IN THE COURT OF APPEAL OF NEW ZEALAND

C.A.90/76

BETWEEN KEITH JAMES NEYLON of Haast, Pilot, and JEAN AGNES NEYLON his wife

Appellants

AND DONN ALEXANDER DICKENS of Tuatapere, Farmer, and MURIEL MAY DICKENS his wife

Respondents

Coram - Richmond P.
Woodhouse J.
Cooke J.

Hearing - March 17, 1977

Counsel - B.D. Inglis Q.C. and L.E. Laing for Appellants
J.F. Burn and P.J. Headifen for Respondents

Judgment - April 6, 1977.

JUDGMENT OF RICHMOND P.

The facts of this case are fully set out in the judgment which Woodhouse J. is about to deliver. It is unnecessary for me to repeat them and I shall proceed at once to a consideration of the several questions arising as a result of the submissions which Mr Inglis made to us in support of the appeal.

1. Does Clause 13 of the contract apply to a consent by the Administrative Division of the Supreme Court?

Mr Inglis submitted that clause 13 applied only in cases where consent of the Land Settlement Board was required. This argument was not advanced in the Supreme Court. I agree with Woodhouse J. that in its context clause 13 is grammatically capable of applying to a necessary consent of the Administrative Division of the Supreme Court as well as to a necessary consent of the Land Settlement Board. I can think of no sensible

reason why the draftsman should have intended clause 13 to apply only in the one case and not in the other. I accordingly construe the clause as intended to apply to both.

2. Was time of the essence under Clause 13?

I agree with Roper J. that, in the light of the decision of the Privy Council in Aberfoyle Plantations Ltd. v. Cheng [1960] A.C. 115, the provisions of clause 13 as to the date by which the consent of the Court should be granted, namely by the 26th day of January 1976, should prima facie be construed as making time of the essence. However evidence was called at the trial as to the general attitude of legal practitioners in Southland towards such a clause. It was said that it was not customarily treated as of any particular importance. Roper J. took the view that no such custom had been proved as would affect the ordinary interpretation of the clause. Whatever may have been the attitude of legal practitioners in Southland I do not think that such attitude amounts to a custom of a kind which the Courts should treat as being known to and accepted by the parties to contracts for the sale and purchase of land. It would not in my view be of a sufficiently notorious kind. I accordingly agree with the learned Judge on this point.

Next it was submitted by Mr Inglis that the circumstances surrounding the parties at the time when the contract was signed on 24 December 1975 were such that the parties must have realised that it would be impossible to obtain the consent of the Court by the 26th day of January 1976. It may be that this was in fact the position but no evidence was given to support such a contention and for myself I simply do not know what might have been the result if special and urgent efforts had been made to have the matter put

before a Land Valuation Committee. I accordingly feel unable to accept this particular submission.

In the result I am not persuaded that on the true construction of the contract, as at the time when it was entered into, time under clause 13 was not of the essence.

3. Waiver and Estoppel

In the Supreme Court Roper J. approached these questions by reference to the tests laid down by Woodhouse J. in Watson v. Healy Lands Ltd. [1965] N.Z.L.R. 511, 514. In that case my brother Woodhouse discussed the difficulty of deciding what is the true nature of waiver at common law and its relationship to estoppel generally and in particular to promissory estoppel. He thought that whether or not the representation relied upon as a waiver is really a sort of estoppel, the representee must show that two elements at least have operated -

(a) "That there was an unambiguous representation arising as the result of a positive and intentional act done by the representor with knowledge of all the material circumstances" and

(b) "That, relying upon that representation, he has carried out the new arrangement".

Both in the Supreme Court, and again in this Court, Mr Inglis laid great stress on the arrangements which were made between Mr Smith (as solicitor for the purchasers) and Mr Broughton (as solicitor for the vendors) on or about 20 January 1976. That was the day when Mr Smith's office reopened. The contract was dated 24 December 1975 and it seems from the evidence that Mr Smith had not seen it until his office reopened, although a copy had been sent to him by the real estate agents on the evening of the same day as the contract was signed. He was very conscious, when he looked at the contract, of the fact that the month allowed for filing an application for the consent of the

