IN THE SUPREME COURT OF NEW ZEALAND

SC 12/2011
[2011] NZSC 38

BETWEEN	SHERMAN LIMITED Applicant
AND	ROY JAY HARLOW AND NANCY JEAN HARLOW Respondents

Court: Elias CJ, McGrath and William Young JJ

Counsel: C R Carruthers QC and J C G Cochrane for Applicant
G J Kohler and A M Cook for Respondents

Judgment: 11 April 2011

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed with costs of $2,500 to the respondent.

REASONS

[1] This application for leave to appeal is brought by the vendor under an agreement for sale and purchase of land that was being subdivided. The proposed ground of appeal arises from a dispute with the purchaser over the vendor's inclusion in an easement instrument, registered the day after the agreement had been entered into, of restrictive covenants in relation to use of the land. The covenants prohibited shooting of wild-life, motorcycling, go-carting and other noisome activities and also restricted the keeping of dogs on the land. None of these matters had been provided for in the agreement although there had earlier been some discussion concerning them. The purchasers, the respondents, were not made aware that the vendor had registered the easement instrument prior to issue of the title on 7 December 2007. A copy of the title was sent to the purchasers' solicitors on 20 December. They did not

actually learn of the covenants in the easement instrument until 26 March 2008. They objected to them on 4 April 2008.

[2] The agreement was on the REINZ/ADLS standard form (8th ed 2006). Clause 5.2(2) provided that the purchaser was required to give notice of "objections or requisitions arising out of the plan" within five working days after being given notice that the plan had been deposited and new titles issued for which search copies could be obtained. The clause provided that, in the absence of such notice, the purchasers were deemed to have accepted the title. The vendor gave successive settlement notices and, when the purchasers failed to settle, the vendor cancelled the agreement.

[3] The High Court Judge accepted the vendor's submission that the restrictive covenants included in the easement instruments were matters "arising out of the plan" in respect of which the purchaser was required by cl 5.2(2) to requisition title.[1] On appeal by the purchasers, the Court of Appeal[2] upheld their contention that the requisition clause did not apply so that the vendor's cancellation was unlawful. The vendor now seeks to appeal against that judgment, principally on the ground that it was incumbent on the purchaser to requisition title under cl 5.2(2) or a common law obligation and, as it failed to do so, the vendor properly gave settlement notices and later terminated the contract.

[4] While the High Court Judge took a different view, we consider the Court of Appeal's conclusion that the purchasers' objections to the restrictive covenants were not matters "arising out of the plan" is a correct interpretation of the clause and that the proposed challenge to that interpretation is not arguable. The easement instrument created various rights of way and service easements which did arise from the plan but no objection was taken to them. The view that the restrictive covenants arose out of the plan, because the same instrument incorporated them, is not tenable. They were unrelated to the plan or to anything needing to be done to have it deposited.

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1 *Sherman Ltd v Harlow* (2010) 11 NZCPR 387 (HC).
2 *Harlow v Sherman Ltd* [2010] NZCA 627.

[5] The vendor's application for leave and submissions also seek to rely on broader grounds for appeal in which they assert there was a common law duty on the purchasers to requisition title for the removal of the covenants. They did, however, raise objection within ten days of learning of the covenants. It cannot be said that they delayed unreasonably in doing so. The vendor also says the purchasers failed to assert their entitlement to compensation or equitable setoff or to respond correctly to the issue of the settlement notices. These arguments all turn on the particular circumstances. Some do not appear to have been raised in the Court of Appeal. None is capable of giving rise to an issue of general or public importance or otherwise providing a basis for us to hold that it is in the interests of justice that we give leave to appeal.

[6] The application is accordingly dismissed.

Solicitors:
McBreens, Hamilton for Applicant
O'Sheas, Hamilton for Respondents