IN THE SUPREME COURT OF NEW ZEALAND
DUNEDIN REGISTRY

A. No.

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LAND LAW.

BETWEEN PATRICIA BRIDGET
Omakau, Married Wo

Plain

A N D MERVYN CLIFFORD BRU
near Alexandra, Farm

Defen

Hearing: 7 December 1976

Judgment: 2 February 1977

Counsel: N.L. Marquet and J.M. Hanan for Plaintiff
M.M. Mitchell for Defendant

JUDGMENT OF QUILLIAM J.

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agreement for sale and purchase entered into between
parties.

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IN THE SUPREME COURT OF NEW ZEALAND
DUNEDIN REGISTRY

A. No. 131

LAND LAW.

BETWEEN PATRICIA BRIDGET [redacted]
Omakau, Married Woman

Plaintiff

AND MERVYN CLIFFORD BROWN
near Alexandra, Farmer

Defendant

Hearing: 7 December 1976

Judgment: 2 February 1977

Counsel: N.L. Marquet and J.M. Hanan for Plaintiff
H.M. Mitchell for Defendant

JUDGMENT OF QUILLIAM J.

This is an action for specific performance of a agreement for sale and purchase entered into between the parties.

On 10 October 1972 the defendant, who was the of a block of land at Alexandra, agreed in writing to sell of that land, comprising 10 acres, to the plaintiff for $ A deposit of $1,000 was paid by the plaintiff upon the co of the agreement and the balance was to be paid "in two y from the signing of this agreement". That would have bee October 1974. Possession was to be given and taken on 17 October 1972 and this was duly done. The land concerned farm land so that the plaintiff was required to file a de tion under s. 24 of the Land Settlement Promotion and Lan Acquisition Act 1952, and this was also done. Following tion of the contract the plaintiff was asked by the manag Vibrapac (Central) Ltd if she would sell the land to that company. She agreed to do so and on 10 May 1973 a writte agreement for sale and purchase was concluded. The price this occasion was $4,000 and a deposit of $1,500 was paid

$1,000 she had already paid, together with a profit to her
$500. In other respects the effect of this transaction wa
simply to pass on to Vibrapac the right to purchase. Sett
was to be on the same day as the purchase by the plaintiff
namely 10 October 1974, and any further money required on
settlement of the plaintiff's purchase was to be supplied
Vibrapac. In one sense the plaintiff rather dropped out o
transaction. Her solicitor, Mr Diehl, had enquired of the
defendant's solicitor, Mr Brunton, whether the transaction
proceed as a sale directly from the defendant to Vibrapac,
this was not agreed to and it was therefore necessary for
plaintiff to complete the necessary documents to enable her
in the matter to be concluded.

On 7 October 1974 Mr Brunton wrote to Mr Diehl
a note of the amount required for completion on 10 October.
This was the balance purchase price of $2,500 together with
small amount for adjustment of rates. On 9 October Vibrapa
solicitors wrote to Mr Diehl enquiring as to the amount
required on settlement of the resale. Unfortunately, at th
stage Mr Diehl did nothing for several days. On 24 October
Mr Brunton wrote to him saying that settlement was required
5 p.m. on 29 October and that time was now of the essence.
letter was delivered to Mr Diehl's office late on the aftern
of 24 October, but he did not see it until the following
morning. That was the day before the Labour Weekend, and
settlement was required for the following Tuesday. He wrote
same day to Vibrapac's solicitors in Christchurch asking for
balance of the money. He had told Mr Brunton that he had to
the money from Christchurch and had protested at the shortne
of the notice, particularly in view of the intervention of t
long weekend. On 1 November Mr Diehl received a cheque from
Vibrapac's solicitors and thereupon offered to settle the
transaction, but Mr Brunton, acting on the defendant's firm
instructions, declined. On 8 November Mr Diehl called to see

Mr Brunton and profforod a cheque in settlement, but this also was declined.

Mr Diehl made several approaches to Mr Brunton over the succeeding months in the hope that the transaction could yet be completed. In view of the need to consider the effect of the delay which occurred it is necessary to continue the narrative in some detail. On 20 November Mr Brunton wrote to Mr Diehl confirming that the defendant was not prepared to complete the transaction and saying that arrangements were being made for a refund of the deposit. On 29 November Mr Diehl replied saying that settlement was still desired and complaining at the short notice given. This was acknowledged by Mr Brunton on 5 December and cancellation of the contract was confirmed. On 16 December Mr Brunton wrote to Mr Diehl enclosing a cheque by way of refund of the deposit. This was accepted by Mr Diehl without protest. On 27 December the defendant, considering himself free to resell the land, entered into an agreement to sell it to a Mr and Mrs Griffiths for $7,500. This agreement was subsequently cancelled as the purchasers proposed leaving the country. On 16 May 1975 Vibrapac's solicitors wrote to Mr Brunton saying that Vibrapac still required completion of its purchase from the plaintiff and proposed seeking specific performance. Mr Brunton replied on 10 June setting out the history of the matter and reiterating that the contract between the plaintiff and the defendant was at an end. On 24 June he wrote again saying that as the Griffiths transaction was not proceeding the defendant was prepared to sell direct to Vibrapac at a price of $10,000. There was no response to this and so he wrote again on 22 July confirming the offer to sell at that price. Vibrapac's solicitors replied on 1 August saying that they considered Vibrapac already had a right to the land under its agreement with the plaintiff. It should be mentioned that any attempts by the defendant to deal with the land again were being prevented by caveats lodged on behalf of the plaintiff and Vibrapac for their respective interests.

