

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA137/2024  
[2024] NZCA 463

BETWEEN YAOWEI PENG  
Appellant  
AND KNIGHT INVESTMENTS LIMITED  
Respondent

Hearing: 3 September 2024  
Court: Thomas, Whata and Grice JJ  
Counsel: Z Chen for Appellant  
R Rao and C Richardson for Respondent  
Judgment: 19 September 2024 at 3.30 pm

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**JUDGMENT OF THE COURT**

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- A The appeal is dismissed.**
- B The appellant is to pay costs to the respondent for a standard appeal on a band A basis, together with usual disbursements.**
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**REASONS OF THE COURT**

(Given by Thomas J)

[1] The appellant, Yaowei Peng, agreed to purchase two sections or lots in a residential subdivision from the owner and developer, the respondent, Knight Investments Ltd. Separate agreements (SPAs) were entered into for each lot,

on the terms of the standard ADLS Agreement for Sale and Purchase.<sup>1</sup> Mr Peng failed to settle the purchase of either lot on settlement, and the default continued despite Knight's settlement notices. Knight's application for summary judgment was granted by the High Court.<sup>2</sup> Mr Peng appeals on the grounds the High Court erred in concluding Mr Peng had no defence and in determining that specific performance was the appropriate remedy.

## **Background**

[2] The background facts are not in dispute.

[3] On 15 April 2021, Knight agreed to sell and Mr Peng agreed to purchase five lots in Knight's subdivision at Clarks Beach, Auckland, lots 188 and 194 to 197.

[4] By deeds of nomination dated 29 April 2021, Mr Peng nominated Philly Worldwide Ltd and Q&S Housing Construction Ltd as purchasers of the two lots the subject of this appeal, lots 196 and 197 respectively. The settlement date in respect of all five lots was 19 May 2023, by which time Q&S Housing was in liquidation and Philly could not secure the necessary funding. Knight issued settlement notices to Mr Peng on 22 May 2023.

[5] On 24 May 2023, Mr Peng offered to purchase the five lots for \$313,000 each (plus GST), claiming that price was in line with his valuation report for lot 194. The contract purchase price for each of lots 196 and 197 was \$416,521.74 (plus GST).<sup>3</sup> The valuation for lot 194 was dated 12 May 2023 and valued lot 194 at \$360,000 (including GST). That offer was declined.

[6] Knight elected not to cancel the SPAs and issued summary judgment proceedings seeking specific performance of them on 22 June 2023. The subsequent resale by Knight of three lots resulted in their being removed from the application for summary judgment.

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<sup>1</sup> Auckland District Law Society and Real Estate Institute of New Zealand *Agreement for Sale and Purchase of Real Estate* (10th ed, 2019).

<sup>2</sup> *Knight Investments Ltd v Peng* [2024] NZHC 285 [judgment under appeal].

<sup>3</sup> This was also the purchase price for lots 194 and 195. The purchase price for lot 188 was \$425,217.39 (plus GST).

*Notice of opposition to application for summary judgment*

[7] Mr Peng gave notice of his intention to oppose the application for summary judgment on the grounds that he:

- (a) had the defence of impossibility to Knight's claim for specific performance in that there was no substantial likelihood that he would be able to perform the contract; and
- (b) had a defence of setoff to the claim for any inquiry into damages in that Knight failed to mitigate its losses.

[8] The defence of setoff in respect of the summary judgment application was withdrawn at the High Court hearing.

**Judgment under appeal**

[9] The application for summary judgment was heard on 20 February 2024, Associate Judge Gardiner issuing her judgment on 23 February 2024.

[10] The Judge identified the single issue as whether Mr Peng's defence of impossibility was reasonably arguable.<sup>4</sup>

*Legal principles*

[11] The Judge referred to r 12.2(1) of the High Court Rules 2016, which provides:<sup>5</sup>

The court may give judgment against a defendant if the plaintiff satisfies the court that the defendant has no defence to a cause of action in the statement of claim or to a particular part of any such cause of action.

