IN THE SUPREME COURT OF NEW ZEALAND

SC CIV 23/2004
[2005] NZSC 39

BETWEEN	PARSOA BAHRAMITASH Appellant
AND	SATISH KUMAR AND SUNILA KUMAR Respondents

Hearing:	21 June 2005
Court:	Elias CJ, Gault, Keith, Blanchard and Tipping JJ
Counsel:	D G Smith and J C Bassett for Appellant D Singh for Respondents
Judgment:	21 June 2005
Reasons for Judgment:	30 June 2005

JUDGMENT OF THE COURT

A. The appeal is dismissed save that the decree of specific performance made by the Court of Appeal is varied as follows.

B. The date on which settlement is to take place is to be 5 July 2005. Interest is to be payable by the appellant as from 11 September 2003 to 5 July 2005 in accordance with cl 3.10(2) of the General Terms of Sale of the Agreement for Sale and Purchase.

C. The appellant is to pay to the respondents costs of $15,000 in respect of the appeal to this Court together with disbursements to be fixed if necessary by the Registrar.

REASONS

(Given by Blanchard J)

[1] At the conclusion of the hearing the Court gave judgment dismissing the appeal. We said that reasons for judgment would follow. We now give those reasons.

The facts and the judgments below

[2] The appellant, Mr Bahramitash, agreed to sell a residential section at Mangere Bridge, Auckland to the respondents, Mr and Mrs Kumar, for $160,000. The contract was dated 21 August 2003 and was on the Auckland District Law Society/Real Estate Institute of New Zealand form.[1] A third party deposited a large quantity of soil on the section which buried and disturbed some of the survey pegs. There is an unchallenged finding of fact by the High Court that this occurred after the contract was entered into. Both parties accepted that this caused damage to the property but did not render it untenantable.

[3] Two clauses of the General Terms of Sale of the agreement form were relevant to this occurrence:

> 4.1 The property and chattels shall remain at the risk of the vendor until possession is given and taken.
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> 4.2 If, prior to the giving and taking of possession, the property is destroyed or damaged, and such destruction or damage has not been made good by the possession date, then the following provisions shall apply:
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> …
>
> (2) If the property is not untenantable on the possession date the purchaser shall complete the purchase at the above price less a sum equal to the amount of the diminution in value of the property.
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> 5.1 The vendor shall not be bound to point out the boundaries of the property except that on the sale of a vacant residential lot which is not limited as to parcels the vendor shall ensure that the property is pegged at the possession date.

[1] Seventh Edition (2) July 1999.

[4] The date fixed for settlement and the giving and taking of possession was 11 September 2003. By letter of 3 September the purchasers, through their solicitor, called upon the vendor to remove the soil from the property and also to point out the pegs or, if unable to do so, "to have the property surveyed and marked with appropriate pegs." The letter said that if these works were not done prior to settlement, the purchasers would deduct compensation of $10,000 and tender the balance of the price.

[5] In response, Mr Sutcliffe, the solicitor for the vendor, said that the pegs had been shown to the purchasers on 29 August and that the agreement made no provision for the vendor to remove the soil. He said that the vendor required "settlement in full" on 11 September.

[6] Before the settlement date Mr Sutcliffe sent a settlement statement which sought payment of the whole of the price, giving credit only for the deposit and an apportionment of rates. The purchasers paid the stipulated amount into their solicitor's trust account.

[7] On 11 September the situation on the property was unchanged. Mr Sharma, a staff solicitor employed by the purchasers' solicitor, Mr Singh, wrote that day to the vendor's solicitor complaining again about the failure "to point out the boundary pegs" and about the presence of the soil. Mr Sharma said that correspondence from the vendor's solicitor gave "clear indication that it would be futile to tender settlement sum less $10,000 demanded as compensation." He went on:

> If we are wrong on this, please advise otherwise no formal tender will be made.

[8] On the same day Mr Sharma made a file note of a conversation with Mr Sutcliffe:

> Spoke with Mr Sutcliffe. He says his instructions are not to allow any credit for the compensation, or to hold any money back.

The next day, 12 September, Mr Sharma made another file note:

> Mr Sutcliffe says his client will arrange for a surveyor to peg the property, but doesn't know exactly when this will be done. His instructions are to settle for full amount as per Statement, or not at all.

