IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2010-404-4303

MARK R BROUGHTON & LYNETTE BROUGHTON
Appellants

v

WYATT FAMILY TRUST HOLDINGS LTD
Respondent

Hearing: 14 October 2010

Appearances: Mr M Keall for Appellants
Mr G Wyatt (granted leave to appear on behalf of Respondent)

Judgment: 20 October 2010

JUDGMENT OF LANG J
[on appeal and cross-appeal against refusal to enter summary judgment]

This judgment was delivered by me on 20 October 2010 at 11.30 am, pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date……..……

Solicitors:
Vlatkovich & McGowan, Whangaparaoa
Mr M Keall, Auckland
Copy to:
Mr G Wyatt, Silverdale

[1] On 13 April 2007 the respondent and cross-appellant, Wyatt Family Trust Holdings Limited, ("Wyatt"), entered into an agreement to sell a property situated at Weranui Road, Kaukaupakapa for $1,350,000.00. The agreement for sale and purchase recorded the purchaser as being "Jack Wright or nominee".

[2] The sale was conditional upon the purchaser conducting a due diligence investigation to ensure that the property was satisfactory for his purposes. The agreement recorded that this condition was for the sole benefit of the purchaser. The purchaser was required to advise the vendor as to fulfilment of the condition no later than 4 pm on 24 May 2007.

[3] On 23 May 2007 Mr Wright entered into a deed of nomination under which he nominated the appellants and cross-respondents, Mr and Mrs Broughton, as the purchasers under the agreement to sale and purchase.

[4] At 11.36 am on the same day Mr and Mrs Broughton's solicitors advised Wyatt's solicitors by e-mail that Mr and Mrs Broughton had been nominated as purchasers by Mr Wright and of the fact that the due diligence condition had been satisfied. They then physically delivered the same advice in hard copy form to Wyatt's post office box and its registered office at 3.05 pm and 3.45 pm respectively. At the same time they provided Wyatt with a copy of the deed of nomination, together with the transfer and notices of sale.

[5] From the perspective of Mr and Mrs Broughton, the agreement was then unconditional and settlement was due to occur the following day. Wyatt, however, refused to accept that Mr and Mrs Broughton were entitled to confirm fulfilment of the due diligence condition. It took the view that Mr Wright himself was required to take that step. Wyatt considered that the purchaser had not satisfied the condition, and it treated the agreement as being at an end at 4 pm on 24 May 2007. It did so because it wanted to accept another offer for a higher price.

[6] Mr and Mrs Broughton did not accept that Wyatt had validly terminated the agreement. It delivered a settlement notice to Wyatt and made it clear to Wyatt that

they were in a position to complete the purchase of the property. That did not produce the desired effect, because Wyatt refused to accept that it was bound to sell the property to Mr and Mrs Broughton.

[7] Approximately three months later the parties reached a compromise. Wyatt agreed to complete the sale of the property to Mr and Mrs Broughton on the basis that both parties were free to pursue claims against each other in the District Court. Mr and Mrs Broughton agreed that, if Wyatt succeeded in persuading the District Court that it would have been entitled to an order for specific performance, they would pay Wyatt the sum of $35,000. That would provide Wyatt with compensation for the opportunity that it had lost to sell its property for a greater price. Wyatt agreed that, if Mr and Mrs Broughton were successful in persuading the District Court that they would have been entitled to an order for specific performance, it would meet their actual and reasonable legal costs in relation to the dispute from 24 May 2007 up until the completion of the sale on 12 July 2007. It would also pay penalty interest for the delayed settlement at the rate specified in the agreement.

[8] Wyatt subsequently issued proceedings in the District Court, and both parties applied for summary judgment against each other. In a reserved decision delivered on 18 June 2010, His Honour Judge Hinton dismissed both applications. Both parties now appeal to this Court against the Judge's refusal to enter summary judgment in their favour.

