IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA533/2021
[2022] NZCA 390

BETWEEN	XIEYAN MAO Appellant
AND	HARGUN SINGH Respondent

Hearing: 18 November 2021

Court: Kós P, Cooper and Courtney JJ

Counsel: D Zhang and E Tie for Appellant
M G Locke for Respondent

Judgment: 22 August 2022 at 2:30 pm

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellant must pay the respondent costs for a standard appeal on a band A basis and usual disbursements.

C The matter is remitted to the High Court for any further orders that may be necessary to ensure the property is transferred in accordance with the High Court stay judgment in *Singh v Mao* [2021] NZHC 2230.

REASONS OF THE COURT

(Given by Cooper J)

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Introduction

[1] The appellant, Xieyan Mao, appeals against a judgment of Associate Judge Bell ordering specific performance of an agreement for the sale and purchase of land located at 57 Yeovil Road, Te Atatu, Auckland (the Agreement).[1] Under the terms of the Agreement, executed on 4 August 2020, Ms Mao was to sell the property to the respondent, Mr Singh, with vacant possession. In fact, the property was subject to a fixed-term tenancy terminating on 6 July 2021. Ms Mao insisted that Mr Singh had to take the property subject to the tenancy and would not complete the sale on any other basis.

[2] On the settlement date, Ms Mao issued a settlement notice and later purported to cancel the Agreement on the basis that Mr Singh had not tendered settlement. Despite her breach of the Agreement by not providing vacant possession, she maintains that her settlement notice was valid and the cancellation of the Agreement was effective. She claims on appeal that the High Court was wrong to find that she had not been entitled to issue a settlement notice and to cancel the Agreement when Mr Singh did not settle in accordance with her notice. She also argues that, in any event, it was not appropriate to order specific performance.

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1 *Mao v Singh* [2021] NZHC 1959 [High Court judgment].

The facts

[3] The property that is the subject of the dispute contained a dwelling house. Being just over 800 square metres in area, the property was suitable for redevelopment. In 2019 Ms Mao obtained resource consent to subdivide and construct up to seven residential units on the property. In June 2020 she let the property under a residential tenancy agreement for a fixed term from 8 July 2020 to 6 July 2021. She then listed the property for sale with the real estate company, Shelter Realty Ltd, which was trading as Harcourts, Te Atatu South (Harcourts). The listing agent was Mr Mason Zhang, a friend of Ms Mao who had previously assisted her with the sale and purchase of various other properties.

[4] The listing agreement with Harcourts recorded that resource consent had been issued for the development of seven terraced houses, but nothing was said in that agreement about tenancies. Ms Mao maintains that she told Harcourts about the fixed-term tenancy and when it would expire. But, in order to avoid disturbing the tenants she asked that there be no open homes, and stipulated that any potential purchasers would have to take the property subject to the existing tenancy. She said Mr Zhang assured her that he could sell the property without open homes and she signed the listing agreement with Harcourts on that basis. Mr Zhang did not give evidence in the High Court.

[5] Mr Singh is a property developer and responded to an advertisement placed by Harcourts marketing the property on the basis that it had resource consent for seven terraced houses. The advertisement said nothing about the tenancy. It appears that Mr Zhang showed the property to several purchasers between 22 July and 4 August 2020. Mr Singh was one of them. Ms Mao said that Mr Zhang told her of the interest in the property and confirmed that every viewer had been advised it would be sold subject to the existing tenancy. Mr Singh however intended to remove the existing house and carry out a multi-unit development.

[6] The Agreement was executed on 4 August 2020 in the 10th edition of the standard form approved by the Real Estate Institute of New Zealand and the Auckland District Law Society. The purchase price was $1.555 million and the

deposit of $155,000 was payable upon the Agreement becoming unconditional. The Agreement was subject to finance to be obtained within four working days.

[7] The front page of the Agreement contained a box in which the names of tenants could be stated. The box was left empty and the words "Yes/No" beside it were untouched. Consistent with that, no particulars of any tenancies were set out in sch 3.

[8] On 7 August 2020, a solicitor acting for Mr Singh, Mr Jaswin Gandhi, advised Ms Mao's solicitor, Ms Sylvia Ding, that the finance condition was satisfied. Mr Singh paid the real estate agents the required deposit on that day.

[9] On 20 August, Ms Ding sent a statement for settlement on 16 September. The statement was in a conventional form, recording the deposit and apportioning rates between the purchaser and vendor. There were no other adjustments to the sale price.

[10] Then, on 25 August, Ms Ding wrote to Mr Gandhi to advise about the fixed-term tenancy. The letter stated:

> Further to my email enclosing [the] settlement statement on 20 August 2020 I am advised now that there is actually a tenant in the … property. However due to the oversight by the agent the details [were] omitted [from] writing on the agreement. It is advised that your client was aware of the existence of the tenant in the property and has agreed to keep the tenant on settlement [when] entering the agreement, but probably may not realize that it is [for] a fixed term until 6 July 2021. … (A tenancy agreement is attached [for] your client's information).
>
> Our client instructs us to advise that she has fully advised the agent of the details of the tenant, especially the fixed term of one year. As such our client's position is that she won't be responsible for any costs claimed by the tenant due to the [break-up] of the fixed term of tenancy.
>
> Therefore it is up to your client to either take the tenant as it is and settle on 16 September 2020, or to have the said agreement cancelled and the parties propose to draft a new agreement.

The Judge noted that the position set out in the email was subsequently maintained by Ms Mao in the proceedings before him.[2]

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2 At [7].

