IN THE SUPREME COURT OF NEW ZEALAND

SC 55/2005 [2005] NZSC 71

BETWEEN WHANGAMATA HOMES LIMITED

Appellant

AND PETER MARTIN JANSEN AND

VIVIENNE MARIE JANSEN

Respondents

Court: Tipping and McGrath JJ

Counsel: D J Taylor and D M Stuart for Appellant

C S Henry for Respondents

Judgment: 3 November 2005

JUDGMENT OF THE COURT

A. The application for leave to appeal is dismissed.

B. The appellant is to pay the respondents costs in the sum of \$3,000.00 plus disbursements, to be fixed, if necessary, by the Registrar.

REASONS

[1] Whangamata Homes Limited seeks leave to appeal against a summary judgment entered against it by the Court of Appeal. The company was ordered specifically to perform a contract into which it had entered with the respondents, Mr and Mrs Jansen. That contract involved the Jansens buying a unit in Whangamata which had been built by the appellant. The agreement contained, as clause 22, a provision to the effect that, if settlement had not occurred by 30 June 2003, either party could cancel by notice in writing to the other. On 30 September 2003 the appellant purported to cancel pursuant to this clause.

[2] The issue for the Courts below was whether the appellant had elected not to cancel or had waived its right to cancel by reason of its conduct between 30 June and

30 September 2003. That conduct was found to be consistent only with an intention

not to invoke the right to cancel. There was no dispute in the Court of Appeal as to

the legal principles which applied. The issue was to determine the consequences in

law of largely undisputed facts. In that respect the Court of Appeal differed from

Randerson J in the High Court. He had declined to enter summary judgment for the

Jansens.

[3] We are not persuaded that the case warrants the granting of leave to ventilate

again what is essentially a factual issue. We say that for two reasons. First, the

factual issue between these parties does not involve any matter of general or public

importance nor does it involve a matter of general commercial significance. The

appellant's comprehensive submissions have not persuaded us otherwise. None of

the criteria for the granting of leave to appeal, as set out in s 13(2) of the Supreme

Court Act 2003, have been demonstrated.

[4] Furthermore, we have no doubt that the Court of Appeal was correct in finding

on the facts of this case a clear election or waiver preventing the appellant from what

would otherwise have been an ability to cancel in terms of clause 22. That clause

cannot possibly be construed as giving a continuing, day to day, right of

cancellation, unrestrained as to time and irrespective of the conduct of the appellant

in the meantime.

[5] In summary, our view is that it is not necessary in the interests of justice for this

Court to hear and determine the proposed appeal. Hence, in terms of s 13(1), we are

obliged to decline the application for leave, with costs as noted above.

Solicitors:

D M Stuart, Waihi for Appellant

Witten-Hannah Howard, Takapuna for Respondents