Relevant principles

[9] The principles to be applied in determining an application for summary judgment were not in dispute in either the District Court or on appeal. They have been clearly established through decisions of the Court of Appeal such as *Pemberton v Chappell* [1987] 1 NZLR 1 (CA); *Grant v New Zealand Motor Corporation Ltd* [1989] 1 NZLR 8 (CA) and *Westpac Banking Corporation v MM Kembla New Zealand Ltd* [2001] 2 NZLR 298 (CA).

[10] In considering an application for summary judgment, the Court is required to apply the following general principles:

a) Mr and Mrs Broughton were required to satisfy the Court that Wyatt had no arguable defence to the claim brought against it. The issue was whether there was a real question to be tried.

b) Wyatt, on the other hand, needed to establish that it had a complete answer to Mr and Mrs Broughton's claim.

c) It is generally not possible to determine disputed issues of fact based on affidavit evidence alone, particularly when issues of credibility arise. Issues of law, even though they may be complex, can, however, be determined in an application for summary judgment.

d) Although the Court should adopt a robust approach, nevertheless summary judgment may be inappropriate where the ultimate determination turns on a judgment that can only properly be reached after a full hearing of all the evidence.

[11] The Judge took the view that neither party had established their cases to the required standard. For that reason he considered that the matter needed to proceed to trial and he dismissed both applications. He did not endeavour to resolve the legal issue that is central to the argument for both parties.

[12] I take a somewhat different approach. The facts in this case are all agreed. The only issue to be determined is whether Mr and Mrs Broughton had the right to step into Mr Wright's shoes and provide Wyatt with advice that the due diligence condition had been satisfied. I consider that that issue can appropriately be determined using the summary judgment procedure. I cannot see what advantage the court could obtain if the matter was to proceed to a full trial. Requiring the matter to proceed to trial will also further delay resolution of the issue and require the parties to incur needless expense.

The issues

[13] Mr and Mrs Broughton raise two main arguments on appeal. First, they contend that, once Mr Wright nominated them as purchasers, they were immediately entitled to all of the benefits given to the purchaser under the agreement. This argument requires consideration of the effect of the Contracts (Privity) Act 1982. Secondly, they submit that the Deed of Nomination also constituted an effective assignment to them of Mr Wright's interest as purchaser under the agreement both in equity and in terms of s 130 of the Property Law Act 1952.

1. Were Mr and Mrs Broughton immediately entitled to all of the benefits given to the purchaser under the agreement after Mr Wright nominated them as purchasers?

[14] The inclusion of the phrase "or nominee" within the description of a party to an agreement for the sale and purchase of real estate is relatively common. It may occur, for example, where the purchaser executes the contract on behalf of a company that is yet to be incorporated or on behalf of a family trust. It may also occur, however, where the purchaser intends to transfer its interest under the agreement to a third party on an arm's length basis.

[15] It is now well established that the use of the phrase does not create a contractual relationship between the nominee and the other party or parties to the contract: *Hurrell v Townend* [1982] 1 NZLR 536 (CA) at 547. For that reason, until the Contracts (Privity) Act 1982 ("the Act") came into force on 1 April 1983, the other party or parties to a contract assumed no obligation to a nominee and a nominee had no ability to enforce the terms of contract against them: *Lambly v Silk Pemberton Ltd* [1976] 2 NZLR 427 (CA) at 432.

[16] Sections 4 and 8 of the Act remedied that problem. They provide:

> **4. Deeds or contracts for the benefit of third parties**
>
> Where a promise contained in a deed or contract confers, or purports to confer, a benefit on a person, designated by name, description, or reference

> to a class, who is not a party to the deed or contract (whether or not the person is in existence at the time when the deed or contract is made), the promisor shall be under an obligation, enforceable at the suit of that person, to perform that promise:
>
> Provided that this section shall not apply to a promise which, on the proper construction of the deed or contract, is not intended to create, in respect of the benefit, an obligation enforceable at the suit of that person.
>
> ...
>
> **8. Enforcement by beneficiary**
>
> The obligation imposed on a promisor by section 4 of this Act may be enforced at the suit of the beneficiary as if he were a party to the deed or contract, and relief in respect of the promise, including relief by way of damages, specific performance, or injunction, shall not be refused on the ground that the beneficiary is not a party to the deed or contract in which the promise is contained or that, as against the promisor, the beneficiary is a volunteer.