[11] That afternoon, Mr Gandhi asserted that the position adopted by Ms Mao was "absurd and preposterous" and he foreshadowed a more substantive reply. On 31 August, Ms Ding wrote again advising that Ms Mao had contacted the tenants, who were requiring compensation in the sum of $18,000 in order to vacate by 20 November 2020, apparently a date which had been discussed between Mr Singh and Harcourts.

[12] Later that same morning, Mr Gandhi wrote as follows:

> Dear Sylvia
>
> We will be writing to you soon in detail.
> The real estate agent is your client's agent.
> Your client has admitted in your earlier email that your client had provided the tenancy details to the agent. However, these details were not passed onto our client.
> Your client's agent had omitted / withheld significant information.
> Our client was led by the [agents] to believe that "vacant possession" will be provided on settlement.
> The property was marketed as a development potential and our client has on this basis engaged its architect and engineers straight after it signed the Agreement and has spent [a] considerable amount of money on these professionals because our client wishes to commence development as soon as it settles.
> Our client has also paid your client a premium price because of the development potential.
> Any costs associated to remove the tenant [are] your client's costs.
> Our client requires vacant possession on settlement and if vacant possession is not provided then your client will be in breach of the Agreement.
> As a consequence, our client will hold your client liable for all the costs and damages it suffers together with penalty interest for late settlement.
> Our client proposes that it can defer settlement on a completely without prejudice basis for another month to 16/10/2020 to allow your client to remove the tenant and provide vacant possession on settlement. Our client's offer on a without prejudice basis is open until 4 pm this Friday, 4/9/2020.
> We look forward to hearing from you

[13] On the same day, Ms Ding replied:

> …
>
> 1. [Our] client would never accept your client's offer unless your client takes over the tenant on settlement; [any] intention contrary to that will invalidate the [Agreement];
>
> 2. In fact we note no "vacant possession" is written on the [Agreement] and our client is not bound by that and [is] not obliged to give vacant possession on settlement;

3. The fact is that your client was told and [made] aware of the tenant and confirmed to take over the tenant on settlement. There is correspondence evidencing that. Therefore your client is bound to take over the tenant on settlement.

4. If your client requires the tenant to move out on 20 November 2020 it is your client's duty to do that after settlement rather than our client's duty to inform the tenant now.

In any event our client's position is that our client will not be responsible for any compensation to the tenant.

…

[14] In a further email, on 4 September, Ms Ding wrote:

…

Our client has accepted your client's offer on the honest belief that your client will take over the tenancy on settlement and [that] belief was confirmed by the agent orally and afterwards and confirmed by the written email by the agent to the property manager (also copied to my client) on 5 August 2020. This email could be treated as supplementary to the main contract.

As such your client is obliged to settle on 16 September 2020 on the basis to take over the tenant as agreed and accepted by [your] client.

…

[15] That email also included suggestions that the parties could agree to avoid the Agreement with neither having any claim against the other, or that the dispute be referred to arbitration.

[16] In a response sent on 8 September, Mr Gandhi rejected those proposals. Among the points made in his email were the facts that the property had been marketed as a development site and purchased for that purpose; that the Agreement required vacant possession; that Mr Singh did not know, nor had he been made aware at the time of signing the Agreement, that the tenants in the property were there for a fixed term; and that he first learnt about the fixed-term tenancy when contacted by Mr Zhang on 24 August. Mr Gandhi concluded:

In view of the above, our client does not accept any of your client's options and requires "vacant possession" on settlement. Our client will charge your client penalty interest for late settlement if "vacant possession" is not given. The Agreement is very clear that "vacant possession" is to be provided.

[17] Ms Ding replied the same day, asserting that Mr Gandhi's emails had reinforced Mr Singh's "actual knowledge that he was aware of the existence of [the] tenancy and … has agreed to take over the tenancy on settlement". Ms Ding stated that if Mr Singh had done due diligence, he would have found out the tenancy was a fixed-term one and accordingly had constructive knowledge of it. Mr Singh's:

> … actual knowledge of the tenancy [had] negated the vendor's duty to yield a vacant possession required by … clause 3.1 of the [Agreement]. In [other words] whether the particulars of the tenancy are included in this contract or not is … irrelevant under [these] special circumstances.

[18] She continued:

> Therefore our client requires … your client [to] settle on 16 September 2020 with the tenancy and our client will reserve her right to charge penalty interest for later settlement and instruct us to serve the settlement notice if the settlement does not proceed on 16 September 2020.

[19] Mr Gandhi replied on 14 September. He reiterated Mr Singh's position that vacant possession was required and if Ms Mao was unable to provide it on settlement, she would be in breach of the Agreement. He again proposed however that the settlement could be deferred without penalty to 16 October to allow Ms Mao time to relocate the tenants. Alternatively, he suggested that settlement take place on 16 September in accordance with the Agreement, subject to the tenants entering into a new tenancy agreement with Ms Mao which would provide for them to vacate the property on or before 20 November. The costs of relocating the tenants would be for Ms Mao. If those proposals were not accepted, then Mr Gandhi had strict instructions to issue a settlement notice on 16 September, in which penalty interest would be claimed together with additional damages that would be suffered as a direct result of Ms Mao's breach of the Agreement.

[20] Later that day, having received the relevant documents for e-dealing on the settlement from Ms Ding, Mr Gandhi sought confirmation that Ms Mao would be providing vacant possession on settlement. This drew the response on 15 September that Ms Mao was not required to provide vacant possession. Mr Gandhi's reply on the same day was that Ms Mao could not unilaterally change the terms of the Agreement. It was clear that vacant possession had to be provided and Mr Singh would not settle

until it was. Mr Gandhi noted that Mr Singh would hold Ms Mao liable for all consequential loss if vacant possession was not provided.

[21] Mr Gandhi wrote to Ms Ding again on 16 September. He advised that his firm was "in funds, ready, willing, and able to settle now". Once again he sought confirmation that vacant possession would be provided. He had strict instructions to charge penalty interest until vacant possession was given.