Court (under s.25 of the Land Settlement Promotion and Land Acquisition Act 1952) would expire on 24 January, which was a Saturday. He realised, and there is no dispute about this, that it would be physically impossible for him to obtain a purchasers' declaration from his clients (who were living in Haast) quickly enough for it to be filed with the vendors' application for consent in time to comply with the statute. Mr Smith said in evidence that he noticed the date of 26 January as it appeared in clause 13 of the agreement, but he does not appear to have been particularly concerned about the provisions of that clause as compared with the effect of non-compliance with the statute. No doubt this was because of the attitude of local practitioners to which I have already made reference. Be that as it may, he telephoned Mr Broughton and explained his difficulties and asked Mr Broughton to file the vendors' declaration and Mr Broughton agreed to do this. Mr Broughton then filed the vendors' application for consent in the Court and at the same time wrote to the Registrar a covering letter, the full text of which is set out in the judgment which Woodhouse J. will deliver. It is apparent from this letter that Mr Broughton also agreed to Mr Smith obtaining a declaration from the purchasers as quickly as possible even though it was quite obvious at that stage that the consent of the Court could not possibly be obtained by 26 January in terms of clause 13.

Roper J. found as a fact that no express reference to clause 13 was made during the discussion between Mr Smith and Mr Broughton. He then considered whether the conduct of Mr Broughton satisfied the requirements as to waiver or estoppel discussed in Watson v. Healy Lands Ltd. (supra) and, as I understand his judgment, came to the conclusion that Mr Broughton's actions did not amount to a sufficiently unambiguous representation. The Judge

thought that they were reasonably explainable on the basis that Mr Broughton was obliged under clause 11 to take all necessary steps to endeavour to obtain the consent of the Court. He also thought, although clause 13 provided that in the event of consent not being granted by 26 January 1976 the agreement would be "void", that its effect could more truly be regarded as rendering the agreement voidable. The Judge considered that it was reasonably possible that Mr Broughton was prompted simply by an anxiety to keep the agreement alive for the purposes of the Land Settlement Promotion and Land Acquisition Act 1952 while leaving it open as to whether or not the vendors would proceed in the event, which was inevitable, that consent would not be obtained by the specified date.

In this Court Mr Inglis submitted that the Judge was in error when he took the view that Mr Broughton was obliged, even at that late stage, to file a vendors' declaration. With respect, I think that Mr Inglis is correct on this point as clause 11 makes it clear that the obligation of the vendor to make application to the Court depends upon prior receipt from the purchaser of the purchasers' declaration. As to the other point which weighed with Roper J., I think it is as well to say that in my opinion the word "void" where used in clause 13 means what it says. It will be noticed that this word is used in clause 13 not only to describe the result if consent is not obtained by the date specified in the clause but also to describe the result if consent to the transaction is refused by the Court. Section 25 (5) of the Land Settlement Promotion and Land Acquisition Act 1952 provides that a transaction which is entered into subject to the consent of the Court shall not have any effect unless the Court consents to it. It is difficult therefore to see how a transaction as regards which the Court has actually refused

its consent could be regarded as voidable rather than void. The word "void" in clause 13 also applies in circumstances where a consent is granted subject to conditions which are not complied with. Under s.25 (4) it is provided that the transaction, in such circumstances, shall be "deemed to be unlawful and shall have no effect". Although I think that the word "void" in clause 13 means what it says it does not necessarily follow that in practice a failure to obtain consent by the date specified will have the result of bringing the agreement automatically to an end, in a situation where none of the statutory provisions to which I have just referred applies. If failure to obtain consent results from the default of one party then it may not be open to that party to assert non-fulfilment - see Scott v. Rania [1966] N.Z.L.R. 527, at 534 para.5 - per McCarthy J. It must I think be accepted also that a party not in default may be precluded from setting up non-fulfilment of the condition as the result of an established election, waiver or estoppel - see Scott v. Rania at p.535 para. 6.

In the present case however, and with respect to the Judge, I think that the actions of Mr Broughton could be reasonably explained only on the basis that he was treating time, under clause 13, as not being of the essence. By filing the vendors application he was taking a step which, in my opinion, he was not obliged to take in accordance with the strict legal position. More importantly, by agreeing to the late filing of the purchasers' declaration he was allowing Mr Smith and his clients to incur expense and trouble which was quite pointless unless time under clause 13 was being treated by the vendors as at large in the circumstances.

