IN THE COURT OF APPEAL OF NEW ZEALAND

CA70/2009
[2009] NZCA 420

BETWEEN	NAPIER HEIGHTS HOLDINGS LIMITED First Appellant
AND	NAPIER HEIGHTS LIMITED Second Appellant
AND	CROWN HEALTH FINANCING AGENCY Respondent

Hearing: 14 September 2009

Court: Hammond, Harrison and Miller JJ

Counsel: D J Goddard QC and S L Rees-Thomas for Appellants
G M Illingworth QC and P J Reardon for Respondent

Judgment: 21 September 2009 at 3 pm

JUDGMENT OF THE COURT

A The application for leave to adduce evidence is allowed.

B The appeal is allowed.

C The summary judgment entered against the appellants is set aside.

D The respondent must pay the appellants costs for a complex appeal on a Band A basis and usual disbursements. We certify for two counsel, including travel costs for the appellants' Wellington-based counsel.

REASONS OF THE COURT

(Given by Hammond J)

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Introduction

[1] This is an appeal from a summary judgment ordering the specific performance of an agreement for sale and purchase of the former Napier Hospital site: HC WN CIV 2008-485-1787 19 December 2008.

[2] There is also an application for leave to adduce evidence on the appeal.

Background

[3] In the High Court, the Crown Health Financing Agency ("CHFA") as vendor applied for summary judgment against Napier Heights Holdings Limited and Napier Heights Limited ("NHH") as purchasers under an Agreement for Sale and Purchase ("the Agreement"). The Agreement provided for the sale and purchase of land and buildings in Napier representing the former Napier Hospital site. The CHFA was effectively acting as agent for the Hawkes Bay District Health Board on this sale. The CHFA sought specific performance of the Agreement and/or damages. The alternative relief of an award of damages was not pursued by CHFA in the summary judgment application.

[4] In 2006, the CHFA embarked on a sale process of the former Napier Hospital site. It pursued a sale by tender, with tenders closing on 11 August 2006. In June 2006, Mr Aharoni, the managing director of NHH, expressed interest in the

property. He was provided with an Information Memorandum and subsequently had a number of discussions with Mr Sweetapple, a commercial property consultant for CHFA. Mr Sweetapple told Mr Aharoni that the CHFA would withdraw the property from tender if and only if it received an offer of at least $20 m.

[5] In July 2006, the CHFA provided a further memorandum to Mr Aharoni on behalf of NHH entitled "Former Napier Hospital – Valuation of Site" ("Valuation Memorandum"). This Valuation Memorandum had attached to it a valuation report from a registered valuer for a much smaller block of land across the road from the property the subject of this litigation. The purpose of it was to provide Mr Aharoni with an estimate of the value of the property, and it sought to persuade him that the value of the property was in excess of $32.5 m.

[6] The Valuation Memorandum reads as follows:

> We obtained a valuation of the property directly across the road from the main site referred to as the Annex (the small white building next to the new apartments) from John Reid in July 2005 for an offer back to the formal owners. The property is basically land value only and is a steep site of 2074 psm. The valuation was $1,250,000 which equates to $602 psm of land. Today with the increase in value that has occurred, the site is probably worth $750 psm of land.
>
> If we apply a land value rate to the site we are selling of even $450 psm that would give a value of $22 m plus there is obviously some value in the Tower block and other buildings. These buildings total approximately 21,000 psm and at a say value of $500 psm that would give $10.5 m for improvements that can be used by the buyer and have intrinsic value as they cannot be replicated under the present zoning rules. You could of course sell off a building a separate title and re-coup a substantial sum e.g. the Arohina building.
>
> This may help with your offer … over to you.

[7] On 3 August 2006, NHH submitted a written offer of $20 m. This offer was accepted by the CHFA, an agreement for sale and purchase was signed by the parties, and a deposit of $1.5 m was paid.

[8] Clause 15.2 of the Agreement provides:

> The purchaser warrants and undertakes that it has entered into this Agreement entirely in reliance on its own judgment and enquiries, and not on the basis of any warranties, undertakings, advertisements or

> representations made by or on behalf of the vendor, any agent of the vendor or any officer or employee of the vendor's agent.

[9] The purchase price of $20 m related to the whole of the property, comprising eight different titles. The largest of these titles contained the Napier Hospital Tower Block. It was agreed that the settlement date for the land other than the Tower Block ("the balance land") was to be 30 April 2008, with settlement in respect of the Tower Block occurring at a later date.