[22] The sale did not settle. Mr Gandhi returned the funds that had been borrowed for the purposes of settlement. Ms Ding then sent Mr Gandhi a settlement notice on 16 September. The notice said nothing about vacant possession. It recited the fact of the Agreement, noted that settlement was required to take place that day, and asserted the vendor was "ready, willing and able to complete settlement" on that day "but for [Mr Singh's] default under the [Agreement]". It continued:

> Accordingly the vendor hereby gives notice in terms of Clause 11 of the Agreement and requires you (without prejudice to any other remedies including penalty interest available to the vendor) to settle on or before the 12th working day after the date of service of this notice upon you, time being of the essence.
>
> …

[23] The notice concluded by stating that unless Mr Singh settled within the time specified, the vendor would be entitled without prejudice to any other rights or remedies available, including commencing proceedings for specific performance or cancelling the Agreement, forfeiting and retaining the deposit and commencing proceedings for damages.

[24] The next event was the settlement notice served by Mr Gandhi, on the same day. That notice, too, recited the Agreement, the settlement date, the fact that Mr Singh was in all material respects ready, willing and able to proceed to settle on the settlement date and asserted that Ms Mao had failed to settle by not providing vacant possession. The notice required settlement within 12 working days, time being of the essence, and recorded that if Ms Mao did not comply with the terms of the settlement notice Mr Singh would exercise such remedies as he might decide pursuant to the Agreement, at law or in equity.

[25] On 2 October , Ms Ding emailed Mr Gandhi cancelling the Agreement for non-compliance with the settlement notice she had earlier sent.

[26] Mr Singh commenced proceedings in the High Court on 8 March 2021.

The proceeding in the High Court

[27] The statement of claim alleged that Ms Mao was required under the terms of the Agreement and by Mr Singh's settlement notice to provide vacant possession of the property on 16 September 2020. It alleged that payment had been tendered on 16 September, and that Mr Singh was "ready, willing, and able to settle on that date". Ms Mao however had failed to provide a transfer with vacant possession or indeed any transfer and accordingly was in breach of the Agreement. Mr Singh sought an order for specific performance and claimed penalty interest under the Agreement. At the same time, Mr Singh applied for summary judgment seeking orders for specific performance, penalty interest and liability for any "[w]asted or unnecessary expenditure incurred … as a result of [Ms Mao's] breaches of the Agreement".

[28] Ms Mao filed a notice of opposition to the application for summary judgment in which she asserted that Mr Singh had confirmed that he would take the tenants on settlement and had thus waived Ms Mao's obligation to provide vacant position. The notice of opposition complained that the Agreement had not been "amended to reflect the intentions of the parties or the waiver".

[29] Having set out the background and referred to the relevant provisions of the Agreement, the Judge noted that while Mr Singh had the option of cancelling the Agreement he wished to continue with it. He was entitled to compensation for being kept out of possession and Mr Gandhi was on good ground in claiming interest for late settlement until vacant possession was provided.[3] Because Ms Mao did not accept Mr Singh's entitlement to compensation, he was in a position where he had to make a claim under cl 10.3 of the Agreement.[4] The problem was that while Mr Gandhi's correspondence had referred to a claim for interest for late settlement, none of his

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3 At [37].

4 Clause 10.3, set out below at [57], specifies certain notice requirements for making claims to compensation under cl 10.

emails constituted a notice under cl 10.3(2). The Judge described this as a "fumble" by Mr Gandhi.[5]

[30] As a consequence of that error, Ms Mao argued that she could give a settlement notice under cl 11.1 of the Agreement, but only if she was in all respects ready, willing and able to proceed to settle in accordance with the Agreement. However, she would only settle if Mr Singh took the property subject to the fixed-term tenancy and without any compensation.

[31] It is relevant to note that in an affidavit sworn in the High Court Ms Mao recorded that after the deposit had been paid but before the settlement date the tenants had advised her that they would agree to move out of the property if paid the sum of $18,000. Their position was advised to Mr Gandhi on 31 August. However, there had been a subsequent exchange of emails between Mr Singh and Mr Gandhi, which Ms Mao summarised in her affidavit:

> Subsequent emails between Sylvia Ding and Jaswin Gandhi were attached to [Mr Singh's] affidavit … The essence of these emails are that my position was that the Property was sold with the existing tenants, which … [Mr Singh] was well aware of and accepted to take them on settlement (and that they should have carried out due diligence before they committed to taking the tenants), but because of [Harcourts'] mistake, this information was not recorded in the [Agreement]. However, [Mr Singh], now knowing that the tenants asked for $18,000 compensation, insisted on vacant possession as per the [Agreement], regardless of the fact that he had previously advised [Harcourts] that he would take the tenants on settlement.

[32] Counsel for Ms Mao submitted in the High Court that although Mr Singh might have cancelled the Agreement, in fact he affirmed it. As the vendor, Ms Mao would only be in default if she failed to settle when Mr Singh properly tendered settlement. Because she had not agreed to any compensation, Mr Singh was obliged to make a claim under cl 10 of the Agreement, but did not do so. That meant he was required to tender settlement without any deduction. Because he had not tendered settlement, Mr Singh was in default and Ms Mao was entitled to give a settlement notice. Her settlement notice was valid and it had not ruled out an adjustment because of the tenants. Mr Singh could still have made a claim under cl 10 but did not do so. In these circumstances, Ms Mao was entitled to cancel the Agreement.

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5 At [38].