[9] In fact a re-surveying and reinstatement of the pegs was attended to on that day. Once this was done, Mr Sutcliffe sent Mr Sharma a settlement notice, dated 12 September, which called upon the purchasers to settle within 12 working days, time being of the essence.

[10] There was no tender of settlement within that time and on 1 October the vendor's solicitor gave notice of cancellation of the contract. The purchasers did not accept that the cancellation was valid and sought a decree of specific performance from the High Court. In a judgment delivered on 4 March 2004,[2] Williams J dismissed their claim and made a declaration on the vendor's counter-claim that the agreement had been validly cancelled. He said that it was Mr Bahramitash's obligation to have the soil removed. But, crucially, he found that the purchasers should have tendered the sum required in the settlement statement less a sum equal to the diminution in value of the property, ie the cost of removing the soil, "supported by at least one quote to give credibility." Williams J took the view that there was no basis in the evidence for reaching a conclusion that tender would have been futile and therefore unnecessary:[3]

> Even in discussions Mr Sharma said he had with Mr Bahramitash's solicitor, it was never suggested that tender was not required, still less tender at a sum less than that shown in the settlement statement. Indeed, Mr Sutcliffe's evidence was that had the solicitors made a formal tender to him of the sum shown in the settlement statement less an amount for the removal of the soil supporting that amount by reference to quotes, he would have taken Mr Bahramitash's instructions on the point and may well have been instructed to accept the reduced settlement figure.

[11] The Kumars appealed to the Court of Appeal. They included in their points on appeal the ground that the High Court had erred in finding that it had not been shown that tender would have been futile.

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2 (2004) 5 NZCPR 387.
3 At [58].

[12] The Court of Appeal allowed the appeal without addressing this question. In a judgment delivered by Hammond J for the Court on 8 November 2004,[4] it was held that the contract had not been validly cancelled because Mr Bahramitash had not, in terms of clause 9.1(2) of the agreement, been "in all material respects ready able and willing to proceed to settle" when he issued his settlement notice. That was because he was "not prepared to give what he had contracted to give, namely, the subject land without the accretion of the spoilage".[5] Because of the invalidity of that notice, the contract remained on foot. The Court of Appeal said that the Kumars "may well have been advised to tender formal settlement with a lesser figure to take account of the spoilage". But they were not thereby precluded from advancing a claim for specific performance, if necessary with an abatement in price.[6] The adjustment provision in clause 4.2(2) was not, the Court said, an exclusive remedy.[7]

[13] The Court ordered specific performance with an abatement for compensation in the sum of $2,000.

Discussion

[14] On the vendor's appeal to this Court, the purchasers gave notice that they supported the judgment below on the ground that, contrary to the finding of the High Court, they had been ready, willing and able to settle and were not obliged to tender settlement, the appellant having made it clear that it would be futile to do so as he would not accept any tendered amount less than the full purchase price. The case in fact turns on this point and its relationship to the obligations of the parties under clause 4.2(2). Contrary to the view taken by the Court of Appeal, the subclause does exclusively govern what each party must do if the property, which under clause 4.1 is at the risk of the vendor until possession is given and taken, is damaged after the contract is entered into but is not rendered untenantable. The meaning of "untenantable" was not in issue before us. The appellant was, like the Court of Appeal in *DFC New Zealand Limited v Samson Corporation Limited*,[8]

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4 (2005) 5 NZ ConvC 194,111.
5 At [28].
6 At [33] and [34].
7 At [36].
8 (1994) ANZ ConvR 216.

content to adopt the statement of Robertson J in that case[9] that it means able to be used and enjoyed by a tenant. Mr Smith, for the appellant, also referred in written submissions to Dr McMorland's comment that "the test would seem to be whether the property as a whole has been rendered unfit for the occupation and use of someone assumed to want the property for the same purpose as the purchaser".[10] In a context where the property is being sold rather than leased, this seems apt.

[15] Clause 4.2(2) applies only if the damage has not been made good by the possession date. The vendor can choose not to remedy the damage. So Mr Bahramitash was not in contractual default merely because he refused to remove the soil from the section. Having plainly made that choice he was, however, obliged to accept a diminution in the price equivalent to the amount by which the value of the property had been affected. He would therefore be in default if he failed to settle with the purchasers when they tendered an appropriate sum.