[12] The Judge then set out the well-established principles governing a summary judgment application:<sup>6</sup>

- (a) The question on a summary judgment application is whether the defendant has no defence to the claim; that is, that there is no real

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<sup>4</sup> Judgment under appeal, above n 2, at [3].

<sup>5</sup> At [19].

<sup>6</sup> At [20], citing *Krukziener v Hanover Finance Ltd* [2008] NZCA 187, [2010] NZAR 307 at [26].

question to be tried. The Court must be left without any real doubt or uncertainty.

- (b) The onus is on the plaintiff, but where its evidence is sufficient to show there is no defence, the defendant will have to respond if the application is to be defeated.
- (c) The Court will not normally resolve material conflicts of evidence or assess the credibility of deponents. But it need not accept uncritically evidence that is inherently lacking in credibility, as for example, where the evidence is inconsistent with undisputed contemporary documents or other statements by the same deponent or is inherently improbable. In the end the Court's assessment of the evidence is a matter of judgment. The Court may take a robust and realistic approach where the facts warrant it.

[13] The Judge correctly noted that a defendant is under an obligation to lay a proper foundation for the defence in the affidavits filed in support of the notice of opposition.<sup>7</sup>

[14] The Judge then cited the principles identified in the leading case on impossibility, *Ngai Tahu Property Ltd v Dykstra*, as follows:<sup>8</sup>

- (a) A Court of equity will not require that to be done which cannot be done. Equity does not act in vain. ....
- (b) The defendant must establish a very substantial probability that it would not be able to comply with an order for specific performance: ...
- (c) Anything less than a very substantial probability that performance will be impossible is insufficient – anticipation of possible difficulties or even a demonstrated difficulty in finding purchase money is unlikely to constitute a defence of impossibility. In such cases and subject to any other overriding equitable considerations a Court in equity is likely to order specific performance in the ordinary manner (with or without conditions) – the defendant may then later approach the Court for a modification or variation of the order: ...
- (d) In an ordinary proceeding, pleading of impossibility is in the nature of an affirmative defence and the onus of proof rests upon the defendant as the person taking the point: ...
- (e) On an application for summary judgment, r 12.2(1) High Court Rules applies. The plaintiff must prove that the defendant has no arguable defence to the claim for an order for specific performance. The onus on the application remains on the plaintiff although, when the plaintiff establishes its contractual entitlement, the evidential onus shifts to the

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<sup>7</sup> Judgment under appeal, above n 2, at [21], citing *Middleditch v New Zealand Hotel Investments Ltd* (1992) 5 PRNZ 392 (CA) at 394.

<sup>8</sup> Judgment under appeal, above n 2, at [22], citing *Ngai Tahu Property Ltd v Dykstra* (2009) 10 NZCPR 734 (HC) at [12] (citations omitted).

defendants to demonstrate a tenable defence: ... Thus, where there is raised an impossibility defence to a summary judgment application for specific performance, the plaintiff must prove that the defendant has no arguable defence that there is a very substantial probability that the defendant will be unable to comply with an order for specific performance.

[15] The Judge found that Mr Peng's affidavit evidence had not laid a sufficient evidential foundation for a defence of impossibility. References to the financial position of the nominee companies was irrelevant, given as a matter of law, a nominating party remains liable under the contract, something confirmed by the provisions of the SPAs.<sup>9</sup>

[16] Mr Peng had not provided a statement of assets and liabilities, income and expenses or evidence of attempts to secure personal finance.<sup>10</sup> The Judge found Mr Peng's evidence fell "well short of establishing an arguable defence that there is a very substantial probability that performance of the agreements will be impossible".<sup>11</sup> She regarded Mr Peng's evidence as in stark contrast to the position in *Ngai Tahu Property Ltd v Dykstra* where extensive affidavits of the defendant's financial position were provided.<sup>12</sup>