[10] Clause 26.1 of the Agreement governed the allocation of the purchase price between the eight titles comprising the property. It provided as follows:

> Prior to the possession date, the Vendor will allocate the purchase price (less any deposit paid) between the eight titles comprising the property, such allocation to be based on a valuation obtained by the Vendor for this purpose.

[11] On 29 April 2008, the CHFA advised NHH that the valuers Telfer Young had undertaken the allocation of the purchase price in accordance with cl 26.1. $11,750,000 or 58.7 per cent of the purchase price was allocated to the Tower Block, with the remaining $8,250,000 or 41.3 per cent allocated between the balance land titles.

[12] The settlement in respect of the balance land did not occur on 30 April 2008.

[13] NHH wrote to CHFA through their solicitors on 2 May 2008, raising two issues. First, NHH did not accept that the allocation of the purchase price had been properly carried out. Secondly, NHH claimed that it had wrongfully been denied its right to "early access", in contravention of cl 28 of the Agreement.

[14] On 17 July 2008, CHFA issued a settlement notice for the balance land, including rates and penalty interest. The time for complying with the settlement notice expired on 5 August 2008. On 14 August 2008, CHFA filed the present application for summary judgment.

[15] In response, on 25 September 2008, NHH wrote to CHFA purporting to cancel the Agreement, identifying four grounds: pre-contractual misrepresentation;

and breaches of cls 28, 26 and 22 (the latter pertained to confidentiality). CHFA did not accept this letter as a valid cancellation and considered it to be repudiation under s 7(2) of the Contractual Remedies Act 1979 ("CRA"). On the basis that settlement had not yet occurred, CHFA sought an order by way of summary judgment for specific performance of the Agreement.

[16] Associate Judge Gendall entered summary judgment granting the CHFA an order for specific performance of the Agreement.

The application for leave to adduce evidence

[17] Mr Goddard QC for NHH applies for leave to admit six further documents contained in the affidavit in support of the application by Mr Aharoni to adduce additional evidence in support of the appeal. The grounds on which leave is sought are as follows:

(a) The further evidence is brief, consisting only of six documents.

(b) The documents go to the heart of the issues in this appeal, and in particular the defences raised by NHH.

(c) The documents were not in the possession of NHH at the time of the summary judgment hearing, and were only obtained in May 2009 through a request made to the Office of Treaty Settlements under the Official Information Act 1982. Similar requests to CHFA for such documents have been refused.

(d) It is clear from the documents themselves that the originals were in CHFA's possession when the summary judgment application was heard by the High Court. It is submitted these documents should have been disclosed to the Court by the CHFA in the affidavits filed in support of its application for summary judgment, or copies should have been provided to NHH so that they could place them before the

Court: *Comalco-CCH Aluminium v Chapman* (1992) 5 PRNZ 382 (HC).

[18] In relation to [17](c) above, the CHFA refused NHH's requests under the Official Information Act as follows: "against the above background [the summary judgment litigation], CHFA has decided the disclosure of the information … is likely unreasonably to prejudice the commercial position of CHFA and of the Hawkes Bay District Health Board."

[19] The documents, which were eventually obtained by the appellants from the Office of Treaty Settlements, include:

(a) A 2004 valuation report of the Napier Hospital site prepared by a registered valuer for the Hawkes Bay District Health Board.

(b) A letter from the valuer to the District Health Board, identifying the "market value" of the 7.2 hectares of land including the property relevant in this litigation as $12.5 m plus GST.

(c) A copy of a "Vendor Agency Disclosure Form" prepared by Mr Sweetapple, recording the "most recent valuation held" as $12.5 m plus GST.

(d) A letter signed by Mr Sweetapple to Mr Hayward of the Property Group, stating that "logistically and financially" subdividing the property would be a "major exercise" as "the existing water, storm water and sewerage are some 80 years old and do not comply with current standards. It is the Council's objective that any subdivision would trigger the replacement of all these services over the five hectare site."

[20] Mr Aharoni's affidavit concludes as follows (at 2.3):

> I can say with complete confidence that if I had been aware of the existence of these documents or of the information which they contained at the time when Mr Sweetapple gave me his "Valuation Memorandum", I would not

> have relied on Mr Sweetapple's estimated value, and the Appellants would not have entered into a contract to purchase the Property for $20 million plus GST.