[16] A vendor's settlement obligation, to convey the property, is interdependent with the purchaser's obligation to pay in accordance with the contract. It is not an obligation to be performed in isolation. Therefore, ordinarily, a vendor will be in default in relation to that obligation only if the vendor has failed to settle when a proper tender of settlement has been made. In *Foran v Wight* Deane J of the High Court of Australia described the position of the parties in relation to settlement:[11]

> In the ordinary case of a contract for sale of land, the contractual obligations of the parties to complete the sale are concurrent and conditional in the sense that the vendor is not obliged to convey the land and the purchaser is not obliged to pay the purchase price otherwise than upon concurrent performance by the other party. Neither vendor nor purchaser will be guilty of breach of contract if he fails to complete within the time or upon the day fixed by the contract unless the other party tenders performance of his concurrent obligations.

Clause 3.7 of the ADLS/REINZ form confirms this position by providing that on settlement date the purchaser is to pay or satisfy the balance of the price (3.7(1)) and

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9 (1993) ANZ ConvR 479.
10 *Sale of Land* (2ed 2000), para 10.13(g).
11 (1989) 168 CLR 385, 433.

the vendor is "concurrently" to hand the documentation to the purchaser (3.7(2)), "the obligations in subclauses 3.7(1) and 3.7(2) being interdependent".

[17] It is, however, for the purchaser to begin the process of settlement by taking or transmitting the settlement sum to the vendor[12] – money goes to documents, as it is often put. Ordinarily, therefore, the vendor cannot be shown to have breached the contractual obligation to convey the property unless there has been a proper tender by the purchaser, and in response to that tender the vendor has exhibited an inability or unwillingness to deliver the title and other documentation required in terms of the contract.

[18] An indication from the vendor, by words or conduct, that a contractually proper tender by the purchaser would be futile has significance in two respects. First, the vendor cannot treat the purchaser as being in default by failing to make such a tender. Secondly, the vendor will be taken to have indicated that he or she is not ready, willing and able in all material respects to perform his or her settlement obligations.

[19] The vendor may of course expressly dispense with the need for formal tender by telling the purchaser not to bother. As Lord Mansfield said long ago, "[t]he party must show he is ready; but, if the other stops him on the ground of an intention not to perform his part, it is not necessary for the first to go further and do a nugatory act".[13] In *Mahoney v Lindsay*[14] the High Court of Australia concluded that the purchasers did not have to make formal tender where the vendor's solicitor told the purchasers' solicitor, who was seeking to make an appointment for settlement, that he did not have instructions to settle. Tender may also be unnecessary in order to demonstrate the vendor's default where the vendor has given an unambiguous indication of not being ready to settle. This happened in *Foran v Wight* where two days before the settlement date the vendors announced that they would not be ready to settle on the due date, in respect of which time was of the essence, because they

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12 *Plowman v Dillon* [1985] 2 NZLR 312, 327.
13 *Jones v Barkley* (1781) 2 Dougl 684, 99 ER 434.
14 (1980) 33 ALR 601.

had not registered a right of way as required by the contract of sale. The purchasers stopped trying to raise finance and two days after the due date gave notice of cancellation. The High Court of Australia held that in the circumstances the purchasers were not required to tender settlement because that would have been nugatory and futile.

[20] The conclusion that going through the motions of tendering would have been a futile exercise is not one which is lightly to be drawn. It is normally prudent, save in the clearest of cases, for the purchaser to carry out a formal tender so that the issue does not arise in litigation, as it unfortunately did in the present case. It is for the purchaser to prove that tender would have been futile. It is a matter which is judged objectively at the time when tender was otherwise due. It is not enough for a purchaser's solicitor to have subjectively concluded, however honestly, that the vendor will not perform the concurrent obligation in response to a tender of the sum which is due. The futility of the exercise must be clear; it must be shown to have been a foregone conclusion that the tender would not have been accepted or was not able to be accepted.[15] In other words, it must be shown that without any real doubt the vendor would either have refused to settle in response to a contractually proper tender or, if willing, would not have been in a position to do so. But a vendor who has by words or conduct plainly intimated an inability or unwillingness to perform the settlement obligation to convey the property will be regarded with scepticism if he or she later says that, contrary to what the purchaser had been told, if tender had in fact been made in terms of the agreement it would have been accepted.