I have however found difficulty in arriving at any conclusion on the evidence that Mr Smith actually drew the

foregoing inference from the actions of Mr Broughton. In other words, I have difficulty in applying any principle of waiver or estoppel which requires proof that Mr Smith was actually induced by any such representation to rely on it and to act upon it. It may be a somewhat fine distinction but it seems on the evidence that Mr Smith was simply not worrying about clause 13; this because of his knowledge of the common attitude of solicitors in Southland towards such a clause. Certainly Mr Smith made no such claim when he gave evidence. The furthest he went was to comment that Mr Broughton had not raised the point. He said - "From my experience of Southland practitioners I would not expect him to".

I have however come to the conclusion that the evidence does establish a waiver by mutual agreement. Undoubtedly Mr Broughton agreed to accept from Mr Smith a method of performance of the purchasers' obligation to supply a declaration which was different from the strict method of performance prescribed by the contract. He also agreed to file the vendors' application for consent in circumstances where the venders were not contractually bound to do so. On the other hand Mr Smith agreed to obtain and make available the purchasers' declaration at some trouble and expense to himself and his clients, in circumstances where it would not be possible to do this until after 26 January - that is to say at a time when, if time was to be treated by the vendors as of the essence, the contract would be void and the purchasers no longer under a duty to supply a declaration. This arrangement was not a mere indulgence by one party, but one made for the mutual benefit of both vendors and purchasers. I think that the arrangements were sufficiently supported by consideration on both sides to amount to a parol variation of the terms of clause 11 of the contract.

I am also of opinion that a sufficient written record of the arrangement, for the purpose of enabling its express terms to be proved, is to be found in Mr Broughton's letter of 23 January addressed to the Registrar.

As I have said, it does not appear to me to be made out by the evidence that Mr Smith actively addressed his mind to the effect of his arrangements with Mr Broughton upon the date specified in clause 13. But I see no reason why ordinary principles of necessary implication should not apply to the agreement reached between them. Had the point been raised by an "officious bystander" I feel confident that in all the circumstances both Mr Smith and Mr Broughton would undoubtedly have answered - "of course that date can't strictly apply". In other words I think that it was a necessary incident of their arrangements that they were treating time under clause 13 as not being of the essence. It was not suggested, if time were held to be at large, that when the vendors repudiated the contract in February time had become of the essence in such a way as would justify that repudiation. I would accordingly allow the appeal.

The Court being unanimous, the appeal is allowed and the judgment entered in the Supreme Court is vacated. In lieu thereof the appellants will be entitled to a decree of specific performance. Leave is reserved to the parties to apply to this Court should any difficulty arise as to the form of the decree and any incidental orders.

The appellants are entitled to their costs of the appeal, including an allowance for extra counsel, which are fixed at $550.00, together with proper disbursements, including such sum as may be allowed by the Registrar for the cost of cyclostyling. They are also entitled to their costs and disbursements in the Supreme Court, to be fixed by that Court.

Solicitors for Appellants: Macalister Bros., Invercargill

Solicitors for Respondents: Nicoll, Sinclair, Cooney and Co. Ashburton

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Respondents

Coram: Richmond P.
Woodhouse J.
Cooke J.

Hearing: 17 March 1977

Counsel: B.D. Inglis Q.C. and L.E.Laing for Appellants
J.F. Burn and P.J. Headifen for Respondents

Judgment: 6 April 1977

JUDGMENT OF WOODHOUSE J.

This case concerns the proposed purchase by the appellants ("the purchasers") of a farm property of about 2,000 acres in Southland. They entered into an agreement for sale and purchase with the respondents ("the vendors") on 24 December 1975 which was conditional in two respects. The one condition related to the ability of the purchasers to make satisfactory arrangements for finance by 9 February 1976. No question has arisen concerning that matter. The other condition was that the consent required pursuant to the Land Settlement Promotion and Land Acquisition Act 1952 should be obtained by 26 January 1976. In the event approval was not given until 12 February and the order of the Court was not sealed until 2 March. No point is made however, of the time that elapsed between the time of approval of the transaction and the formal sealing of the order. The

simple issue is whether in all circumstances of the case the delay beyond 26 January justified the vendors in their subsequent refusal to perform the contract. Roper J. held that it did and refused the purchasers specific performance of the contract.