[21] Mr Illingworth QC for the CHFA opposes the application for leave to adduce evidence. He notes that it was common ground between the parties that, prior to sale, Mr Sweetapple had forwarded to Mr Aharoni a 2006 Dominion Post article which stated:

> The estimated sale value of the old Napier hospital site is soaring, with Hawke's Bay District Health Board now expecting more than $20 million.
>
> The disused hospital is on a prime 4.9-hectare (12-acre) site at the western end of the Napier hill. Tenders close on August 11.
>
> It has a ratable value of $7.1 million. Early estimates of its sale value were $10 million to $12 million.
>
> District health board chairman Kevin Atkinson said the board was budgeting for a sale price of $20 million. He expected the actual figure would be comfortably more. He had heard that tenderers were proposing a wide range of uses for the site, from refurbishment of existing buildings to demolition of everything including the landmark eight-storey tower block.
>
> Crown Health Financing Agency chief executive Graeme Bell, who is overseeing the sale, predicted a price well over $12 million yesterday.
>
> "There has been strong interest throughout New Zealand from people who believe the site has enormous potential for a range of possibilities, including residential development, apartments, private hotel and retirement villages," he said.
>
> "This is a prime real estate opportunity in one of New Zealand's most popular provincial cities. It is within minutes of the city centre and it commands some of the most spectacular views in New Zealand."
>
> Mr Atkinson said the board would not actually receive anything like the final selling price. "We've already got $3 million of it, and then we get 85 per cent of the rest after expenses have been deducted." Those expenses would be in the millions.
>
> The cash could not be used for operational expenses, or to cut the board's $13 million hospital services deficit.
>
> Health Minister Pete Hodgson had written to the board saying the money could be used only for capital works such as new buildings or extensions.
>
> The board had budgeted more than $11 million for new buildings over the next three years, Mr Atkinson said. This was mainly for new mental health facilities.

> If the site fetched less than $20 million the board would have to borrow the difference to pay for the buildings.

[22] Despite being advised of the "early estimates" via this article, NHH did not ask CHFA for any valuation reports or other documents prior to making its offer to purchase the property. The first attempt by NHH to obtain copies of any valuation reports was in February 2009, over two months after the High Court had granted CHFA summary judgment. The notice of opposition concludes:

> In the absence of a request for more detailed information concerning the earlier estimates of value, about which Mr Aharoni was expressly advised, there is no basis for a contention that the respondent engaged in misleading or deceptive conduct by failing to supply that information.

[23] The question of whether further valuation reports were in existence was raised during argument in the High Court. The Associate Judge rejected NHH's argument that the reference in the Dominion Post article to "early estimates" indicated that CHFA was in possession of valuations suggesting a much lower figure than the estimate contained in the Valuation Memorandum, and that those valuations had not been disclosed to NHH (at [33]). He concluded that "*there is no evidence* before the Court confirming that [CHFA] was in possession of other valuations" (at [34]) (emphasis added). However, the Associate Judge also indicated that "failure to disclose the existence of earlier valuations might in such circumstances amount to a 'half-truth' misrepresentation" (at [34]).

[24] Rule 45(1)(b) of the Court of Appeal (Civil) Rules 2005 relevantly provides that the Court may, on the application of a party, grant leave for the admission of further evidence on questions of fact by affidavit. In *Erceg v Balenia Ltd* [2008] NZCA 535, this Court articulated the requirements that apply in a r 45 application (at [15]):

> The Supreme Court has confirmed that the well understood and firmly established principles developed under previous rules remain: *Paper Reclaim Ltd v Aotearoa International Ltd* [2007] 2 NZLR 1. Those requirements are that the evidence be fresh, credible and cogent. It will not be regarded as fresh if it could, with reasonable diligence, have been produced at the trial: *Rae v International Insurance Brokers (Nelson Marlborough) Ltd* [1998] 3 NZLR 190 at 192 (CA). Particular weight will be accorded in summary judgment proceedings to the need for finality: it is only in exceptional circumstances that the Court will permit further evidence to be filed on appeal: *Lawrence v Bank of New Zealand* (2001) 16 PRNZ 207 (CA).

[25] We are satisfied that the evidence sought to be adduced would establish that the CHFA was in possession of lower valuations, albeit ones that would substantiate the "early estimates" alluded to in the Dominion Post article. But, at the level of principle, Mr Illingworth's emphasis on NHH's failure to request valuation reports is misconceived. See *Comalco-CCH Aluminium v Chapman* at 384:

> It is for the plaintiff to put the evidence supporting its claim *and anything that may be of detriment to the plaintiff* before the Court in the initial affidavit. The defendants then have the right of reply.
>
> (Emphasis added.)

