IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA562/2023
[2024] NZCA 350

BETWEEN	JAY BATH Appellant
AND	ANNA KATARAINA WHAKARURU and SONNY MARUPO WHAKARURU (as trustees of the SONNY AND ANNA WHAKARURU FAMILY TRUST) Respondents

Hearing:	18 June 2024
Court:	Katz, Brewer and Downs JJ
Counsel:	T Nelson for Appellant J C Z Loh and R Rao for Respondents
Judgment:	30 July 2024 at 10.00 am

JUDGMENT OF THE COURT

A Leave is granted to adduce fresh evidence.

B The appeal is dismissed.

C The appellant must pay the respondents costs for a standard appeal on a band A basis and for a standard application on a band A basis, with usual disbursements.

REASONS OF THE COURT

(Given by Downs J)

The appeal

[1] The appellant, Jay Bath, agreed to purchase a residential property, in Manurewa, from the respondents, as trustees of the Sonny and Anna Whakaruru Family Trust (the property). The appellant defaulted. The respondents promptly resold the property, but at a loss. Associate Judge Sussock granted the respondents summary judgment in relation to:[1]

(a) Damages of $320,500 for their net loss on the resale.

(b) Penalty interest on the unpaid portion of the purchase price: $72,822.30.

(c) Costs and expenses of $36,080.75 in relation to the resale.

(d) Rates in the amount of $1,200.64.

[2] The appellant contends it is reasonably arguable the respondents failed to mitigate their losses, hence the Judge erred in granting them summary judgment.

[3] The appellant seeks leave to adduce marketing material from the resale process as fresh evidence. The respondents offer no opposition to the application. We grant the application to adduce fresh evidence.

Background

[4] On 14 September 2021, the appellant entered an unconditional agreement (the agreement) to purchase the property from the respondents. The price was $1,160,000. The appellant paid a five per cent deposit (of $58,000). Settlement was scheduled for 17 May 2022.

[5] On 5 April 2022, the appellant emailed the respondents.[2] The appellant said his financial position had changed and he was "now seeking to arrange finance through

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1 *Whakaruru v Bath* [2023] NZHC 2474 at [104(a)–(d)].

2 This (and other correspondence) was through the parties' lawyers.

a second-tier lender which will take some additional time". The appellant sought to renegotiate both the purchase price and settlement date. He suggested the price be $900,000 (not $1,160,000) and settlement be six months later (than 17 May 2022).

[6] The respondents declined to renegotiate the agreement.

[7] On 17 May 2022, the appellant again asked for a six-month extension. He also asked for a price reduction to $1,000,000.

[8] The respondents said they would agree to the extension provided: the appellant immediately paid an additional five per cent deposit; the purchase price remained $1,160,000; and the appellant paid an additional sum of $30,000.

[9] The appellant declined, saying he was "not in a position, financially, to complete settlement of the purchase price referred to in [the agreement] and also to pay [the respondents] the additional deposits".

[10] The appellant failed to settle on 17 May 2022. The appellant says in an affidavit this was because he was unable to obtain finance from banks or other lenders.

[11] On 18 May 2022, the respondents offered to settle in three months' time at a price of $1,100,000, provided the appellant paid one days' worth of penalty interest and immediately paid a further deposit of $52,000.

[12] The appellant declined this offer. He again sought a six-month extension. The appellant suggested a price of $1,000,000.

[13] On 19 May 2022, the respondents declined the appellant's offer and issued a settlement notice. On 16 June 2022, the respondents cancelled the agreement.

[14] The respondents say the appellant's default placed them in a "very precarious" financial position, so they needed to sell the property quickly. We say more about this aspect of the case shortly.

[15] On 13 July 2022, the respondents signed an agency agreement with Pat Lapalapa of Ray White. Mr Lapalapa was familiar with the property as he and Ray White had acted for the respondents in the original sale to the appellant. Mr Lapalapa appraised the value of the property as $925,000.

[16] On 2 August 2022, the property went to auction. The highest bid was $700,000, and the property passed in. However, the respondents received three prompt conditional offers:

(a) Offer 1: $710,000 with a 5% deposit, subject to a due diligence clause for 10 working days, with settlement 30 working days from the unconditional date;

(b) Offer 2: $790,000 with a 5% deposit, subject to a due diligence clause for 10 working days, with settlement five weeks from the unconditional date;

(c) Offer 3: $781,500 with a 10% deposit, subject to finance and a building report within 10 working days, with a settlement date of six weeks.