The agreement for sale and purchase seems to have been prepared by the land agent who had been engaged by the vendors and he may not have appreciated that difficulties could arise in relation to obtaining the consent by 26 January, taking into account the absence of most lawyers from their offices during the legal vacation which had commenced by 24 December and would not end in the Southland district until 28 January. In the event the agreement was received and examined by the solicitor acting for the purchasers (a Mr Smith) after he had returned to his offices from the legal vacation. He realised at once that time was very short and in particular that the declaration by the purchasers which would be needed to support an application to the court for consent to the transaction could not be completed and filed in the registry of the court for several days at least because his clients were at a distance, at Hawea. He also appreciated that the statutory period for filing an application for consent of the court was to expire on 24 January failing which the contract would be of no effect. He thereupon telephoned Mr Broughton, the solicitor acting for the vendors, to explain that the transaction was one in respect of which the consent of the court was required and that acting for the purchasers he was in a difficulty because their declaration could not be made quickly available. He requested Mr Broughton to file the application for consent on behalf of the vendors with advice that the purchasers' declaration would follow. Mr Broughton agreed to deal with the matter in this

fashion and on 23 January an application by the vendors for consent to the transaction was duly filed together with a covering letter addressed to the registrar of the court and dated on the same day. The text of Mr Broughton's letter reads:

> "re: Application for Consent to Sale Dickens to Naylon.
>
> We enclose herewith Application for Consent to this transaction.
>
> Messrs Macalister Bros are acting for the purchasers and they confirm that the Purchasers' Declaration has been forwarded to their client at Masat for completion.
>
> We confirm that the Purchasers' Declaration will be filed in support of the application when it is returned from Masat."

Mr Smith proceeded to obtain a declaration by the purchasers and it was duly filed with the court some days after the application had been lodged; and the consent was duly obtained prior to the date mentioned in the written contract for settlement.

In the meantime the purchasers had completed arrangements for the sale of a farming property of their own and on 5 February Mr Smith advised Mr Broughton that the purchasers had "been able to arrange the necessary finance to declare this contract unconditional." There was no reply to that letter and on 16 February he forwarded a transfer to Mr Broughton for perusal and execution by the vendors. However on 23 February the latter replied by advising that the vendors had given instructions that they did not intend to proceed with the sale of the farm property and for that reason they had refused to call in order to execute the transfer. No reason was given in the letter for the refusal of the vendors to go forward with the transaction but Mr Broughton indicated verbally to Mr Smith that they claimed there had been no contract between the parties because

Mrs Dickens (one of the vendors) had not signed the contract personally. The purchasers made formal demand for settlement on 26 February and tendered the purchase price the following day. And on 11 March proceedings were issued claiming specific performance of the contract. On 8 April a statement of defence was filed and it was then claimed for the first time that the contract had become void by reason of the delay which had occurred beyond 26 January in obtaining the consent of the court.

The issues raised on the appeal are:

(1) that the contract does not contain any specific provision limiting the time in which the relevant consent was to be obtained;

(2) that even if reference in the contract to 26 January could be related to the day by which the particular consent under discussion was to be obtained then time was not of the essence of the contract;

and

(3) in any event any strict limitation as to time had been waived by the vendors; or they were estopped from raising the point.

The first of those matters depends upon the construction and effect of clauses 11, 12 and 13 of the agreement as follows:

"11. If the land affected by this Agreement exceeds five acres in area this contract is subject to any necessary consent of the Administrative Division of the Supreme Court and the Purchaser will within fourteen days from the date of signature of this Agreement either:

(a) Complete and deposit with the District Land Registrar a Declaration in conformity with Section 24 of the Land Settlement Promotion and Land Acquisition Act 1952 and deliver a copy to the Vendor, or

(b) Deliver to the Vendor any statement declaration or other document required by regulation or otherwise to be completed

by the Purchaser for filing with an application to the Administrative Division of the Supreme Court and the Vendor shall within one month from date hereof unless such declaration shall have been deposited as aforesaid make application to the Administrative Division of the Supreme Court for any necessary consent to this transaction

and each party hereto shall do all such acts and things as may be necessary or expedient for the purpose of endeavouring to obtain such consent or ensuring compliance with the provisions of the Land Settlement Promotion and Land Acquisition Act 1952 and any regulations for the time being thereunder. And each party shall bear his own legal and all other costs whatsoever of and incidental to any such declaration application or other process.