[26] NHH's application for leave to adduce further evidence is allowed. "Reasonable diligence" is the lynchpin of the analysis in fresh evidence applications in appeals from summary judgment proceedings. It cannot be said that NHH was not reasonably diligent in attempting to obtain access to the "early estimate" valuations, given the Official Information Act requests undertaken but refused to them. Moreover, in our view, it was the CHFA's obligation to introduce this evidence, even if it operated to its detriment, in the first-instance summary judgment application. The evidence is material, and for reasons we will shortly come to, there is an arguable case on the merits meaning that summary judgment should not have been entered here.

Arguable defences

Introduction

[27] The admission of this further evidence necessarily means that, in relation to some significant issues, this Court is obliged to consider those points on a different footing than they stood before the Associate Judge.

[28] That said, we are of a clear view that this is not an appropriate case for the entry of summary judgment. Where the defence raises questions of fact that can only be determined at a trial, it is not appropriate to enter summary judgment: *Pemberton v Chappell* [1987] 1 NZLR 1 (CA). If there is an arguable defence that turns on disputed facts, summary judgment should not be entered: *Doyles Trading*

Co Ltd v West End Services Ltd [1989] 1 NZLR 38 (CA). Of particular relevance here is that the Court should be wary of shutting out defences that cannot be proved without recourse to discovery and interrogatories: *Middleditch v NZ Hotel Investments Ltd* (1992) 5 PRNZ 392 (CA).

[29] The argument before us covered a wide range of matters, but we think there are two defences raised by NHH which raise particular difficulties and which require that this matter be determined at trial. First, that the settlement notice given by the CHFA was invalid, as it was based on an apportionment of the purchase price that was not carried out in the manner required by cl 26. Secondly, that the contract was induced by misrepresentation in the Valuation Memorandum.

[30] For the sake of completeness, we note that the Associate Judge concluded that it was fair and reasonable that the cl 15 exclusion (at [8] above) should be conclusive between the parties: at [46].

The purchase price allocation clause (cl 26)

[31] The Associate Judge dismissed the argubility of NHH's defence based upon cl 26. He found that there was a clear agreement that the purpose of the clause was "simply to allocate the $20 million price on a pro rata basis" across the eight certificates of title: at [52]. He rejected also an argument that a valuation was never carried out: at [53]. He was satisfied that in the absence of fraud the parties were contractually bound to the allocation obtained by the CHFA: at [54].

[32] Clause 26.1 (at [10] above) contemplates a two-stage process for determining the allocation of the purchase price: that the vendor would obtain a valuation for that purpose, and the vendor would base the allocation on this valuation.

[33] As to the interpretation of the term "valuation", on the basis of *Boat Park Ltd v Hutchinson* [1999] 2 NZLR 74 (CA), Mr Goddard argued that the report obtained from Telfer Young was not a valuation. The consequence of his argument on this point, if correct, would be that the obligation to settle has not yet arisen, and there has not been any valid settlement notice.

[34] Further, Mr Goddard argued that cl 26 requires the vendor to act in good faith in seeking a valuation where used in cl 26.1, and does not permit the vendor to go "valuation shopping" until it gets a result it likes. Mr Aharoni gave evidence that at least one other valuer had provided a valuation to CHFA for the purpose of cl 26.1, which the CHFA elected not to use. Even if the Court were to find that there was no implied obligation of good faith in cl 26.1, the CHFA's lack of good faith in "valuation shopping" should have a bearing, in Mr Goddard's submission, on the informed exercise of the remedial discretion. Because specific performance is a discretionary equitable remedy, it would have been open to the Associate Judge to find that the conduct of the CHFA disentitled it from relief.

[35] Mr Reardon, who argued this part of the case for the respondents, criticised NHH's argument that the word "valuation" had a literal and single meaning, regardless of context. He argued that all the parties intended was that the vendor alone was to allocate the purchase price; that decision was to be based on valuation advice; and the vendor was to obtain a valuation "for this purpose". He submitted that the Telfer Young report complied with the requirements of cl 26 of the Agreement.

[36] We think there was clearly room for argument under this head. The normal meaning of the word "valuation" is at odds with the somewhat mechanistic interpretation placed upon it by CHFA in this instance. Certainly, the total figure to be allocated was $20 m. However, the Telfer Young report was nothing more than a pro rata adjustment of the purchase price amongst the eight titles, with what appear to be arbitrary adjustments for position, particularly sea views.

