

IN THE SUPREME COURT OF NEW ZEALAND

**SC 69/2005
[2006] NZSC 12**

BETWEEN	ROBERT JAMES SWETMAN AND WESTHAM HOLDINGS LIMITED Applicants
AND	GLOBE HOLDINGS LIMITED Respondent

Court: Elias CJ, Blanchard and Anderson JJ

Counsel: J E Dorbu for Applicants
P W Michalik for Respondent

Judgment: 27 March 2006

JUDGMENT OF THE COURT

A. The application for leave to appeal is dismissed.

B. Costs to the respondent of \$2,500.

REASONS

[1] This is an application for leave to appeal from a judgment dismissing an appeal to the Court of Appeal from the entry of summary judgment in the High Court. This Court has considered the written submissions in support of and in opposition to this application and has determined that it is unnecessary to have oral submissions.

[2] The applicants, as purchasers under an agreement for the sale of land, were required to pay a deposit. They failed to do so. The respondent then obtained summary judgment for specific performance.

[3] The vendor had wished to retain part of the transferred land. The mechanism for achieving this was a covenant by the purchasers to subdivide and transfer title to that part following conveyance of the whole area by the vendor. Amongst specific steps the purchasers had to take was the preparation and submitting of a survey plan to the appropriate authority for consent to the subdivision. One of the arguments now raised on behalf of the applicants is that the vendor itself has submitted a survey plan and has thereby pre-empted the applicants' ability to do so. Why that should be so is not adequately explained and, in any event, the issue seems largely factual.

[4] In the High Court the applicants resisted summary judgment for specific performance but did not seek to avoid the contract. On the contrary, they affirmed the contract and said they were prepared to complete.

[5] As the matter was presented in the High Court, there was plainly no impediment to a grant of specific performance. Nevertheless an appeal was brought, coupled with an application to the Court of Appeal to adduce further evidence. That included a valuation report prepared for the vendor by registered valuers and the application made by the vendor for resource consent. The Court of Appeal declined to admit that evidence, principally on the grounds of irrelevance and want of freshness.

[6] The provision for subdivision invokes s 225 of the Resource Management Act 1991, subs (1) and (2) of which deemed the agreement subject to certain conditions about the depositing of a survey plan and cancellation for delay in such depositing. Counsel submitted, in support of the present application, that by virtue of s 225, the obligation to take subdivisional steps lay on the vendor not the purchasers (notwithstanding the specific acceptance of that obligation by the purchasers in terms of the agreement itself); and that even if the burden were on the purchasers, a term must be implied into the contract that it remains conditional on the resource consent being granted.

[7] These arguments do not help the applicants because they are the parties charged under the agreement with the obligation to advance the subdivision. They cannot invoke their own default by seeking to rely on s 225(2) of RMA. Further, it

is likely that they would be regarded as effectively the vendor for the purposes of s 225(2) since they are taking the whole of the land and are obliged to subdivide off and convey back a minor part. In any event, the agreement provides its own remedy – payment of additional purchase price – if subdivision cannot be achieved within a fixed period.

[8] The Court of Appeal's decision not to allow additional evidence was orthodox in principle and unchallengable on its merits. But in any event, that aspect of the Court of Appeal's judgment engages no principle of general or public importance or of general commercial significance. The substantive decision of the Court of Appeal, which turns on its own facts, also gives rise to no question which meets the criteria for leave stipulated in s 13 Supreme Court Act 2003.

[9] Leave to appeal is declined with costs to the respondents of \$2,500.

Solicitors:
Murdoch Hall & Co, Auckland for Applicants
Morrison Kent, Wellington for Respondent