12. If any of the land affected by this Agreement is held under lease or license under the provisions of the Land Act 1948 this contract is subject to any necessary consent of the Land Settlement Board being obtained within the period referred to in Clause 13 hereof and each party hereto shall within fourteen days from the date hereof make such application therefor as may be necessary and each party hereto shall do all such acts and things as may be necessary or expedient for the purposes of endeavouring to obtain such consent or securing compliance with the provisions of the Land Act 1948 and any regulations for the time being thereunder and each party shall bear his own legal and other costs whatsoever of and incidental thereto

13. If any such consent where necessary shall not be granted by the 26th day of January 1976 or such later date as the parties agree on or shall be refused or shall be granted subject to conditions then this Agreement subject as hereinafter mentioned shall be void PROVIDED HOWEVER that if such consent shall be granted within such time subject to conditions to which the parties shall in writing agree or subject to conditions not prejudicial to the Purchaser if the Vendor shall within seven (7) days after the grant thereof give notice in writing to the Purchaser or his Solicitor of the Vendors willingness to comply with such conditions then this Agreement shall be binding upon the parties as modified by such conditions."

It will be noticed that both clause 11 and clause 12 deal with the possible need for consent to the contract but it is only clause 11 that has application in the present case. The following clause 12 is concerned with the rather more limited number of transactions which concern land held under lease or license pursuant to the provisions of the Land Act 1948; and the present agreement does not affect any such land. However it is contended on behalf of the vendors that the words,

"if any such consent" at the beginning of clause 13 refer only to the consent that might have been needed in terms of clause 12; that they do not embrace the sort of consent mentioned in clause 11 and which, of course, is needed in the present case. The point is made that although clause 12 speaks expressly of the contract being subject to the Land Settlement Board consent "being obtained within the period referred to in clause 13", there is no similar and express reference in clause 11 to that same period. It is said that grammatically the words in clause 13 refer back only to the consent mentioned in the immediately preceding clause 12 and that such a construction is reinforced by the specific reference to time in the latter clause. Alternatively an argument was addressed to the court that if it should be thought that there were some ambiguity associated with the issue of construction then certain of the surrounding circumstances pointed to the same interpretation.

In my opinion the opening words of clause 13 relate to both types of consent. It may be thought inconsistent on the part of the draftsman to include a specific reference to time in the one clause and not in the other. But where both types of consent to a contract were needed it would be pointless to require the consent of the Land Settlement Board by a particular date while leaving a more flexible period available for obtaining the no less essential consent of the administrative division of the Supreme Court. I think the words, "<u>any</u> such consent" where they appear in clause 13 refer both to clause 11 and to clause 12. It happens that the contract is contained within a printed form which has been designed to provide for each of two possible statutory requirements; but the draftsman cannot have intended to put a specific time limit upon

the one matter while leaving open the more numerous transactions likely to need the sort of consent referred to in clause 11. The drafting may seem inelegant but I think it is unambiguous and that clause 13 clearly controls the time within which the consent mentioned in clause 11 is to be obtained.

The second point is whether the time fixed for satisfaction of the condition as to consent is to be regarded as of the essence of the contract. Roper J. so held and, with respect, I agree with him. Equity will not interfere with a condition as to time where the stipulation has clearly been intended by the parties to be observed precisely. In the present case, subject to certain provisos which are not relevant to this particular issue, the contract was made to depend upon the fulfilment of a condition that the necessary consent should be obtained by 26 January. It was provided that failure to meet that time limit would render the contract void; and I think that in the context that last word means exactly what it says. During the hearing there was some discussion by counsel concerning a so-called custom or practice said to have grown up in the Southland district to the effect that goodwill and mutual understanding in the legal profession had rendered the condition as to time flexible on the basis of reasonableness. But I am quite satisfied that whatever may be the informal practice in this regard the intention of the parties themselves as disclosed by the contract was that time should be treated as of the essence.

The third ground of appeal is that if the condition as to time had to be met precisely then the need to do so was waived by the vendors: that their solicitor agreed to extend the time by acceding to the request of the solicitor acting for the purchasers that the vendors should file

their application for consent by 24 January and that at the same time he would inform the court that the necessary declaration by the purchasers would be provided at a later date; and that in the circumstances both solicitors realised that this certainly could not be done before 26 January. It was said in the alternative, but as part of the same submission, that by words and conduct the vendors are estopped from raising the condition as to time against the purchasers' claim for specific performance.