[37] It is of course the case that sometimes a court can and should determine the meaning of a contractual provision on a summary judgment application. But here, the clause was unusual and had a very distinct context. The operation of cl 26 is not restricted just to that provision. There are downstream consequences flowing from it, relating to finance and the future release of some titles.

[38] The CHFA has chosen to put a meaning on the clause that gives the appellants no rights whatsoever, even in the case of an egregious misallocation. Mr

Reardon accepted in oral argument that there must be some outer limit to what the valuer and the vendors could do. In our view, that concession was rightly made; however, it follows that there is a difficult point of construction of the Agreement, which would depend upon further evidence as to the way the Agreement was to operate in the particular contexts which would arise. It is arguable that the Agreement required that the valuer place a valuation on the balance land and the Tower Block, then apportion the purchase price in the same proportions.

[39] In our view, this proceeding needed to go to trial on the cl 26 point alone.

The misrepresentation and Fair Trading Act 1986 defences

[40] Mr Goddard contended that NHH has arguable misrepresentation and/or misleading and deceptive conduct under the Fair Trading Act 1986 ("FTA") defences based on information contained in the Valuation Memorandum. Because these defences turned on documents in the sole possession of CHFA, Mr Goddard noted that these proceedings provide a textbook example of the dangers of entering summary judgment and dispensing with discovery and a trial.

[41] NHH assert that there is an arguable defence that the CHFA made express and implied representations that were false, and that some of these representations were known to be false by the CHFA and its agents. Mr Goddard argues that the Associate Judge erred in dismissing the misrepresentation and FTA defences on grounds including lack of supporting evidence in circumstances where the relevant evidence was solely in the possession of the CHFA. Mr Goddard further argues that cl 15 does not provide an answer to the misrepresentation claim for two reasons. First, at common law an exclusion clause is not effective to exclude liability for fraud. Secondly, s 4 of the CRA requires the court to assess whether it is fair and reasonable for the provision to be conclusive between the parties having regard to all the circumstances of the case.

[42] For the purposes of the appeal, NHH have prepared a draft amended statement of defence and counterclaim. If it is permitted to defend this claim on the

merits, it will proceed to file an amended pleading in this form. The key issues raised in the amended pleading are as follows:

(a) The CHFA made express and implied representations that were false and misleading, and that induced entry into the contract. NHH say that these misrepresentations: entitled them to cancel the Agreement under the CRA; are misleading and deceptive conduct which entitled them to relief under ss 9, 14 and 43 of the FTA; and disentitled the CHFA from equitable relief in the form of an order for specific performance.

(b) The CHFA did not comply with the requirements of the Agreement in respect of apportionment of purchase price. (This issue has been disposed of at [31]-[39] above.)

[43] Once the fresh evidence is admitted, as we have allowed, the respondents face considerable difficulties in resisting at least an arguable claim of misrepresentation. We are satisfied that the effect of cl 15 is also arguable. Both senior counsel developed careful submissions on the relevant legal principles, focusing on the constituent elements of a statement of opinion and the concept of inducement. However, it is unnecessary, and even undesirable, in setting aside a summary judgment that we should canvass all of the arguments and express our view on them lest anything which falls from this Court be regarded as determinative in a lower court. It is only necessary to indicate that there is an arguable misrepresentation defence on the basis matters now stand, albeit they are now on a different footing than they were before the Associate Judge.

[44] There is considerable room for argument about what was said, what was disclosed (and why the things which were not disclosed were not disclosed), and how the Valuation Memorandum should be seen in its particular context. On the law, this matter is one of those difficult cases where an opinion is tendered but it is said to cross the line into actionability. This in turn raises issues about where the edges of actionability lie. Historically, however, both the High Court and this Court

have been reluctant to determine such issues in the absence of specific findings of fact. And all the relevant facts have not yet been determined in this case.

[45] Because NHH have arguable defences that can only be tested at a trial after discovery, with the benefit of oral evidence and cross-examination to test credibility, we agree with Mr Goddard that this was not a propitious case for summary judgment.

Conclusion

[46] In the result, we allow the application for leave to adduce evidence.

[47] We allow the appeal, and set aside the summary judgment entered by Associate Judge Gendall.

[48] The respondent must pay the appellants costs for a complex appeal on a Band A basis and usual disbursements. We certify for two counsel, including travel costs for the appellants' Wellington-based counsel. This Court transferred the proceeding for hearing at Auckland, in a divisional court, to expedite the resolution of it.

Solicitors:
Kensington Swan, Wellington for Appellants
Cooper Rapley, Palmerston North for Respondent