[17] In *Rattrays Wholesale Ltd v Meredyth-Young & A'Court Ltd* [1997] 2 NZLR 363 (HC) Tipping J reviewed several earlier authorities dealing with the ability of a nominee to invoke ss 4 and 8 and said at 383:

> . . . if a nominee is referred to in a contract such reference must be with the intention of meaning something, and that must be the creation of legal obligations in favour of the nominee. In my view the promisor should be held to his promise to the nominee provided the identity of that person can be clearly ascertained from a name, description or reference to a class included in the deed or contract in question. . . . Clearly there must have been an intention to create an obligation enforceable at the suit of the nominee.

[18] In *Laidlaw & Anor v Parsonage* [2010] 1 NZLR 286 (CA and SC) the Court of Appeal confirmed that the phrase "or nominee" was a sufficient designation of 'name, description or reference to a class' to satisfy the requirements of s 4 and allow the nominee, once named, to sue to enforce a contractual promise to its nominator. The Supreme Court declined leave to appeal on the basis that the reasoning of the Court of Appeal was entirely convincing. That being the case, Mr and Mrs Broughton are clearly entitled to sue to enforce promises that Wyatt made to the purchaser in the agreement that it entered into with Mr Wright.

The arguments

[19] Wyatt accepts, given the principles confirmed in *Laidlaw*, that Mr and Mrs Broughton have standing to sue in relation to the contract. It contends, however, that this is restricted to an entitlement to issue proceedings against Wyatt in the event that it refused to accede to Mr Wright's requirement that the land should be conveyed into the name of Mr and Mrs Broughton. It says that Mr and Mrs Broughton never enjoyed the benefit of, and consequently have no ability to enforce, any of the other promises that Wyatt made to the purchaser under the agreement. In particular, they were not entitled to the benefit of the due diligence investigation that Mr Wright was entitled to undertake, and they had no ability to advise Wyatt that the due diligence condition had been satisfied.

[20] Wyatt relies upon the fact that Mr Wright was the purchaser named in the agreement. It says that his nomination of Mr and Mrs Broughton did not alter that fact. It points out that clause 8.7(4) of the agreement required notice of fulfilment of the due diligence condition to be served "by one party on the other party". Mr and Mrs Broughton were never parties to the agreement. As a result, Wyatt contends that Mr Wright was the only person who had the ability to serve it with the required notice that the due diligence condition had been fulfilled.

[21] Wyatt accepts that, as a logical extension of this submission, Mr Wright was also required to take all other steps necessary to complete the purchase of the property. His nomination of Mr and Mrs Broughton meant only that Wyatt could be compelled to convey the property into their name rather than into the name of Mr Wright.

[22] Mr and Mrs Broughton point out that Wyatt became aware that Mr Wright had named them as his nominees on 23 April 2007. They contend that from that point on they were entitled to all of the benefits that the agreement bestowed upon the purchaser. This included the benefit of the due diligence condition. For that reason, they say that they had the ability to give Wyatt notice that the due diligence

condition was fulfilled, and (using their status under s 4 of the Act) to sue to enforce the contract if Wyatt refused to complete the sale of the property to them.

The authorities

[23] The factual matrix in several cases suggests that it is not uncommon for a nominee to step into the shoes of the purchaser and complete a transaction at a point prior to settlement. In *Coldicutt v Keeys* HC Whangarei A 50/84, 17 May 1985 the nominated purchaser had completed the statutory declaration then required of any purchaser of farm land by virtue of the Land Settlement Promotion and Land Acquisition Act 1952. In that case Hillyer J said at 26:

> It seems to me that the requisite ingredients of that section are present. There is a promise in the agreement for sale and purchase by Mr Keeys to sell the land. The sale may be to a nominee. A benefit is thus conferred or purported to be conferred. The first plaintiff is not designated by name, however he is designated by description as a nominee, and he is not a party to the deed or contract.
>
> Turning to the proviso to the section, there is nothing in the contract itself to indicate that it was not intended to create an obligation enforceable at the suit of the nominee. Indeed, the only purpose of the use of the words "or nominee" in the contract, must be to give the nominee a right to complete the contract, and clause 4 of the special conditions of sale states that the purchaser will not be relieved of the obligations under the agreement, should the nominee fail to complete. It follows from that clause, it is anticipated that the nominee will take over the obligations of the purchaser and complete the contract. (emphasis added)

[24] In *Village Lifestyles Ltd v Lee* HC Auckland CIV 2008 404 1639, 6 August 2008 the nominated purchaser had given the vendor notice that a condition relating to the commercial and financial viability of the purchase had been satisfied so that the agreement was unconditional. The nominated purchaser had also issued a settlement notice in the same way that Mr and Mrs Broughton have done in the present case.

[25] Similarly, in *Smada Group Ltd v Miro Farms Ltd* [2007] NZCA 568, the nominated purchaser advised the vendor that it had been nominated and that all the conditions in the agreement had been satisfied so that the agreement was unconditional.

[26] There is nothing in any of these cases to indicate that the nominated purchaser was not entitled to complete the contract.

[27] Moreover, when it declined leave to appeal in *Laidlaw*, the Supreme Court had this to say:

> [3] The very purpose of a nominee provision is to enable the nominee to take the benefit of the contract by enforcing it (as permitted by s 8), while at the same time leaving the vendor with the protection of the continuing liability of the purchaser if the nominee proves unwilling to complete. A designation by description requires no more than a sufficient identification of the person who may take the benefit. There is no good reason why that person should not be identified by the nomination of the purchaser. Identification by a third party or by the occurrence independently of an event or by some other particular means is not required by s 4.

[28] This passage clearly suggests that the Supreme Court considered that a nominee has the ability to complete a contract in place of the nominating party.

Decision

[29] Construing the agreement in the present case as a whole, I consider that this conclusion must be correct. The agreement contemplates that the purchaser will be either Mr Wright or his nominee. Nomination may occur at any time, and any person may be nominated. There is no restriction, either, on the extent to which the nominee may obtain the benefit of the agreement.

[30] It follows, in my view, that the nominee is entitled to the full benefit of the agreement from the point at which the nomination takes effect. Thereafter it may do everything that the purchaser was entitled to do under the contract. It may also enforce the terms of the agreement if the vendor fails to comply with any of its obligations to the purchaser under the agreement. The nominee would also be required to comply with clause 8.7.2 of the agreement, which obliged the purchaser to do all things reasonably necessary to enable all conditions inserted for the benefit of the purchaser to be fulfilled by the due date for fulfilment. As counsel for Mr and Mrs Broughton points out, that obligation would obviously include serving notice that the due diligence condition had been fulfilled.

[31] Clause 1.3(2) of the agreement is also relevant. It provides as follows:

> Where the purchaser executes this agreement with provision for a nominee, or as agent for an undisclosed 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 hereunder.

[32] This clause was obviously inserted in recognition of the possibility that the nominee might attend to completion of the contract in place of the named purchaser. Given the fact that the vendor has no direct contractual relationship with the nominee, it needs the reassurance that Clause 1.3(2) provides in case the nominee fails to complete the agreement. As the Court of Appeal noted in *Laidlaw* at [41], the intention of the clause is to prevent a purchaser from escaping liability by nominating an impecunious person as purchaser.

[33] It is not difficult to envisage other situations in which the protection afforded to the vendor by the clause might become important. In cases where the nominated purchaser deals directly with the vendor after being nominated, the original purchaser might subsequently attempt to escape liability under the agreement by relying upon events that have occurred in the course of those dealings. Clause 1.3(2) prevents the original purchaser from relying upon arguments of that type.

[34] This goes back to the comments of the Supreme Court in the first sentence of the passage cited at [26] from *Laidlaw*. If the argument for Wyatt is correct, the clause would be redundant because Mr Wright is the only person entitled to complete the agreement. He would therefore always remain liable to perform the obligations imposed on the purchaser under the agreement.