The rather ambivalent form of the submission itself may be some reflection of the various and not entirely harmonious attempts that have been made from time to time to analyse waiver as a concept within the law of contract. One problem is that like the word estoppel, the term waiver has been used in a number of different ways. In relation to estoppel that sort of problem is described by Jordan C.J. in O'Connor v. S.P.Bray Ltd (1936) 36 S.R. (NSW) 76 at p.80. He there refers to the origins of common law estoppel and the eventual "infiltration in the first half of the nineteenth century of the equitable doctrine of estoppel by representation"; and at p.82 he mentions the confusion that can arise unless the individual types of estoppel are distinguished and recognised for what they really are. Then in 9 Halsbury 4th Ed. para 571, by reference to waiver, there is a similar indication of the vagueness that can attach to a word when it is used in different senses; and the paragraph includes a reference to waiver in situations which really create an election "between two mutually exclusive rights." Nevertheless in the law of contract, as that paragraph indicates, the term "waiver" has been aptly used and understood over a long period to describe the process, usually quite informal, "whereby one party voluntarily grants a concession to the other party" to adopt the words of the

same paragraph of Halsbury, "by not insisting upon the precise mode of performance provided for in the contract, whether before or after any breach of the term waived." In my opinion the doctrine, considered in that sense, continues to operate and to have binding effect.

It is suggested in Chitty on Contracts, 23rd Ed. para 1241, that waiver probably had its origins in the need to mitigate a strict application of the provisions of the Statute of Frauds, 1677, which otherwise would require any modification of a written contract to be in writing, no matter how comparatively insignificant the change and regardless of any consideration of practical or commercial convenience. But waiver has never been accepted or regarded as a means whereby the basic structure of a contract could be varied or some alteration made in the consideration to be given and received. It has aimed simply at providing an efficacious method of enabling concessions to be made concerning the strict performance of what may be described rather loosely as machinery provisions. Often enough it has been said that it is difficult to distinguish between a variation agreed upon as a matter of contract and the sort of forbearance intended to operate as a waiver. There are criticisms too (provided at length, for example, by Mr J.S. Ewart in his book "Waiver Distributed") that the concept of common law waiver to which I have been referring has no rationale and no independent existence: that all the so-called "waiver" situations must be categorised as properly within the area of election on the one hand, or recognised as founded upon some sort of estoppel on the other. I had occasion to refer to some of these matters in Watson v. Healy Lands Ltd (1965) NZLR 511 at p.514. But I there expressed the opinion that at least it could be said that a waiver involved first, "an unambiguous

representation arising as the result of a positive and intentional act done by the representor with knowledge of all the material circumstances", although the intention may be implied from all the relevant circumstances; and second, that the party relying upon it must be able to show that "he has carried out the new arrangement". With all respect to those who doubt the separate existence of a common law waiver, I do not recile from the view I then expressed and I would merely add (to make the point quite explicit) that in the case of a waiver of this sort there is never any need for the party acting in terms of the indulgence to show detriment. In this respect I think waiver is quite unqualified. A similar conclusion has been reached by the High Court of Australia in relation to those cases of election where the choice is to affirm or disaffirm the contract: see Sargent v. A.S.L. Developments Ltd (1974) 131 C.L.R. 634 per Stephen J. at 647.

When the facts of the present case are examined it is clear that when Mr Smith, acting for the purchasers, telephoned his opposite number, acting for the vendors, his immediate and urgent purpose was to ensure that the contract should be kept alive. He realised that by reason of the Land Settlement Promotion and Land Acquisition Act 1952 it would cease to have any effect if the application for the consent mentioned in clause 11 were not filed in the registry of the court by 24 January. To avoid that statutory effect he requested Mr Broughton to file an application on behalf of the vendors, after explaining that the necessary declaration by the purchasers could not be provided for several days. Of course clause 11 of the contract provides that the purchasers' declaration should have been delivered to the vendors within fourteen days of the execution of the agreement. Obviously that had not been done. So Mr Smith was

really requesting the indulgence of the vendors in two respects: first that they should put aside the failure to deliver the purchasers' declaration within the fourteen day period; and, second, that they should ensure that the contract remained effective beyond 24 January (a Saturday) by filing their application for the court's consent. It is agreed that Mr Broughton had authority to speak for the vendors and acted on their behalf when he acceded to the request. He thereupon proceeded to give effect to the arrangement that had been suggested by Mr Smith. He obtained and filed the application by the vendors; and in addition he forwarded to the registrar of the court the accompanying letter to which reference has been made in which he explained the absence of the purchasers' declaration by indicating the arrangement that had been made to have it filed "when it is returned from Hawst."

