

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

CIV 2009-404-005451

BETWEEN ARRANMORE DEVELOPMENTS
 LIMITED
 Plaintiff

AND SALAHUDDIN KHAN AND ISMOT
 ARA KHAN
 Defendant

Hearing: 11 March 2010

Appearances: M Fisher and K Muston for the Plaintiff
 R McKelvin for the Defendants

Judgment: 11 March 2010

**ORAL JUDGMENT OF
ASSOCIATE JUDGE CHRISTIANSEN**

Solicitors/Counsel:

M Fisher, Barrister, Auckland – mjfisher@erskinechambers.co.nz

Daniel Overton Goulding, Onehunga – david@doglaw.co.nz

R McKelvin, Khan and Associates, Papatoetoe – mckelvinr@xtra.co.nz

[1] The plaintiff seeks a degree of specific performance of an agreement in respect of the defendants' purchase of a subdivision lot in a development at East Tamaki, Auckland. The defendants oppose. They say that only Mr Khan signed the agreement to purchase. Therefore the agreement was never perfected, is incomplete and unenforceable. They stated it was their intention to be bound only after both had signed.

[2] In the alternative they claim a defence arising from the circumstances whereby the vendor assigned its ownership interest in the subdivision development to the plaintiff. The defendants assert: they have no contract with the plaintiff but only with the vendor (Prema). They assert the assignment amounted to repudiation of the defendants' agreement and therefore that the plaintiff is estopped from pursuing this claim. In any event it claims the defendants have not "stated their willingness to perform the assigned obligations".

Background

[3] The defendants' purchase agreement with Prema noted the names of them both as purchaser. A deposit of \$1,000 was paid on the signing of the agreement. A further sum of \$34,900 was required 20 working days after.

[4] The agreement was signed by Mr Khan alone above the notation:

"(If signed other than by the Purchaser, the signatory warrants and represents that he/she is authorised in writing to sign on behalf of the Purchaser and will within 15 Working Days of the date hereof cause the Purchaser to confirm such authority in writing".

[5] Clause 1.3.1 of the agreement stated:

"If there is more than one Purchaser or Vendor, the liability of the purchasers or of the vendors, as the case may be, is joint and several."

[6] By agreement dated 3 June 2008 the plaintiff purchased the development from Prema and took and assignment of Prema's rights and obligations under the sale and purchase agreements entered into with purchasers in the development, including that of the defendants. On 9 June 2008 notice of the assignment was forwarded to the defendants' solicitors.

[7] The defendants' solicitors replied by letter dated 13 June 2008 under a heading referring to both defendants as 'The Purchasers - My Clients'. The solicitor wrote:

“...I am of the view that the vendor is not entitled to willy nilly sell the property to Arranmore Developments Ltd because the agreements for sale and purchase of the property which the vendor has with the various purchasers. The vendor has privity of contract with the various purchasers and the purchasers would be entitled to enforce the agreement against the vendors. The vendor no doubt would be in breach of contract if in the event the vendor has sold the property and if the vendor is called upon to perform the agreement the vendor doesn't perform. It is all very well if in the event Arranmore Developments Ltd have been able to perform the agreement without any difficulties then there would be no need for the purchasers to look to the vendors to perform the agreement, however in situations where Arranmore doesn't perform the agreement and vendors have already sold the property to Arranmore then in that case the vendors would be in breach of contract.”

[8] Later in the letter the solicitor stated:

“Therefore as discussed the vendors need to enter into a novation agreement with Arranmore Developments as well as individual purchasers for the individual lots. This way all the 3 parties would be protected and the purchaser would not only have recourse against the vendor but also against Arranmore Developments Ltd in the event that they did not perform their part of the deal.”

[9] The solicitor concluded by requesting Prema's solicitors to provide a draft novation agreement for approval.

[10] In response Prema's solicitor stated Prema would cooperate with regards to any necessary deed of novation. The plaintiff also wrote to the defendants' solicitors confirming that it was happy to enter into a deed of novation “should you wish to provide one”.

[11] By letter dated 25 June 2008 the defendants' solicitors advised: “I look forward to receiving the deed of novation...”.

[12] The following day the plaintiff wrote to the defendants' solicitors with notice requiring payment of the outstanding deposit within three working days. Four days later the defendants' solicitors responded:

“On 9 June 2008 you informed us that your client Prema Developments Limited have sold the property to Arranmore Developments Limited. This sale was completed without any notice to either us or our clients. Our clients had an agreement for sale and purchase of Lot 35 of the subdivision of the property which we understood your client was completing. My client had not only acquitable (sic) but legal interest in the land and inspite of that your client has sold the property to Arranmore Developments Limited in breach of the sale and purchase agreement with our client ...”

“This is pure repudiation of the contract on the part of your client and I inform that my clients accept your repudiation and hereby cancel the agreement which my clients had entered into...”

[13] The following day Prema’s solicitors responded:

“The assignment by Prema... to Arranmore... of the vendor’s rights under the sale and purchase agreement with your client does not constitute a repudiation of the Agreement and does not provide your clients with any grounds to cancel the Agreement.”

[14] Subsequent correspondence from the defendants’ solicitors disclosed their proposition that the agreement for sale and purchase was voidable because Prema had on sold the property to a third party without the knowledge of the defendants thereby “materially altering the contract”.