[35] If Wyatt's submission is correct, other consequences would also follow. It would mean that the only promise that the nominee could enforce is the vendor's promise to convey the land to the nominee. That outcome does not sit easily with the outcome in *Laidlaw*. In that case the plaintiffs were the nominees of the original purchaser. They sought to enforce a warranty in the agreement for sale and purchase that the house that they had purchased pursuant to the agreement was constructed in accordance with the provisions of the Building Act 1991. The Court of Appeal upheld this Court's finding that, as the nominees of the original purchaser, they were

entitled to enforce that warranty against the vendor. The Court noted at [39] that "the promise relied upon by the trustees was made to the purchaser and the purchaser included the nominee". That conclusion would not be available if the only promise that the vendor was required to honour to the nominee was a bare promise to convey the land to the nominee.

[36] I also consider that the approach for which Mr and Mrs Broughton contend is necessary in order to give effect to the remedial nature of the Act. In *Laidlaw* the Court of Appeal approved the approach taken by Tipping J in *Rattray* (supra) and by the Court of Appeal in *Ballance Agri-Nutrients (Kapuni) Ltd v The Gama Foundation* [2006] 2 NZLR 319 (CA). In those cases Tipping J and the Court of Appeal had declined to follow a line of authority (including the decision of the Court of Appeal in *Field v Fitton* [1988] 1 NZLR 482 (CA)) establishing that where the words "or nominee" were used, the benefit that the nominee received was conferred by the nomination and not by the contract in which the words were used. As a result, the nominee could not bring itself within the wording used in s 4.

[37] Tipping J held that such an approach was unduly restrictive and that it was also unconvincing. He pointed out (at 382) that, in reality, a nominee receives the benefit of both the contract and the nomination. The contract creates the ability to nominate, whilst the nomination is the process by which the beneficiary of the contract is identified.

[38] Importantly for present purposes, Tipping J also relied upon the remedial nature of s 4. He noted (at 382) that the Act was designed to do away with a rule that had been regarded as unnecessarily restrictive for many years. The long title to the Act describes it as an Act "to permit a person who is not a party to a deed or contract to enforce a promise made in it for the benefit of that person". Tipping J considered that s 4 "should be given such fair, large and liberal interpretation as will best ensure its remedial purpose". I consider that the same approach is required in the circumstances of the present case.

[39] This does not involve any detriment to Wyatt. When it agreed to sell to Mr Wright or his nominee, Wyatt accepted that it might ultimately be required to sell the

property to a person other than Mr Wright. Wyatt had no interest in the identity of the nominee, because Mr Wright was free to select anybody as his nominee. Wyatt's obligations under the agreement also remain unchanged once Mr Wright nominated Mr and Mrs Broughton. It was not required to assume any further responsibilities than it had already agreed to bear. Moreover, although Wyatt was required to deal with Mr and Mrs Broughton and not Mr Wright in completing the sale of the property, it retained the ability to enforce the agreement against Mr Wright if Mr and Mrs Broughton failed to perform the purchaser's obligations under the agreement.

[40] Mr Wyatt contended that s 6 of the Act governed the position. It provides as follows:

> **6 Variation or discharge of promise by agreement or in accordance with express provision for variation or discharge**
>
> Nothing in this Act prevents a promise to which section 4 of this Act applies or any obligation imposed by that section from being varied or discharged at any time—
>
> (a) By agreement between the parties to the deed or contract and the beneficiary; or
>
> (b) By any party or parties to the deed or contract if—
>
> (i) The deed or contract contained, when the promise was made, an express provision to that effect; and
>
> (ii) The provision is known to the beneficiary (whether or not the beneficiary has knowledge of the precise terms of the provision); and
>
> (iii) The beneficiary had not materially altered his position in reliance on the promise before the provision became known to him; and
>
> (iv) The variation or discharge is in accordance with the provision.