[17] The respondents accepted offer three given the 10 per cent deposit and absence of a due diligence clause.

[18] On 28 September 2022, the property settled pursuant to offer three.

[19] The respondents sued the appellant for their losses and sought summary judgment. The appellant contested summary judgment on the basis it was reasonably arguable the respondents had failed to mitigate their loss. Judge Sussock held otherwise and granted summary judgment in relation to the amounts at outlined above at [1].

The appellant's case

[20] The appellant essentially advances two grounds of appeal.[3]

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[3] We say "essentially" as the appellant also contends the respondents should have accepted one of his other offers or re-engaged with him following the auction. We address this contention in the context of the second ground of appeal, see below at [27].

[21] The first concerns the onus of proof. To obtain summary judgment, a plaintiff must satisfy the court the defendant has no defence to the plaintiff's claim.[4] The appellant contends the Judge incorrectly placed the onus on him to show he had a defence to the claim:[5]

> That is evident in the Court's ultimate conclusion, where it stated "the circumstances are appropriate for summary judgment to be entered. *The defendant has not established that he has a reasonably arguable defence* that the plaintiffs have failed to act reasonably to mitigate their loss".
>
> That is not an isolated misstatement. There are clear signs throughout the judgment that the Court effectively treated the evidential onus to show some tenable basis for the mitigation defence as requiring the Appellant to establish an arguable defence. In addressing the point directly, [Judge Sussock] stated: "It is not enough for a defendant to assert a defence in response to an application for summary judgment; *[the defendant] must provide a sufficient evidential foundation to show that it is reasonably arguable*".

[22] The second concerns the resale process. It was common ground in the High Court and before us that there is no material difference between the contractual obligation in the agreement to act in good faith on resale and the common law duty to mitigate loss. It follows the respondents were required to take reasonable steps in the circumstances to obtain a proper price on resale. The appellant contends it is at least arguable the process adopted by the respondents was unreasonable in the circumstances, hence arguable the respondents failed to mitigate their loss. On behalf of the appellant, Mr Nelson advanced a six-point critique of the process:

(a) The resale price was lower than it ought to have been. The resale price was $378,500 lower than the original contract and $178,500 below the rateable valuation.

(b) Associated marketing was unreasonable in that it implied "a fire sale". The marketing included these statements: "No plan B! Vendors Moving Outta Auckland"; and "[t]he previous purchaser has failed to settle and therefore the Vendors need an urgent sale now as they have no plan B".

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4 High Court Rules 2016, r 12.2(1).

5 Footnotes omitted, emphasis in original.

(c) The listing period was unreasonably short: 20 days, whereas the median listing period at that time was 45 days.

(d) The respondents acted unreasonably following the auction. Despite the poor outcome, they did not attempt to renegotiate with the appellant or relist the property.

(e) The evidence does not establish the respondents acted on the advice of the agent, a difficulty compounded by the absence, in evidence, of the agent's advice to them. In relation to this aspect, Mr Nelson stressed the limited nature of the evidence from the respondents and their agent. Mr Nelson argued this aspect warranted close exploration at trial.

(f) Inadequate evidence of financial distress. Mr Nelson argued the respondents failed to prove "they could not reasonably market [the property] any longer". Mr Nelson said adequate evidence in this context meant documentary evidence of "any investments, savings or other assets", or clear evidence of the respondents' "net financial position at the time".

Analysis

[23] We begin with this convenient summary of principle of resale and damages by the learned author of *Sale of Land*:[6]

> A vendor who resells following cancellation for repudiation or breach by the purchaser does not owe a duty of care to the purchaser based on proximity; there is no analogy between such a vendor and a mortgagee selling in exercise of the power of sale. The vendor is in the same position as any other person seeking damages after the cancellation of a contract; the duty is the ordinary common law duty to mitigate the loss. The duty to mitigate requires only that the vendor take such steps to obtain a proper price as are reasonable in the circumstances, including those in which the vendor is placed by the purchaser's default. In assessing what is reasonable in those circumstances "the conduct of the vendor is not to be weighed in nice scales" and "the urgency of the need of a vendor to sell his property and receive the proceeds of sale will often have appealing features". A vendor is not obliged to delay a sale in the hope or even expectation, the market prices will increase. On the

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6 Donald McMorland *Sale of Land* (4th ed, Cathcart Trust, Auckland, 2022) at 565 (footnotes omitted).