[33] The Judge described that argument as "somewhat artificial". He said:

> [45] … As it was presented at the hearing, counsel accepted that if Mr Singh had made a claim under cl 10, Ms Mao would have no defence to the claim for specific performance. It was not, however, submitted that if Mr Singh had made a claim under cl 10, Ms Mao would have had a change of heart and would have settled with arrangements made following the procedures in cl 10. Such an argument would have failed on the evidence.

[34] The Judge then referred to the Supreme Court's decision in *Bahramitash v Kumar* and held that by her words and conduct Ms Mao had clearly showed an unwillingness to settle in accordance with the Agreement even if Mr Singh's tender of settlement had included a formal claim under cl 10.[6] "She was not in all material respects, ready, willing and able to settle" and therefore was not entitled to issue her settlement notice on 16 September.[7] In those circumstances, Ms Mao was not entitled to cancel the Agreement. Accordingly, the Agreement "remained in full force and effect", and Mr Singh was entitled to sue for specific performance under its relevant provisions.[8]

The appeal

[35] Ms Mao's notice of appeal alleged three grounds, one of which was abandoned in the submissions filed prior to the hearing. The grounds on which the appeal proceeded were:

(a) that the Judge erred in finding Ms Mao was not entitled to issue a settlement notice and cancel the Agreement when Mr Singh did not settle in accordance with her notice; and

(b) even if she was not entitled to cancel the Agreement, it was inappropriate for the Judge to have ordered specific performance.

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6 At [46]–[49], citing *Bahramitash v Kumar* [2005] NZSC 39, [2006] 1 NZLR 577 at [17]–[18] and [20].
7 At [49].
8 At [49].

First ground of appeal — Ms Mao's right to cancel

The appellant's argument

[36] Mr Zhang, who appeared for the first time in this Court, informed us that Ms Mao no longer disputes she was obliged to give vacant possession, but he says the fact of the matter was that she could not do so, given the tenancy. In these circumstances, he contends that cl 3.13(2) of the Agreement was triggered.

[37] Clause 3.0 of the Agreement contains provisions concerning possession and settlement. Clause 3.13 contains provisions under the heading "Vendor Default: Late Settlement or Failure to Give Possession". Clause 3.13(2) provides as follows:

> (2) If this agreement provides for vacant possession but the vendor is unable or unwilling to give vacant possession on the settlement date, then, provided that the purchaser provides reasonable evidence of the purchaser's ability to perform the purchaser's obligations under this agreement:
>
> (a) the vendor shall pay the purchaser, at the purchaser's election, either:
>
> (i) compensation for any reasonable costs incurred for temporary accommodation for persons and storage of chattels during the default period; or
>
> (ii) an amount equivalent to interest at the interest rate for late settlement on the entire purchase price during the default period; and
>
> (b) the purchaser shall pay the vendor an amount equivalent to the [interest] earned or which would be earned on overnight deposits lodged in the purchaser's lawyer's trust bank account on such portion of the purchase price (including any deposit) as [is] payable under this agreement on or by the settlement date but remains unpaid during the default period less:
>
> (i) any withholding tax; and
>
> (ii) any bank or legal administration fees and commission charges; and
>
> (iii) any interest payable by the purchaser to the purchaser's lender during the default period in respect of any mortgage or loan taken out by the purchaser in relation to the purchase of the property.

[38] Mr Zhang submitted there was no doubt that Mr Singh, when faced with Ms Mao's breach, chose to affirm the Agreement. Mr Singh had unequivocally rejected an offer made by Ms Mao that the Agreement be cancelled with neither party having any claim against the other. Further, Mr Gandhi's email of 15 September sought confirmation that vacant possession would be provided on the settlement date, his letter of 16 September advised that his firm was in funds and that Mr Singh was "ready, willing, and able to settle now", reiterating the request for confirmation that vacant possession would be provided. Finally, the settlement notice issued by Mr Singh had demanded settlement within 12 working days. In the circumstances, either Mr Singh had no right to cancel the Agreement and cl 3.13 was engaged as soon as Ms Mao was unable to provide vacant possession or, while he had the right to cancel the Agreement, he failed to do so, having affirmed it instead, and therefore was obliged to proceed in accordance with it.

[39] Mr Zhang referred to observations made by Tipping J in *Holmes v Booth*:[9]

> Under the general law if one party is in breach of contract, either actual or anticipatory, [where that] breach justifies cancellation, but the innocent party (A) elects to keep the contract alive, he keeps it alive for the benefit of the party in breach (B) as well as for his own benefit. *Thereafter A remains subject to all his own obligations and liabilities under the contract. He may well have a right to claim damages for breach, but having elected to proceed he must proceed in terms of the contract. If he fails to do so he may thereby give B grounds for cancellation, thus putting an end to his own right to require performance.* That is exactly what is said to have happened in this case. The position is a fortiori if B's breach does not entitle A to cancel.

[40] Although Tipping J was in the minority in that case, his approach has subsequently been endorsed in *Property Ventures Investments Ltd v Regalwood Holdings Ltd*.[10] This meant that Mr Singh was obliged to proceed with the transaction, subject to his claim for compensation under cl 3.13. Any dispute under cl 3.13 was to be resolved in accordance with the mechanism provided by cl 10.[11]

[41] Under cl 10.1, given that Mr Singh had not purported to cancel the Agreement, his obligation to settle remained. Mr Singh should have made a claim for

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9 *Holmes v Booth* (1993) 2 NZ ConvC 191,633 (CA) at 191,648 (emphasis added).

10 *Property Ventures Investments Ltd v Regalwood Holdings Ltd* [2010] NZSC 47, [2010] 3 NZLR 231 at [72]–[73] per Blanchard, McGrath and Wilson JJ. See also at [96] per Tipping J.