[41] I do not, however, consider that s 6 applies to the circumstances of the present case. That section applies where one or both parties to a contract seek to vary or discharge one or more of the obligations imposed by the contract. That did not occur here. Neither the vendor nor the purchaser (whether that be Mr Wright or Mr and Mrs Broughton) sought to vary or discharge any of the obligations of either party to the agreement for sale and purchase. Rather, Mr and Mrs Broughton

endeavoured to comply with the existing terms of the agreement. They also sought to ensure that Wyatt did the same.

[42] Mr Wyatt also submitted that the decision of the Court of Appeal in *Gibbston Valley Estate Limited v Owen* (1999) 4 New Zealand ConvC 193,024 is relevant. In that case the purchaser in an agreement for sale and purchase had entered into a deed with a third party by which it assigned its interest under the agreement to the third party by way of mortgage. When the purchaser failed to complete the purchase, the vendor served a settlement notice on the purchaser but not the assignee. The purchaser failed to comply with the settlement notice, and the vendor cancelled the contract.

[43] In *Gibbston,* the Court was required to consider the consequences that followed the assignment of the purchaser's rights under the agreement. The assignee had argued that, because s 11 of the Contractual Remedies Act 1979 gave the vendor a right to claim relief against the assignee, the vendor was under a corresponding obligation to serve a copy of the settlement notice on the assignee as well as the purchaser. The Court of Appeal held that the assignment was not absolute, and that it was merely by way of charge. For that reason the vendor would not have been entitled to rely upon s 11 to claim relief against the assignee. The critical issue in *Gibbston* is therefore fundamentally different to that which arises in the present case. For this reason I do not consider that *Gibbston* is of any assistance to Wyatt.

[44] Taking all of these matters into account, I conclude that Mr and Mrs Broughton were entitled to the full benefit of the agreement, including the due diligence condition, after their solicitors gave Wyatt notice that Mr Wright had nominated them as purchasers under the agreement. They were therefore entitled to serve notice on Wyatt that the due diligence condition had been satisfied. This in turn entitled Mr and Mrs Broughton to issue the settlement notice and require Wyatt to complete the sale of the property to them. They would therefore have been entitled to an order for specific performance if they had not entered into the compromise with Wyatt that enabled them to complete the purchase of the property. This means that they were also entitled to obtain summary judgment against Wyatt in the present proceeding.

[45] In case I am wrong on that point, I propose to briefly consider the alternative argument advanced by Mr and Mrs Broughton.

2. Did the Deed of Nomination amount to an absolute assignment of Mr Wright's interest as purchaser to Mr and Mrs Broughton?

[46] The operative portion of the Deed of Nomination was worded as follows:

> 1. **Jack** nominates the Broughtons as purchaser under the Agreement to the intent that the Broughtons shall complete the purchase in place of **JACK** in accordance with the terms of the Agreement as fully and effectually as if the Broughtons were the contracting party on their own behalf.
>
> 2. **JACK** will do all things necessary and use his best endeavours to ensure that the Broughtons receive the full benefit as purchaser of the land under the Agreement.
>
> 3. The Broughtons will indemnify **JACK** for all liability under the Agreement and will perform and observe as purchaser all the terms and conditions under the Agreement as if they were the original named purchaser under the Agreement and so as to relieve **JACK** of any liability to the vendor under the Agreement.

[47] In order to qualify as an equitable assignment no particular form is required. As the learned authors of Todd, *The Law of Contract in New Zealand* (3rd ed, LexisNexis, Wellington 2007) point out at 17.1.1(b), the transaction in question does not need to purport to be an assignment or to use the language of an assignment. They go on to say at 539:

> . . . If the intention of the assignor clearly is that the contractual right shall become the property of the assignee, then equity requires the assignor to do all that is necessary to implement his or her intention. The only essential is that there be an intention to assign.

[48] I consider that the language used in the deed manifests Mr Wright's intention to unconditionally assign all of his rights as purchaser under the agreement to Mr and Mrs Broughton. It is not, as was the case in *Laidlaw*, merely an assignment by way of charge or mortgage. The fact that Mr Wright agreed to use his best endeavours to ensure that Mr and Mrs Broughton received the full benefit afforded to the purchaser under the agreement does not derogate from that conclusion.

