have sufficient liquidity to find the deposit payment. It is likely that such persons would apprehend they would also not have such liquidity in the event that the contract did not proceed yet they were asked to pay the bond holder a sum equivalent to the deposit. In that sense the word "*failure*" is opaque and does not reveal clearly to the purchaser the extent of the purchaser's liability under the bond as being independent of any liability to the vendor.

[30] I am far from convinced that these issues were fully argued before the Court of Appeal in *Singh*. This is because there was no evidence there that Home Bonds had notice of a dispute. However, although I consider myself not strictly bound, it is customary for the High Court to follow relevant reasoning of the Court of Appeal particularly where it is close to being the ratio of the decision even if, in my respectful opinion, the reasoning is wider than the material facts demanded in *Singh*.

I think it is a matter for the Court of Appeal, not this Court, to either confirm the breadth of the ratio or confine it to cases where Home Bonds is not on notice. Accordingly, I follow the Court of Appeal's reasons in *Singh* and infer that the Court interpreted the word "*failure*" in cl 27 to mean any non-payment of the settlement sum demanded, whether justified or not. As a result the appeal is dismissed.

[31] Nothing in this judgment prevents Ms Sim from commencing proceedings against Hanover Finance, or its liquidators, with a claim to recover the sum of $44,000 and any other losses she suffered as a consequence of the enforcement of the bond.

[32] Mr Singh had a subsidiary argument that there had not been formal compliance with cl 27 as between the assignee of the bond and the bond holder. It will be recalled that Hanover Finance solicitors had communicated the demand for payment of the bond by way of email inviting collateral examination of proof of service. But the letter from the solicitor, Mr Ngu, of 17 September acknowledged receipt of the demands of 12 September. Those aspects of cl 27 are for the benefit of the bond holder. There is no doubt that demands were made; were disputed; and the money was not paid. Ms Sim cannot have the benefit of those conditions in cl 27. They are for the benefit of Home Bonds and have been effectively waived by Home Bonds.

Conclusion

[33] The appeal is dismissed. Costs are reserved. If the parties cannot agree costs I will receive submissions limited to five pages each, which have been exchanged in draft before filing.

Solicitors:
Shean Singh, Auckland, for Appellant
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