[21] This brings us to Williams J's factual finding that on the evidence in the case it was not shown that tender in terms of clause 4.2(2) would have been futile. As we have noted, that finding was the subject of appeal and was not addressed by the Court of Appeal. For the reasons we have already given, the decision of the Court of Appeal was inconsistent with that finding. It is therefore necessary for us to consider it.

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15 *Band v Shearer* (1990) ANZ ConvR 631, 632 per Tipping J.

[22] It is notable that Williams J does not refer to the evidence of Mr Sharma concerning what he was told by Mr Sutcliffe about the vendor's attitude over compensation in the telephone conversations between the solicitors on 11 and 12 September, namely the evidence supported by Mr Sharma's two file notes which are set out above.[16] That may have been because the way in which the evidence was adduced was somewhat unsatisfactory. No mention was made of the file notes in Mr Sharma's examination-in-chief or cross-examination. They first appeared when he was being re-examined by Mr Singh. But, significantly and perhaps with a recognition that as Mr Sutcliffe had not yet given evidence an objection was unlikely to be sustained, Mr Dale, the trial counsel for Mr Bahramitash, indicated that he had no objection to the witness being referred to the file notes. Mr Sharma then read them out and gave their dates. He was asked whether he tendered them in evidence and said that he did. The notes of evidence record that Mr Dale said that he "does not need these documents produced". In this Court, Mr Smith was disposed to contend that all that was before Williams J in evidence was Mr Sharma's testimony and that the file notes had not become part of the evidence. In our view this submission was unrealistic. It is clear that trial counsel effectively consented to the content of the file notes becoming part of the evidence.

[23] Once the evidence of the two conversations as recorded in the file notes and confirmed by Mr Sharma is added to what is found in the earlier correspondence, particularly the letter on the settlement date in which Mr Sharma indicated to Mr Sutcliffe his understanding that tender of anything less than the amount demanded in the settlement statement would be futile, Williams J's finding is unsustainable. It has not been suggested that the file notes themselves were an unreliable record of the conversations. Mr Sutcliffe could hardly have been made it plainer to Mr Sharma, both on the settlement date and on the day on which the vendor's settlement notice was given, that it would be a complete waste of time tendering any sum less than the full balance of the purchase price. Whether or not the deduction of $10,000 which Mr Sharma had signalled might have been justified by clause 4.2(2) then became beside the point. We simply do not know what figure might actually have been tendered – a few days later when it was appreciated that the

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16 At [8].

pegs had been reinstated Mr Sharma was writing to seek $5,000 in compensation – but as Mr Sutcliffe was representing to Mr Sharma immediately before issuing the settlement notice that his instructions were not to allow any deduction at all, this is of no moment.

[24] It is true that when he gave evidence Mr Sutcliffe said that if Mr Sharma had come to his office with "a reasonable amount less a deduction", he would have delivered the title and a transfer. But, on the basis of what he told Mr Sharma on 11 and 12 September, that would have been contrary to his instructions from Mr Bahramitash. Regrettably, when Mr Sutcliffe gave evidence the file notes were not put to him for his comment, but he was asked about Mr Sharma's oral evidence that he (Mr Sutcliffe) was not prepared to settle unless settlement was made in full, and all Mr Sutcliffe was prepared to say was that he did not "recall saying that at all". That response is insufficient to contradict Mr Sharma's evidence, supported as it is by the contemporaneous file notes.

Conclusion

[25] For these reasons, we were brought to the conclusion that the High Court should have found that a tender of a lesser sum allowing for reasonable compensation in terms of clause 4.2(2) would have been futile and was accordingly unnecessary. It follows that the purchasers were not in default when the vendor's settlement notice was given. They were in a position to settle. Their money was in their solicitor's trust account. The vendor was in default in refusing to settle and his purported cancellation was not valid. The purchasers are therefore entitled to specific performance of the contract.

Solicitors:
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Shean Singh, Auckland for Respondents