[49] Mr Wright obviously intended that Mr and Mrs Broughton would bear the entire burden of completing the purchase of the property from Wyatt. This meant that they would be required to carry out all of the purchaser's obligations under the agreement. In return, they would receive all of the benefits that the purchaser was to receive under the agreement. Equity would therefore assist Mr and Mrs Broughton by making an order for specific performance in their favour.

[50] The deed would also, in my view, amount to a statutory assignment in terms of s 130 of the Property Law Act 1952. That Act was in force at the time that Mr Wright and Mr and Mrs Broughton entered into the Deed of Nomination. As the learned authors of Todd point out at 17.1.1(c), a transaction will qualify as a statutory assignment if it meets the following criteria:

(i) The assignment must be absolute; and

(ii) It must be in writing; and

(iii) Notice of the assignment must be given to the other party or parties to the contract.

[51] In the present case I have already held that the assignment was unconditional and there is no dispute that the deed was in written form. The remaining element is satisfied by the fact that Mr and Mrs Broughton's solicitors gave Wyatt notice of the assignment on 23 May 2007. For this reason Mr and Mrs Broughton would have been entitled, in their capacity as assignees, to claim relief against Wyatt pursuant to s 11 of the Contractual Remedies Act 1979. That relief could have included an order requiring Wyatt to perform its contractual obligation to convey that property to Mr and Mrs Broughton.

3. Remaining arguments for Mr and Mrs Broughton

[52] Counsel for Mr and Mrs Broughton advanced an alternative submission that, if Mr Wright was the only person who could serve notice of the fulfilment of the due diligence condition on Wyatt, Mr and Mrs Broughton should be regarded as Mr

Wright's agent for that purpose. This argument fails on the facts, because it is clear from the correspondence that Mr and Mrs Broughton's solicitors sent to Wyatt that Mr and Mrs Broughton were acting in their own right in serving notice of fulfilment on Wyatt and not on behalf of Mr Wright.

[53] Counsel also argued that Mr and Mrs Broughton were entitled to satisfy the due diligence condition notwithstanding the fact that they were not parties to the agreement because that was an event that the agreement expressly contemplated. Counsel drew an analogy in this context with an agreement containing a condition requiring a third party to issue a code compliance certificate by a due date.

[54] I am not convinced by this argument. I accept that the agreement contemplated that Mr Wright might nominate another person to complete the purchase in his place. It did not, however, contemplate that a complete non-party would acquire any rights at all. The only way in which Mr and Mrs Broughton could acquire the right to serve notice of fulfilment of the due diligence condition was through their status as Mr Wright's nominee.

Result

[55] Mr and Mrs Broughton were entitled to obtain summary judgment against Wyatt. For that reason their appeal is allowed and Wyatt's cross-appeal is dismissed.

Orders

[56] I enter judgment in favour of Mr and Mrs Broughton in the sum of $9,056.25, being the actual legal costs that they incurred between 24 May 2007 and 12 July 2007.

[57] I also enter judgment in their favour in the sum of $19,935.62, being interest at the rate of 11 per cent per annum on the unpaid purchase price in respect of the period between 24 May 2007 (the date upon which the sale should have been completed) and 12 July 2007 (49 days at $406.84 per day).

[58] Mr and Mrs Broughton are also entitled to interest on the sum of $28,991.87 in accordance with the provisions of the Judicature Act 1908 for the period between 12 July 2007 and the date of this judgment.

Costs

[59] Mr and Mrs Broughton also seek indemnity costs, but I do not consider that to be appropriate in the circumstances of the present case. The grounds for an award of indemnity costs are set out in r 14.6(4) of the High Court Rules. None of those grounds is satisfied in the present case. Although Wyatt has been unsuccessful, it cannot be said that it has acted vexatiously, frivolously, improperly or unnecessarily in commencing and continuing the proceeding in the District Court or on appeal.

[60] Mr and Mrs Broughton are entitled to costs on the appeal on a category 2B basis, together with disbursements as fixed by the Registrar.

Lang J