11 We set out the relevant parts of this clause below at [57].

compensation flowing from the failure by Ms Mao to provide vacant possession. Once such a claim had been made, it would be for Ms Mao to respond. She could have chosen one of three options:

(a) accept Mr Singh's claim and agree to an amount of compensation being deducted from the purchase price, in which case, settlement could have proceeded on 16 September 2020, the originally agreed settlement date;

(b) dispute Mr Singh's right to make the claim. In that case, Ms Mao would have to give notice to Mr Singh within three working days after service of Mr Singh's notice of claim. The Agreement provided for arbitration as the mechanism for the resolution of any such dispute; or

(c) accept Mr Singh's right to make the claim, but dispute the amount payable, in which case an interim amount could be paid to a stakeholder pending resolution of the dispute over quantum.

[42] But on Mr Zhang's case, Mr Singh had not followed the mechanisms provided for by the Agreement. On the contrary, he had done exactly what cl 10.1 forbade him to do, and delayed settlement. He was unwilling to settle until Ms Mao provided vacant possession and as a consequence took a course that was not open to him.

[43] Mr Zhang submitted there were three errors in the Judge's approach. First, the fact that Ms Mao took an "entrenched position"[12] was irrelevant because the provisions of the Agreement, in particular cl 10.6, provided a mechanism to resolve disputes in respect of any compensation payable. Given the dispute-resolution process in that clause, there should be no reason to make the "tendering is futile" inquiry (into whether Ms Mao would have been willing to settle in accordance with the Agreement even if Mr Singh's tender of settlement had included a formal claim under cl 10). Clause 10.6 could have the effect of compelling a party to resolve a dispute. Further, Ms Mao's position was not "as entrenched" as the Judge found. Ms Mao had offered to arbitrate the dispute and overall, the facts did not justify a conclusion that the tender of settlement would have been futile, if such a test indeed applied.

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[12] Referring to High Court judgment, above n 1, at [48].

[44] The second error that Mr Zhang submitted the Judge made turned on the fact that Mr Singh had refused to settle unless he received vacant possession, but by his conduct had refused to participate in a dispute-resolution process. As we understand it, Mr Zhang argued the Judge was wrong to proceed on the basis that Ms Mao would not change her mind regarding the process to be followed, when Mr Singh himself had refused to participate in the dispute-resolution process contemplated by cl 10.6.

[45] Thirdly, Mr Singh had never been open to settlement with compensation in lieu of vacant possession. His insistence on vacant possession was an entrenched position, and "not a course of action that was available to him, either under general law or the [Agreement]". Mr Zhang argued that in accordance with *Bahramitash v Kumar* it must be shown that without any real doubt the vendor "would have refused to settle in response to a *contractually proper tender* before the court will say tender [will] be futile".[13] Mr Singh did not make a contractually proper tender.

[46] It followed that Ms Mao was entitled to issue her settlement notice and to cancel the Agreement when Mr Singh did not comply with it.

The respondent's argument

[47] For the respondent, Mr Locke submitted the facts of the case do not engage either cl 3 or cl 10 of the Agreement. Mr Zhang was wrong to submit that Ms Mao could not have given vacant possession, when her own affidavit filed in the High Court recorded that the tenants would have moved out of the property in return for compensation of $18,000. Instead of paying that sum, Ms Mao appeared to complain that Mr Singh was unjustified in insisting that any such compensation should be a matter between her and the tenants. This was relevant in two ways. First, Ms Mao could have provided vacant possession but chose not to do so. Second, it provided justification for the Judge's conclusion that Ms Mao was not ready, willing and able to settle in accordance with the Agreement. Mr Locke submitted the Judge's reasoning was correct.

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13 Referring to *Bahramitash v Kumar*, above n 6, at [20] (emphasis added).

Analysis

[48] Mr Zhang's argument in support of the appeal endeavours to establish by reference to cls 3.13(2) and 10.1 of the Agreement that Mr Singh was obliged to settle even though Ms Mao was at no stage prepared to comply with the requirement that the property be sold with vacant possession. That was Ms Mao's position at all relevant times during the dealings of the parties and remained the position when the case was argued in the High Court. Ms Mao's argument on appeal essentially proceeds on the ground that cls 3.13(2) and 10 of the Agreement obliged Mr Singh to settle the transaction on a basis which he had clearly not contracted upon. Whether or not the Agreement is to be applied in this way has to be assessed in the context of her consistently maintained position.

[49] The analysis must also take into account that there is no reason to doubt that Mr Singh was in a position to settle and had the funds necessary for that purpose but chose not to do so in the face of Ms Mao's determination that the property would not be sold for vacant position.

[50] As has been seen, the principal ground of the appeal is that the Judge erred in finding that Ms Mao was not entitled to issue a settlement notice and cancel the Agreement when Mr Singh did not settle in accordance with her notice. On the view we have formed, there is a straightforward answer to that question.

[51] Clause 11.0 of the Agreement is headed "Notice to complete and remedies on default". Clause 11.1(1) and (2) then provide:

> 11.1 (1) If the sale is not settled on the settlement date, either party may at any time thereafter serve on the other party a settlement notice.
>
> (2) The settlement notice shall be effective only if the party serving it is at the time of service either in all material respects ready, able, and willing to proceed to settle in accordance with clauses 3.0 and 10.0 or is not so ready, able, and willing to settle only by reason of the default or omission of the other party.

[52] Ms Mao's settlement notice was served at a time when she was plainly continuing her stance that she would not provide vacant possession under the

Agreement. In this Court, but only now, she concedes that she was obliged to give vacant possession. At the time she served the settlement notice she was not prepared to do so. She was not, therefore, "in all material respects ready, able, and willing to proceed to settle in accordance with clauses 3.0 and 10.0" of the Agreement. That meant she could not satisfy the requirements for issuing a valid settlement notice.