> other hand, adequate steps must be taken in relation to advertising and promotion of the resale and the property must be kept in reasonable order and condition to encourage such a sale.

[24] It follows the inquiry is *not* whether the respondents obtained the best price at resale, a point that immediately addresses the difference in the resale price, above at [22]. Moreover, we emphasise the modest nature of the duty upon the respondents. They had to do no more than act reasonably in the circumstances, a duty "not to be weighed in nice scales".[7] We make six further points.

[25] First, we note the respondents engaged the same (licensed) agent who had obtained the higher price from the appellant. We also note:

(a) The property was listed for 20 days, a typical auction period — at least in Auckland. The 20-day period was only two days shorter than that accompanying the original sale (22 days). That the median listing period was longer is, therefore, insignificant.

(b) The respondents spent more on marketing in relation to the resale than they did on marketing in relation to the original sale ($2,391.87 versus $864.43).

[26] Second, we see nothing arguably problematic about the marketing material. It is not uncommon for vendors to alert the market to a change in circumstances in the hope of attracting (sufficient) market interest in the property. Furthermore, the respondents' marketing attracted no fewer than eight registered bidders.

[27] Third, we are unpersuaded of the prospect of any unreasonableness in connection with the respondents' post-auction behaviour. Indeed, we consider the respondents faced a particularly challenging combination of circumstances:

(a) The market had changed materially since their sale to the appellant. Following a period of "unprecedented sales prices", the market was "in heavy decline".

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[7] *Mana v Fleming* [2007] NZCA 324, (2007) 8 NZCPR 469 at [41], quoting *Sulliavn v Darkin* [1986] 1 NZLR 214 (CA) at 223 per Somers J.

(b) Interest rates were rising.

(c) The respondents had a loan of more than more than $500,000 in relation to the property. The fixed-term interest rate in relation to that loan had been 2.29 per cent. On 8 April 2022, that rate expired. Thereafter, the interest rate in relation to the loan quickly reached 6.34 per cent.

(d) The respondents were also servicing a second loan of more than $50,000.

(e) Mr Whakaruru was the sole provider. He earned $69,557.49 per annum.

(f) The respondents were in the process of leaving Auckland, in part to care for Mrs Whakaruru's elderly mother.

(g) Before the sale to the appellant, family members had been living with the respondents, and paying rent. But they had left in anticipation of settlement with the appellant.

[28] Given this combination, we do not consider there is any realistic prospect of criticism attaching to the respondents' acceptance of offer three — an offer with the highest deposit and fewest conditions — or to them not engaging further with the appellant once the property passed in at auction. We note the appellant did not bid at the auction and repeatedly declined to increase his deposit. The latter addresses the appellant's contention it is arguable the respondents should have accepted one of his other offers.

[29] Fourth, the combination of circumstances, noted above at [27], also addresses the appellant's contention of the limited nature of the evidence, noted above at [22], in that it demonstrates the respondents had little choice but to resell the property, and quickly. That being so, their instructions to Mr Lapalapa, and his advice to them, could not be of any forensic significance.

[30] Fifth, we consider the respondents amply demonstrated their financial distress in the evidence they adduced to the High Court. Mrs Whakaruru said:

> **Resale of the Property**
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> 9. At [21] to [32] of Mr Bath's affidavit, he raises concerns regarding the listing period of the [property], the loss on the resale and claims that we should have waited to sell the [property].
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> 10. I would like to first respond to this by explaining why we were not able to wait for the [property] to be sold and hope for the market to improve.
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> *Reason for sale*
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> 11. The primary reason for the sale of the [property] was to raise finances to move closer to my family in Whakatane, particularly, my mother who was 86 years of age and suffers from dementia. I was looking to spend more time with her and care for given that I am her enduring power of attorney …
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> 12. As for the timing of the sale, in 2021, the property market was seeing unprecedented sales prices. Sonny and I saw this as a perfect time to sell as our fixed interest rate of 2.29% with ANZ was expiring on 8 April 2022 …
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> 13. With the rising property values, we believed it was the best time to sell to raise funds to move to Tauranga and purchase our forever home as we are no longer young of age and Sonny is nearing the age of retirement.
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> 14. When the [property] was initially sold on 14 September 2021, my husband and I could not believe the number of bidders at the auction willing to purchase our property as it was unconditionally.
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> 15. I understand from Sonny that he spoke to his employer regarding his relocation to the Tauranga branch was and they advised that they would be agreeable for him to be working from Tauranga from 18 May 2022 onwards.
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> 16. Prior to the lockdown in 2021, we used to rent the four downstair bedrooms to tenants to generate additional income to supplement payment of our mortgage and loans.
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> 17. From April 2021, we only had family boarding with us that being our daughter (sole parent of our then two-year-old grandson) and my brother and were receiving $630.00 per week up to April 2022 when they left the [property] and found alternative accommodation.
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> 18. Sonny and I moved out all of our furniture and belongings in early May 2022 prior to the settlement date and waited for the settlement of the [property]. Our storage costs at Rentashed, Whakatane where my mother resides was $280.00 per month at 9 May 2022 which increased to $300.00 per month in December 2022.

19. While Mr Bath's communications on 5 April 2022 suggested that settlement may not happen, we still needed to prepare to vacate the house should settlement have proceeded. We were effectively in a state of limbo during the course of the negotiations.

Our circumstances following Mr Bath's failure to settle

20. After Mr Bath's failure to complete his purchase of the [property]. Sonny and I kept our furniture and belongings in storage and were confined to essentially our bedroom, living out of a bag, on an airbed. At least this made things easier for us to keep the house perfectly clean and presentable for any impromptu inspections and open homes.

21. Sonny and I were in a very precarious position financially. We were not able to afford moving to Tauranga to rent, let alone purchase a property there while paying for the mortgage on the [property].

22. Sonny is the sole income earner between us. From April 2022 to September 2022, he received a salary of $69,557.49 per year, receiving a net pay of $963.90 per week …

23. As our fixed term mortgage rate expired in April 2022, we were on a floating interest rate which increased substantially and is set out below as follows …

    23.1 5.04 % per annum in May 2022;

    23.2 5.54% per annum in June 2022;

    23.3 5.94% per annum in July and August 2022; and

    23.4 6.34% per annum in September 2022.

24. We were also servicing a loan to Harmoney Limited of $50,450.00 paid at approximately $1194.20 per month which we paid out on the settlement of the [property] …

25. This significant increase in our mortgage repayments coupled with our loss of rental income put us in a bad position financially. The majority of Sonny's monthly pay was going towards the [property] and payment of our loan. It was simply unsustainable for us to wait and hope for the market to improve. Further, we had made commitments to my family and Sonny's employer to relocate to Tauranga.

26. Thankfully, Sonny's employer was understanding of our circumstances and was agreeable to delay in his relocation to Tauranga while we tried to sort out the sale of our [property].

[31] We see no reason to doubt what Mrs Whakaruru says.

[32] Sixth, in a case such as this, the Court should not overlook what is perhaps the most important circumstance: the respondents were in this situation because the appellant had defaulted on his contractual obligations to them.

[33] As will be apparent then, we do not accept it is arguable the process adopted by the respondents was unreasonable in the circumstances.

[34] This leaves the appellant's first ground of appeal. We accept the Judge misstated the onus in at least the first of the passages identified by Mr Nelson, see above at [21]. However, as we are satisfied it is not reasonably arguable the process adopted by the respondents was unreasonable in the circumstances, and equally satisfied the respondents cannot be criticised for not engaging with the appellant post-auction, it follows the Judge was correct to grant summary judgment irrespective of the language she used in reaching that conclusion. In summary, it is not reasonably arguable the respondents failed to mitigate their loss.

Result

[35] Leave is granted to adduce fresh evidence.

[36] The appeal is dismissed.

[37] The appellant must pay the respondents costs for a standard appeal on a Band A basis and for a standard application on a band A basis,[8] with usual disbursements.

Solicitors:
Patel Nand Legal, Auckland for Appellant
Inder Lynch Lawyers, Auckland for Respondents

[8] Court of Appeal (Civil) Rules 2005, rr 53G(4) and 53GA(1).