Some point was made on behalf of the vendors that anything done by Mr Broughton to keep the contract in being beyond 24 January related merely to the statutory time limit for filing the application, with some sort of unspoken reservation that in no way was his agreement to co-operate intended to modify the contractual provision requiring that the consent of the court should be given by 26 January. For my part I think that argument assumes not only a delicacy of judgment by Mr Broughton that is unlikely enough in itself but also that the arrangement that was then translated into action could have no practical purpose. For both he and Mr Smith knew that an application filed on Friday 23rd January could not possibly produce a consent of the court within the contractual time limit about to end on the following Monday - and this even if the purchasers' declaration had been already available. Certainly it is not shown in the evidence that during the telephone conversation

there was express reference to the fact that if the application was to serve its purpose of obtaining a consent that had any meaning there must be a consequential extension of the time mentioned in clause 13. But, with all respect to Roper J. who took a different view, I think it would be unreal to regard Mr Broughton's agreement with Mr Smith as something which was to be limited in its effect merely to the filing of the application. That sort of effect would have been achieved merely by filing the application. But in addition there was the supplementary explanation that Mr Broughton thought it proper, if not necessary to provide as part of the practical arrangement made with Mr Smith: that in due course the application would be supported by the other necessary papers to be completed by the purchasers themselves. These steps were consciously intended by Mr Broughton, and so by the vendors, to produce an effective end result; and that conscious intention was undoubtedly shared by the purchasers through their solicitor. He had the agreement before him and gave evidence that he was aware of the time limit in clause 13 in addition to the proximity of the statutory time limit which he had calculated by reference to the date on which the agreement had been executed. So I am satisfied that when the vendors acceded to, and acted upon, the proposals put forward on the purchasers' behalf the contractual time limit in clause 13 was consequentially but quite deliberately, extended. I think therefore that the vendors waived the strict requirement as to time and that they were not justified in their refusal to complete.

I would allow the appeal and order specific performance.

A.D. Williamson J

Solicitors for Appellants: Macalister Bros., Invercargill.

Solicitors for Respondents: Nicoll, Sinclair, Cooney & Co., Ashburton.

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Judgment: 6 April 1977

JUDGMENT OF COOKE J.

As to the interpretation of clause 13 of the contract of 24 December 1975, I agree with Roper J. that the time specified for obtaining any necessary consent, namely by 26 January 1976, should be treated as initially of the essence. I also agree that the Judge was right in his assumption that the words 'any such consent where necessary' relate not only to any necessary consent of the Land Settlement Board but also to any necessary consent of the Administrative Division. The arrangement of clauses 11, 12 and 13 points to this interpretation, and it is unlikely that the parties to such a contract would attach greater or different importance to Land Settlement Board consent than to Administrative Division consent.

I think that 'void' in clause 13 means what it says. That is to say, if a necessary consent is not granted by the required date, either party will prima facie be entitled

to say that the contract has come to an end, unless steps are taken in accordance with the proviso to the clause to keep it alive. The scheme of the clause, including the proviso, is such that to treat 'void' as meaning merely voidable by one of the parties taking positive steps to cancel the contract seems to me too strained a construction. The decision of this Court in Barton v. Russell (7 July 1975, C.A. 33/75) is distinguishable. The context and subject-matter of the clause there were materially different. Similarly the clause in Sutton v. Gundowa Pty Ltd (1950) 81 C.L.R. 418 was materially different in its wording. But, being a purely contractual stipulation, this provision in clause 13 could be varied by agreement or waived, or one party by his conduct could be precluded from taking advantage of it. This appears consistent with the speeches of the House of Lords in New Zealand Shipping Co. Ltd v. Societe des Ateliers [1919] A.C. 1, the substance of which decision is, I think, correctly stated in the headnote.

As to waiver, with respect I am not persuaded by the crucial point in the learned Judge's reasoning, which was that on 23 January 1976 Mr Broughton had no alternative but to comply with Mr Smith's request. By clause 11 (b) the purchaser was required within fourteen days of the agreement to deliver to the vendor his declaration under the Land Settlement Act for filing with an application. Even assuming that in a contract with as tight a time schedule as this one the time of fourteen days was not of the essence, the fact remains that by 23 January the purchaser was so seriously in default that there was no longer any possibility of obtaining consent by 26 January. It was not the fault of the solicitors on either side that

