

BETWEEN

CONNELL FRANKLIN GAWN
Omamari, Farmer, and
PHYLLIS BREMNER GAWN
his wife

Appellants

AND

IAN MACDONALD of
Kerikeri, Farmer

Respondent

Coram: Somers J
Casey J
Hillyer J

Hearing: 11 November 1986

Counsel: M.P. Crew for appellants
B.P.C. Carter for respondent

Judgment: 13 March 1987

JUDGMENT OF HILLYER J

This is an appeal against a refusal to grant specific performance by summary judgment of a contract for sale and purchase of a farm.

The facts as known to the Court at this stage are fully set out in the judgments of Somers J and Casey J, which I have had the advantage of reading. I agree with them that the appeal must be dismissed; not for the reasons set out in the decision in the High Court, but because on the evidence before the Court the provisions of paragraph 3.7 of the contract were not complied with.

That paragraph is as follows :

"3.7 Where -

- (a) The transfer of the property is to be registered against a new title document in the course of issuing (including a new or provisional title document following the loss of the outstanding copy of the title): and
- (b) A search copy, as defined in s.172(A) of the Land transfer Act 1952, of that title document is not obtainable by the fifth working day prior to the settlement date, then the settlement date shall be deferred to the fifth working day following the date on which the search copy is obtainable, unless the purchaser shall elect that settlement shall still take place on the original settlement date. This clause shall not apply where it is necessary to register the transfer of the property to issue or if s.172(a) is not in force at the settlement date."

I do not know whether those provisions were in the minds of the parties, certainly no reference to them was made until the minute from this Court was addressed to counsel. Those provisions are however, part of the contract and the parties are bound by them.

I agree as Somers J says, that the vendors (or their solicitors) contemplated a composite settlement at which the vendor would pay the price of freeholding the land to the Crown, contemporaneously with the receipt of the purchase moneys from Mr McDonald, and the delivery of a transfer to him. If the purchaser (or his solicitors) agreed to that course it might have amounted to a waiver of the provisions of s.3.7 or as it is put in the clause, an election that the settlement should take place on the original settlement date. There was however, on the

application for summary judgment, no averment on oath that that was the case.

The summary judgment procedure lays down quite rigid rules. Affidavits are required from both parties setting out what they say the factual situation was. The Court is not entitled to go beyond those allegations. It would have been quite easy for the appellant, if such had been the case, to have stated that arrangements had been made, which in effect amounted to an election that the settlement should take place on the original settlement date, even if a search copy as defined in s.172A of the Land Transfer Act, 1952 was not obtainable by the 5th working day prior to the settlement date, but that was not done. It may however be considered at the substantive hearing.

At this stage judgment cannot be entered for the appellants.

McCarthy J