[17] The Judge specifically reminded herself that special care was required when specific performance was sought on summary judgment, noting that different issues may arise in respect of the exercise of the Court's discretion to order specific performance in contrast to whether there was an arguable defence to liability.<sup>13</sup> She noted that Mr Peng did not identify any other considerations aside from the claim that performance was impossible.<sup>14</sup>

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<sup>9</sup> Judgment under appeal, above n 2, at [24]. Clause 1.5(2) of the sale and purchase agreements provided:

Where the purchaser executes this agreement with provision for a nominee, or as agent for an undisclosed or disclosed but unidentified principal, or on behalf of a company to be formed, the purchaser shall at all times remain liable for all obligations on the part of the purchaser.

<sup>10</sup> Judgment under appeal, above, n 2, at [25].

<sup>11</sup> At [26].

<sup>12</sup> At [27].

<sup>13</sup> At [28], citing *Hart v Bankfield Farm Ltd* (2008) 9 NZCPR 685 (HC) at [39].

<sup>14</sup> Judgment under appeal, above n 2, at [30].

[18] The Judge entered summary judgment for Knight in respect of its claim for an order for specific performance by Mr Peng of the SPAs in respect of lots 196 and 197.<sup>15</sup>

**Did the High Court err in its approach to summary judgment?**

[19] Ms Chen, for Mr Peng, submitted that not only was there an onus on Knight to show Mr Peng had no defence to the claim, there was also an onus on Knight to show that specific performance was the appropriate remedy. She pointed out that specific performance is an equitable remedy and is discretionary, and submitted that the “normal remedy for default” was an award of damages, which was something available to Knight under the SPAs. Ms Chen submitted that Knight offered “nothing persuasive” to demonstrate that specific performance, in light of Mr Peng’s inability to obtain finance or other sources to settle, was the most appropriate remedy.

[20] In Ms Chen’s submission, Knight failed at the first step to offer credible financial evidence that Mr Peng had the ability to settle and therefore failed to show that specific performance was the most appropriate remedy.

[21] As the Judge identified, the principles governing summary judgment are well settled and the question is whether the defendant has a defence to the claim. Where the evidence is sufficient to indicate there is no defence, the defendant will need to respond by laying a proper foundation for any defence.

[22] It was not a matter for Knight to anticipate what defence Mr Peng might raise but rather to provide evidence in support of its claim. That is what Knight did in its affidavits in support of the application wherein it sought orders for specific performance of the SPAs or alternatively an inquiry into damages. Two affidavits in support were provided by the sole director of Knight, verifying the allegations in the statement of claim and Mr Peng’s failure to settle. Despite our observation that it was not for Knight to anticipate the defence, Knight clearly had some wind of the issues likely to be raised by Mr Peng in light of his offer to settle at a reduced price and said:

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<sup>15</sup> At [31].

### **Specific performance sought**

28. Mr Peng had intended to market house and land packages on the individual lots. I understand that with the ongoing downturn in the property market, he and his associated entities have had some difficulty in finding buyers at appropriate price levels. Ultimately these agreements are not "options" or conditional in any way on Mr Peng having found buyers by the settlement date. This was a commercial deal.
29. I do not have any particular details about Mr Peng's present financial position. Annexed and marked "O" is a copy of a search from the Companies Register showing that Mr Peng is currently a shareholder and/or director of 28 different companies. I have no reason to believe that he is impecunious or would be unable to comply with an order to perform the agreements.
30. The plaintiff remains ready, willing and able to perform the agreements. There is no impediment at our end to transferring ownership if Mr Peng pays the balance of the purchase price and settles on the lots.
31. The plaintiff seeks that Mr Peng is ordered to perform all of the agreements in accordance with his contractual obligations.

### **No arguable defence**

32. I am not aware of any reason why this application should not be granted.
33. I confirm my belief that the defendant has no arguable defence to the plaintiff's claim.