[53] Mr Zhang's argument that Ms Mao was ready, able, and willing to proceed in accordance with cl 3.0 was based on cl 3.13(2), which we earlier set out.[14] Before dealing with that provision however it is necessary to notice the preceding provisions of cl 3. In particular, under cl 3.1, unless particulars of a tenancy are included in the Agreement, the property is to be "sold with vacant possession" and the vendor "shall so yield the property on the settlement date". By her conduct Ms Mao showed that she was not prepared to comply with that provision.

[54] Insofar as cl 3.13(2) is concerned it is clear that Ms Mao was unwilling to give vacant possession. Mr Zhang argued that she could not do so because of the tenancy. We accept that was the situation on the settlement date, but that was as a result of her own failure to ensure she could give vacant possession. It is clear that some arrangement could have been made with the tenants. On Ms Mao's own evidence, they would have agreed to go on payment of $18,000. But she apparently regarded that as a sum she should not have to pay even though, under the terms of the Agreement, it was her obligation to do what was necessary to give vacant possession. There was no doubt about Mr Singh's ability to perform his obligations under the Agreement and so Ms Mao would have had an obligation under cl 3.13(2)(a)(ii) to pay penalty interest, subject to any deduction under cl 3.13(2)(b).

[55] We note also that under cl 3.13(6), the provisions of cl 3.13 are "without prejudice to any of the purchaser's rights or remedies including any right to claim for any additional expenses and damages suffered by the purchaser". This means that the purchaser's rights to sue for breach of contract are preserved: it is not obliged to adopt the procedures set out in the clause. It should also be noted that cl 3.13(7) provides that if the parties are unable to agree on the amount payable under the cl 3.13, either

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[14] See above at [37].

party "may make a claim under" cl 10.0. Again, the permissive nature of the language indicates that they cannot be required to do so.

[56] Mr Zhang's submission is that Mr Singh was obliged to proceed through the cl 10 process, acquiring the property subject to the tenancy, and then claiming compensation as envisaged by cl 3.13(2) and (6). It was plain that the parties would not be able to agree on any amount payable, again because of the stance adopted by Ms Mao; it was her claim that notwithstanding what the Agreement said about vacant possession, Mr Singh was bound to acquire the property subject to the tenancy and if necessary seek compensation under the Agreement.

[57] This takes us to cl 10.0, "Claims for compensation". Relevantly, the clause provides:

> 10.1 If the purchaser has not purported to cancel this agreement, the breach by the vendor of any term of this agreement does not defer the purchaser's obligation to settle, but that obligation is subject to the provisions of this clause 10.0.
>
> 10.2 The provisions of this clause apply if:
>
> (1) the purchaser claims a right to compensation for:
>
> (a) a breach of any term of this agreement; or
>
> …
>
> (2) there is a dispute between the parties regarding any amounts payable:
>
> (a) under ... subclause 3.13 ...
>
> …
>
> 10.3 To make a claim under this clause 10.0:
>
> (1) the claimant must serve notice of the claim on the other party on or before the last working day prior to the settlement date (except for claims made after the settlement date for amounts payable under ... subclause 3.13, in respect of which the claimant may serve notice of the claim on the other party at any time after a dispute arises over those amounts); and

(2) the notice must:

(a) state the particular breach of the terms of the agreement, or the claim under ... subclause 3.13 ... ; and

(b) state a genuine pre-estimate of the loss suffered by the claimant; and

(c) be particularised and quantified to the extent reasonably possible as at the date of the notice.

…

10.5 If the amount of compensation is agreed, it shall be deducted from or added to the amount to be paid by the purchaser on settlement.

10.6 If the purchaser makes a claim for compensation under subclause 10.2(1) but the vendor disputes the purchaser's right to make that claim, then:

(1) the vendor must give notice to the purchaser within three working days after service of the purchaser's notice under subclause 10.3, time being of the essence; and

(2) the purchaser's right to make the claim shall be determined by an experienced property lawyer or an experienced litigator appointed by the parties. If the parties cannot agree on the appointee, the appointment shall be made on the application of either party by the president for the time being of the New Zealand Law Society. The appointee's costs shall be met by the party against whom the determination is made.

10.7 If the purchaser makes a claim for compensation under subclause 10.2(1) and the vendor fails to give notice to the purchaser pursuant to clause 10.6, the vendor is deemed to have accepted that the purchaser has a right to make that claim.

…

10.10 The procedures prescribed in subclauses 10.1 to 10.9 shall not prevent either party from taking proceedings for specific performance of the contract.

10.11 A determination under subclause 10.6 that the purchaser does not have the right to claim compensation under subclause 10.2(1) shall not prevent the purchaser from pursuing that claim following settlement.

…

[58] The Judge found that once Mr Singh had decided not to cancel the Agreement Mr Singh had an obligation to settle under cl 10.1. He could claim compensation under cl 3.13, but it was clear that Ms Mao did not accept the basis upon which such

a claim would have been advanced. Mr Singh's obligation was therefore to make a claim under cl 10.3. Mr Gandhi's correspondence did not include such a claim.[15]

[59] However in the circumstances of this case, Mr Singh's failure to tender settlement and his failure to make a claim under cl 10 did not entitle Ms Mao to give a settlement notice. We have already explained that she was not ready, willing and able to settle in accordance with the agreement, but in *Bahramitash v Kumar* the Supreme Court held that a vendor would ordinarily not be in default in relation to its obligation unless the purchaser made a proper tender of settlement.[16] It is for the purchaser to begin the process of settlement by tendering the settlement sum, and a vendor will not breach its obligations in the absence of such a tender.[17]

[60] However, there can be words or conduct which indicate that proper tender by the purchaser would be futile. Demonstrated futility has a two-fold significance. First, the vendor is not able to treat the purchaser as being in default by failing to make a tender. Second, the vendor in such circumstances will have shown that it is not ready, willing and able in all material respects to perform its settlement obligations.[18] A finding of futility will not lightly be made, and the futility of the exercise must be clear. That is, "it must be shown to have been a forgone conclusion that the tender would not have been accepted or was not able to be accepted".[19] As the Court put it:[20]

> In other words, in 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.