this situation arose. The awkward time schedule was evidently not suggested by them. But, having regard to the terms as to time in the contract signed by the parties, it seems to me that by 23 January there was a fundamental breach by the purchaser, in the sense in which that term is used for instance in the Suisse Atlantique case [1967] 1 A.C. 361. (Throughout this judgment 'purchaser' and 'vendor' are used in the singular, as in the contract itself, since nothing turns on the fact that the parties on each side were husband and wife.) The vendor was accordingly entitled to rescind on that day. Instead the vendor's solicitor, as to whose authority no point is taken by the vendor, agreed to and did file an application for consent to the contract, notifying the Registrar in the covering letter that the purchaser's declaration would be filed when returned from Hasst. On behalf of the vendor the solicitor knew of the facts constituting the breach by the purchaser. For the reasons given by Stephen and Mason JJ. in Sargent v. A.S.L. Developments Ltd (1974) 131 C.L.R. 634, 642-6, 656-8, it is immaterial that the solicitor may not have had the right to rescind in mind; it is enough that he knew all the facts giving rise to that right. As I see it, by filing the application, knowing of the fundamental breach, the vendor by his solicitor waived that breach, in the sense that he elected not to rescind for it and affirmed the contract. Within the proposition stated by Lord Wilberforce in Mardorf Peach v. Attica Sea Carriers [1977] 1 All E.R. 545, 551, the filing of that application in these circumstances was 'clear and unequivocal' evidence that the vendor was actively keeping the contract alive. Within Mason J.'s proposition in the Sargent case at p.656, he was exercising a right to apply for consent arising by or under the contract.

The question then becomes one of the extent of the waiver. The very reason why the breach waived was fundamental was that it meant inevitably that consent could not be obtained by 26 January. The filing of an application for consent on 23 January, with full knowledge of the breach and the impossibility, was pointless if the contract was to come to an end three days later. In common sense and fairness, as I see it, the vendor should be held to have elected to treat the contract as one which would not come to an end on 26 January. It is not consistent with what was done on 23 January that the time specified in clause 13 was to remain of the essence.

The making of the application on 23 January is attributable to the purchaser also. Having procured it by request, he should equally be bound by the implication. In any event, the evidence does not establish that at the date when the contract was made it would have been impossible to obtain consent by 26 January; the impossibility that developed must be regarded as caused by the purchaser's default. As he could not take advantage of his own wrong, he could not have been heard to say that the contract ended on 26 January: 9 Halsbury's Laws of England, 4th ed. para. 533 and the authorities there cited.

If detriment to the other party be needed, as Sir Alexander Turner thinks is the case with one kind of election (Spencer Bower and Turner on Estoppel by Representation, 322-5), it is to be found here. The purchaser by his solicitors proceeded to complete and file his declaration, to give notice that finance had been arranged, and to prepare and forward a transfer, no doubt incurring costs in these steps, before the vendor resiled. On the evidence,

including the evidence about Southland practice, I think that as a result of the telephone conversation between the solicitors on 23 January, Mr Smith naturally and reasonably took it for granted that the vendor was treating the contract as alive; and that this remained the position until well into February. As for detriment to the vendor, if that be relevant, the vendor acted on the purchaser's request by filing the application and at least for some time co-operated in arrangements with a view to completion.

For these reasons I think that each party was precluded from asserting that the contract became void on 26 January - the vendor by waiver; the purchaser perhaps by waiver also, but certainly because he could not take advantage of his own default. And each party acted to his detriment on the understanding that the contract was being kept alive. On these views it is unnecessary to decide whether the arrangement on 23 January amounted to an oral variation of the contract or whether detriment is essential for waiver; but I am not to be taken as dissenting from the President's opinion on the first point or Woodhouse J.'s opinion on the second.

An alternative route to the same result would be to treat the arrangement between the solicitors on 23 January as an implied agreement on a later date for the purposes of clause 13. There appears to be no reason why an agreement that consent may be obtained within a reasonable time should be outside the scope of this clause. It is clearly within its spirit. The date could then be rendered certain by reasonable notice from either party. To give business efficacy to the dealings of 23 January it may be that such an agreement should be implied. But the case for the

purchaser has not been presented in quite that way, and I prefer to base my judgment on the reasons already given. It has not been contended for the vendor that if the provision as to 26 January was waived there was any delay thereafter entitling the vendor to refuse to complete. For these reasons I would allow the appeal and order specific performance.

R B Cooke J.

Solicitors:

Macalister Bros., Invercargill, for Appellants

Nicoll, Sinclair, Cooney & Co., Ashburton, for Respondents.