[15] In due course demand was made by the plaintiff for settlement of the purchase price. There was no settlement and settlement notices were issued. These proceedings have followed.

The issues essentially

[16] They involve a claim related to the fact that Mrs Khan did not sign the agreement, and because of Prema’s assignment of vendor’s rights when it sold its interest in the development to Arranmore.

Summary judgment principles

[17] The principles in these kinds of cases are clear. As summarised by the Court of Appeal in *Krukziener v Hanover Finance Ltd* [2008] NZCA 187:

“The question for this Court is whether the defendants have a defence to the claim, that is, that there is no real question to be tried: *Pemberton v*

Chappell [1987] 1 NZLR 1. The onus is on the plaintiff but where its 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* (1997) 11 PRNZ 66 (CA). The Court does not normally resolve material conflicts of evidence or assess the credibility of deponents. But it need not accept uncritically evidence that is inherently lacking in credibility, as for example where the evidence is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable: *Eng Mee Yong v Letchumanan* [1980] AC 331. In the end the Court's assessment of the evidence is a matter of judgment. The Court may take a robust and realistic approach where the facts warrant it: *Bilbie Dymock Corp Ltd v Patel* (1987) 1 PRNZ 84 (CA).

Considerations

Whether contract incomplete because not signed by Mrs Khan

[18] The evidence discloses that the defence related to Mrs Khan concerning the absence of Mrs Khan's signature, was not raised at all until the filing of the defendants' opposition to summary judgment. Mrs Khan deposes it was the intention of the parties that they would only be bound after everyone had signed. But, there is no affidavit from Mrs Khan at all about this. If she maintained that position arguably she had duty to speak out about it. But there was no demur even from her solicitor, until these proceedings.

[19] As is evident from the correspondence from the defendants' solicitors it was never asserted Mrs Khan, or for that matter Mr Khan was not liable for those same reasons raised by the notice of opposition.

[20] I accept the submission that by Mrs Khan remaining silent she encouraged Prema to believe the agreement was binding and enforceable.

[21] I accept therefore the contract is enforceable against both defendants notwithstanding the absence of Mrs Khan's signature because Mrs Khan is estopped from denying that Mr Khan was her authorised agent to sign the agreement on her behalf. In the circumstances Mr Khan's deposition suggesting otherwise cannot be relied upon.

[22] Even if I was wrong in that conclusion the agreement is enforceable against Mr Khan separately because, and in this respect I adopt plaintiff's counsel's submission, on the proper construction of the agreement and having regard to the context and surrounding circumstances, Mr Khan's signature and liability under the agreement was not conditional on Mrs Khan's signature being affixed to it.

Whether the assignment released defendants from contract

[23] The defendants' opposition based on circumstances relating to the assignment of Prema's rights to it is also, I believe, misunderstood by the defendants.

[24] For the defendants it is submitted there was no novation – by which Prema's rights would have transferred to the plaintiff by agreement with the defendants.

[25] The defendants' position appears to be that because the defendants never agreed to accept the assignment of Prema's rights to the plaintiff they have no separate contract with the plaintiff and therefore are not party to the arrangements between Prema and the plaintiff.

[26] The law is clearly stated in *McMorland's Sale of Land* at clause 10.10:

“The vendor has the same right according to ordinary contractual principles to assign the benefit of the contract as does the purchaser. Such assignments frequently take the form of a transfer to the assignee of the legal estate in the land, subject to the right of the purchaser, rather than merely an assignment of the right to receive the purchase money. This raises rather different issues than apply to an assignment by a purchaser. However, provided the assignee accepts and carries out the liabilities of the vendor in regard to the transfer of title to purchaser, such an assignment is good because there is no personal element in the benefit to which the purchaser is entitled; it is merely necessary that the purchaser be placed on settlement to become the registered proprietor, an obligation which is not personal to the contracting vendor. Equally, provided the purpose of the assignment is not to deprive the purchaser of the benefit of the contract of purchase, an assignment pursuant to which both the assignor and assignee intended to carry out the terms of the contract of sale is not a repudiation of that contract.

Unless there has been a novation, the contracting vendor remains liable to the purchaser for the performance of the vendor's obligations under the contract.”

Summary

[27] Arguable defences do not arise from either of the claims made on behalf of the defendants. The terms of the agreement clearly bind them both jointly and severally as purchasers and subject to purchaser's obligations which have not been fulfilled. That position is reinforced by reasonable inferences to be obtained from the parties correspondence conducted through the defendants' solicitors.

[28] Of course the plaintiff would have been happy to conclude a novation agreement by which it assumed Prema's rights as vendor, for that was not obtained by the assignment of Prema's rights. But the fact that that did not occur did not defeat whatever rights the defendants had against Prema by virtue of their agreement for sale and purchase. Those obligations and covenants remained, notwithstanding the assignment the defendants' settlement obligations were required to be completed with the plaintiff. An assignment of one's interest as a vendor is not an abdication of one's obligations as a vendor.

Judgment

[29] There is an order for specific performance of the agreement to bind the defendants, jointly and severally.

[30] Leave is reserved to the plaintiff to apply for such further and/or ancillary orders as may be appropriate to give effect to the decree of specific performance.

[31] Costs are awarded to the plaintiff on a category 2B basis together with disbursements as fixed by the Registrar.

Associate Judge Christiansen