[61] We consider the Judge was right to conclude that futility was demonstrated by the facts of this case. On the settlement date the property was tenanted, and Ms Mao was both unable to comply with her obligation under the Agreement to convey the property with vacant possession and unwilling to do so in any event. Although she had established that the tenants would be prepared to move on payment of the sum of $18,000 compensation, no arrangements had been made to that effect. In fact she did

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15 High Court judgment, above n 1, at [38].
16 *Bahramitash v Kumar,* above n 6, at [16].
17 At [17].
18 At [18].
19 At [20].
20 At [20].

not accept that it was her obligation to provide vacant possession under the Agreement. She maintained that stance in defending Mr Singh's claim in the High Court, and there can be no real doubt about her position. Had Mr Singh tendered the purchase price less the amount required to buy the tenants out, Ms Mao would not have accepted that payment as an adequate tender because she denied her responsibility to do so under the Agreement. The situation presented was not just that the property was tenanted, but that Mr Singh was confronted with the prospect that he would have to pay out the tenants to secure vacant possession. And it was by no means clear that the tenants' offer to Ms Mao would extend to Mr Singh. There was therefore no certainty that $18,000 was all Mr Singh would have been asked to pay.

[62] These conclusions are important. We are satisfied they establish futility, and that Mr Singh was therefore not in breach of the Agreement by failing to tender settlement. And the fact that he did not cancel the Agreement in response to Ms Mao's stance does not mean he was obliged to settle on her terms. Under cl 10.1, his obligation to settle was "subject to the provisions of this clause 10.0". That obviously includes cl 10.10, with the result that nothing in the preceding subclauses had the effect of preventing him from taking proceedings for specific performance of the Agreement, which he subsequently did. In the situation that arose, Mr Singh was not obliged to make a claim for compensation under cl 10. He could sue for specific performance.

[63] We do not consider these conclusions are contrary to anything said in *Property Ventures Investments Ltd v Regalwood Holdings Ltd*.[21] In that case, the Court had to consider a provision in a sale and purchase agreement that provided:[22]

> 6.5 Breach of any warranty or undertaking contained in this clause does not defer the obligation to settle. Settlement shall be without prejudice to any rights or remedies available to the parties at law or in equity, including but not limited to the right to cancel this agreement under the Contractual Remedies Act 1979.

[64] For the majority, Blanchard J wrote:[23]

> [72] The subclause is not happily drafted but both its language and certain policy considerations lead us to the view that … cl 6.5 does no more than

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21 *Property Ventures Investments Ltd v Regalwood Holdings Ltd*, above n 10.
22 At [2].
23 Footnotes omitted.

> confirm the position under the general law, namely that, while the contract remains on foot, the existence of a breach of warranty is not a licence for a purchaser simply to sit on its hands refusing to proceed to settlement until the breach is remedied. To adopt Tipping J's metaphor from *Holmes v Booth*, a purchaser who has come to this fork in the road is faced with only two possible routes, cancellation or performance, and once the latter is chosen is bound to perform in accordance with the contract when called upon. There is no intermediate road available. Nor can the purchaser suspend an election without risking default. It risks being taken to have affirmed the contract but defaulted in performance.

[65] Blanchard J went on to explain that while the first sentence in the clause in question did not create any difficulty, there was an ambiguity in the second. He considered that it was to be understood as looking prospectively towards the settlement which must occur unless the purchaser elected to cancel and validly did so.[24] Clause 10.1 of the Agreement in this case takes a different form but, as with the clause at issue in *Regalwood*, it provides that in the absence of cancellation the breach by the vendor of any term of the Agreement[25] does not defer the purchaser's obligation to settle.

[66] However, there does not appear to have been an equivalent to the words now used in cl 10.1 that the "obligation is subject to the provisions of this clause 10.0", which leads directly to the preservation of the right to seek specific performance under cl 10.10. Indeed, the predecessor of cl 10.0 appears to have been inserted into the standard-form agreement in response to the Supreme Court's suggestion in *Regalwood* that:[26]

> It should … not be beyond the wit of the drafters of standard-form real estate contracts to devise a mechanism which will enable speedy resolution of bona fide and reasonable purchasers' claims for equitable compensation or set-off and protect each of the contracting parties whilst doubt about the correct position remains.

The clause thus represents a distinct difference to the wording in the *Regalwood* clause, which contemplated exercise of the right only after settlement had taken place.

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24 At [73].

25 The reference to "any term of the Agreement" means the net is cast more widely that the clause discussed in *Regalwood*, which was limited to a breach of warranty or undertaking.

26 At [75]. For further discussion, see *MGH Trah Ltd v Fox Mortimer Trustee Co Ltd* [2021] NZCA 59, (2021) 22 NZCPR 102 at [38]–[40].

[67] The second distinction that can be made is that *Regalwood* was not a case where it could have been concluded that the tender of settlement would have been futile. Here, it was Ms Mao's conduct which relieved Mr Singh of the obligation to tender settlement. This was not a case of a breach of warranty, as in *Regalwood*, but rather a clearly justified conclusion that vacant possession would not be provided in accordance with the Agreement. In these unusual circumstances, we consider cl 10.10 enabled Mr Singh to seek specific performance on the basis that he wanted to rely on the Agreement.