[23] The first affidavit exhibited a search of the Companies Register showing entries involving Mr Peng. The second exhibited the SPAs which specifically provide in cl 11.4 that, if the purchaser failed to comply with a vendor's settlement notice, then the vendor had the option of suing the purchaser for specific performance or cancelling the agreement and seeking damages. There is nothing in the SPAs to suggest that a vendor should seek the latter as opposed to the former. There was no requirement for Knight to prove that damages would be an inadequate remedy.

[24] Ms Chen was critical of the evidence, submitting (but with no evidence) that there were errors and the information was not correct.

[25] The point, however, is that all Knight could do was present publicly available information. Details of Mr Peng's financial position were obviously within Mr Peng's knowledge and it was for him to provide that evidence in support of his defence of

impossibility. Once Knight discharged the initial burden to establish its contractual entitlement, the evidential onus shifted to Mr Peng to demonstrate a tenable defence.

**Did Mr Peng provide evidence of a tenable defence?**

[26] The Judge was undoubtedly correct to conclude that Mr Peng’s evidence fell well short of establishing there was a very substantial probability that Mr Peng would be unable to comply with an order for specific performance. This is for a number of reasons:

- (a) Mr Peng said he would face “tremendous difficulty if ... forced to try to settle all the properties”. At that stage, specific performance was sought in respect of all five lots. By the time of the summary judgment hearing, specific performance was sought in respect of two of the five lots only. There was no updating affidavit evidence in respect of Mr Peng’s ability to settle the purchase of two lots.
- (b) Mr Peng claimed that Philly Worldwide did not have the funds or ability to secure funds to settle. That was irrelevant. Mr Peng was liable as the party to the SPAs. That he “never anticipated”, as he claimed in his affidavit, that he would be called upon to settle the purchases given the nominations, was immaterial, as was his claim that he believed he would be “absolved from any further liabilities” given the nominations.
- (c) The valuation relied on by Mr Peng was in respect of lot 194 only and was dated 12 May 2023. There was no updating information at the time the application was heard on 20 February 2024.
- (d) While Mr Peng gave details of a residential property he held in his own name in Mt Eden, Auckland, he provided no information regarding his equity in that property.
- (e) The email from Collinson Mortgages suggesting Mr Peng would have difficulties accessing finance did not include any context: what finance



was sought and for what, and what information about Mr Peng's financial position was provided to Collinson Mortgages?

[27] Furthermore, when these issues were pointed out in the reply affidavit from Daniel Nakhle, sole director of Knight, Mr Peng apparently did nothing to update the information. Mr Nakhle's reply affidavit also provided some details of what would appear to be substantial multi-unit developments with which Mr Peng was associated.

[28] The onus was on Mr Peng to demonstrate he had a tenable defence. When claiming impossibility, he had to provide evidence of his personal financial situation and inability to secure funds. He failed to do so. The most obvious evidence that he should have provided was a sworn statement of his assets, liabilities, income and expenditure from an appropriate professional, as well as evidence of efforts to obtain finance for the purchases. Indeed we accept Mr Rao's submission, for Knight, that the opaque way in which Mr Peng has approached his defence justifies an inference that he is in a contrary position from that which he contends.

**Did the Judge err in exercising her discretion to order specific performance?**

[29] The Judge reminded herself that special care was needed before ordering specific performance on summary judgment and that the exercise of her discretion involved different issues from those to be considered when addressing whether there was an arguable defence in respect of liability.<sup>16</sup> We cannot fault that approach.

[30] Knight had a contractual entitlement to seek specific performance on Mr Peng's default. Mr Peng did not discharge the onus on him of laying an evidential basis for impossibility and there was no error in granting summary judgment for specific performance.

**Result**

[31] The appeal is dismissed.

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<sup>16</sup> At [28].

[32] The appellant is to pay costs to the respondent for a standard appeal on a band A basis, together with usual disbursements.

Solicitors:  
Righteous Law Limited, Auckland for Appellant  
Inder Lynch, Manukau for Respondent