[68] It will be apparent from what we have already said that we do not accept that the Judge erred in the specific ways Mr Zhang submitted. We do not consider that Mr Singh was obliged to tender settlement and engage in the procedures set out in cls 10.3 and 10.6 of the Agreement. We have seen no reason to disturb the Judge's finding that the position adopted by Ms Mao was "entrenched": there was every indication that she would not change her mind.[27] Finally, there was no reason for Mr Singh to settle with compensation in lieu of possession. Mr Singh was not obliged to tender the settlement in the circumstances.

[69] For these reasons the first ground of appeal fails.

Second ground of appeal — relief

[70] The Judge considered that specific performance as sought by Mr Singh was an appropriate remedy. He gave brief reasons for doing so, including the fact that specific performance is well established as an appropriate remedy to enforce agreements for the sale and purchase of real estate. He noted that the property represented a development opportunity, which Ms Mao had been prepared to sell on a rising market. It was not clear that Mr Singh would be able to obtain a comparable development opportunity at the same price. He also considered that damages might not be an appropriate remedy, because Ms Mao was apparently resident in Australia, thereby potentially making enforcement more difficult. Further, the Judge thought that calculating damages would be a "less efficient remedy than specific performance", observing that the calculation of damages to compensate for a lost development

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[27] High Court judgment, above n 1, at [48].

opportunity would not be as straightforward as allowing the developer to actually have that opportunity.[28] He considered that although Mr Singh had delayed commencing the proceeding for approximately five months after Ms Mao cancelled the Agreement, the delay was insufficient to count against an order for specific performance.[29]

[71] Mr Zhang suggested that the Judge did not take into the account the severity of the remedy, submitting that having genuinely believed the Agreement was validly cancelled, Ms Mao commenced a development of the property herself, incurring costs in the process. He submitted there was no reason to suppose that damages could not be quantified. He supplemented this with evidence from the bar about Ms Mao's financial position. Mr Zhang also raised issues concerning Mr Singh's conduct, criticising him on the basis Mr Singh had insisted throughout on the land being transferred to him with vacant possession, an outcome to which he claimed Mr Singh was not entitled. He also criticised Mr Singh for not invoking the correct process to resolve the dispute. Further, Mr Zhang raised an issue as to whether Mr Singh was in fact entitled to the loan which he had obtained in order to settle. This argument was apparently based on the fact Mr Singh had obtained a bank loan for 80 per cent of the purchase price of the property, which Mr Zhang claimed Mr Singh would not normally have been able to do as somebody intending to develop it.

[72] None of these arguments is persuasive. The remedy of specific performance has often been considered the appropriate remedy to enforce agreements for the sale and purchase of real estate and that remains the position.[30] In *Foreman v Hazard* Richardson J, writing for this Court, said:[31]

> Land is always treated as being of unique value in respect of which the common law remedy of damages is inadequate so that the remedy of specific performance is available to the purchaser as a matter of course unless, following settled principles, the Court refuses the remedy.

[73] There is no reason why specific performance should not be ordered in this case.

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28 At [53].
29 At [54].
30 Stephen Todd and Matthew Barber *Burrows, Finn and Todd on the Law of Contract in New Zealand* (7th ed, LexisNexis, Wellington, 2022) at [21.4.2(d)]; and D W McMorland *Sale of Land* (3rd ed, Cathcart Trust, Auckland, 2011) at [12.29].
31 *Foreman v Hazard* [1984] 1 NZLR 586 (CA) at 594.

[74] It will be apparent from what we have already said that we cannot accept Mr Zhang's criticisms of Mr Singh, who simply wanted to get what he bargained for. This land was marketed as appropriate for redevelopment, and Mr Singh purchased it for that purpose. In his affidavit filed in the High Court Mr Singh said he made the offer to purchase the property because of its development potential. While he could see the house was tenanted when he was shown the property by the agent, his intention was to remove the house. He had not been given any details of any existing tenancies and of course knew the Agreement provided for vacant possession. We consider that Mr Singh had no obligation to make inquiries about the tenancy in the circumstances.

[75] A comparison of Mr Singh's conduct with that of Ms Mao is not favourable to her, taking into account her insistence that Mr Singh was obliged to take the property subject to the tenancy, a position only conceded as incorrect when the matter reached this Court. In the meantime Mr Singh had twice offered to extend the settlement date to give Ms Mao time to secure vacant possession — offers which she declined.

[76] We see no error in the Judge's conclusion as to remedy. The second ground of appeal also fails.

The stay in the High Court

[77] Subsequent to the delivery of the High Court judgment, Ms Mao made an application for a stay of execution. In a further judgment dated 27 August 2021, Associate Judge Bell granted a stay.[32] He noted he had earlier directed that settlement take place on 20 August 2021.[33] Ms Mao had not settled in accordance with the order but, having regard to the appeal, the Judge was satisfied that execution should be stayed. He accordingly granted a stay subject to conditions, including that Ms Mao be in a position to grant vacant possession of the property within four weeks of this Court giving its decision on the appeal.[34]

[78] In the circumstances, and given that our decision is to dismiss the appeal, we consider the appropriate course to follow is to remit the matter to the High Court

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32 *Singh v Mao* [2021] NZHC 2230 [High Court stay judgment].
33 At [1], citing High Court judgment, above n 1, at [56].
34 At [14].

for any further orders that may be necessary to ensure that the property is transferred in accordance with the High Court stay judgment.

Result

[79] The appeal is dismissed.

[80] Ms Mao must pay Mr Singh costs for a standard appeal on a band A basis and usual disbursements.

[81] The matter is remitted to the High Court for any further orders that may be necessary to ensure the property is transferred in accordance with the High Court stay judgment in *Singh v Mao* [2021] NZHC 2230.

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