In his evidence Mr Diehl said that in a previous transaction the defendant had at first refused to complete but had later changed his mind and agreed to do so. Mr Diehl was, therefore, continually hopeful that the transaction could be revived, but he did nothing further about it until August 1975 when, because of the fact that Vibrapac's solicitors informed him they proposed to seek specific performance from the plaintiff, he notified Mr Brunton that the plaintiff would seek specific performance from the defendant. It was not until after that that the plaintiff herself was informed of what had happened and she became justifiably angry. The present proceedings were duly commenced, as also were proceedings by Vibrapac against the plaintiff. It was subsequently agreed that the latter proceedings should await the result of the present case.

In this situation the plaintiff now claims that the defendant specifically perform the contract of sale and, alternatively, an order for damages for the defendant's failure to perform his contract. In the further alternative the plaintiff claims damages of $6,500 for wrongful repudiation and loss of bargain if specific performance cannot be had.

The date for settlement of the contract was 10 October 1974. It was agreed by counsel, however, that there was nothing in the contract itself which made time of the essence. There was in cl. 6 the familiar provision dealing with default, and this was as follows:-

> "6. If the Purchaser shall make default in payment of any instalment of the purchase moneys hereby agreed to be paid or of interest thereon or in the performance of observance of any other stipulation or agreement on the part of the Purchaser herein contained and such default shall be continued for the space of fourteen days then and in such case the Vendor without prejudice to his other remedies may at his option exercise all or any of the following remedies namely:-
>
> (a) May rescind this contract of sale and

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>
> (a) May rescind this contract of sale and thereupon all moneys theretofore paid

(b) May re-enter upon and take possession of the said lands and property without the necessity of giving any notice or making any formal demand.

(c) May re-sell the said lands and property either by public auction or private contract subject to such stipulations as he may think fit and any deficiency in price which may result on and all expenses attending a re-sale or attempted re-sale shall be made good by the Purchaser and shall be recoverable by the Vendor as liquidated damages the Purchaser receiving credit for any payments made in reduction of the purchase money. Any increase in price on re-sale after deduction of expenses shall belong to the Vendor. "

The expression "performance of observance" is an obvious misprint for "performance or observance", and, in any event, does not have any significance in the present case.

The effect of a clause which, for practical purposes, was precisely the same as cl. 6, was considered in the recent Court of Appeal decision of Thomas v. Monaghan (1975) 1 N.Z.L.R. 1. That was a case in which the contractual date of settlement was 29 October 1973 and, as in the present case, there was no general provision making time of the essence. The counterpart of the present cl. 6 was, in that case, cl. 10. On 21 October 1973, the purchasers not having settled, the vendors gave notice requiring settlement by 4 p.m. on 30 November, time being of the essence, and advising that if settlement was not effected the agreement would be void and of no further effect. The purchasers endeavoured to settle on 3 December but the vendors refused to do so. The matter requiring determination by the Court of Appeal was the point of time at which a "default" had been committed by the purchasers within the meaning of cl. 10. The Court went on, however, to consider the purpose of such a clause and Richmond J., delivering the judgment of the Court, said at pp. 7 - 8:-

" At first glance it appears that cl. 10 does indeed show an intention that a default continuing for 14 days is a matter going to the substance of the contract. This is so because the parties have not merely fixed a date for

specifically to a period of time which must elapse before the contractual right to rescind arises. In this respect cl. 10 differs from the conditions of sale considered in Smith v. Hamilton (1951) 1 Ch. 174, and Solomons v. Halloran (1906) 7 S.R. (N.S.W.) 32.

There is, however, another argument which can be advanced in favour of the view that the 14 day period is not of the essence in its application to stipulations as to time. In the first place it does not say so, although reference is expressly made in cl. 5 to time being of the essence. Moreover, there are other possible explanations as to why the 14 day period was introduced into the clause. The purpose of cl. 10 was considered by FB Adams J. in Hoskins v. Rule (1952) N.Z.L.R. 827. That learned Judge said:

> ' The rights conferred are not limited to the contingencies of total repudiation or total failure in performance on the part of the purchaser, but are to arise on any default in payment of purchase-moneys or interest, or in performance or observance of any other stipulation. The vendor's option to proceed under the clause is thus a stringent remedy. The clause is one intended to apply to every breach ...' (ibid, 832).

With that view we agree. It would seem accord that one purpose of the 14 day requirement is to provide some mitigation in favour of the purchaser of the otherwise stringent provisions of the clause. It can be argued therefore, that in its application to a stipulation as to time the 14 day requirement of cl. 10 has two effects. First, and as already mentioned, tha it prevents rescission until the 14 days have expired. Second, that the 14 day period is of importance in determining the point of time at which the other party can give a notice making time of the essence. "

This passage is, of course, obiter, but it is a clear indication of the Court's view as to the purpose of precisely the kind of clause which appears in the present contract. The importance of the passage to the present case that it requires me to hold that it was not open to the defe dant to give a notice making time of the essence of the contr until after the fourteen day period of default had expired. Settlement date was 10 October. Default was made on that day Before cl. 6 could come into operation that default had to continue for the space of fourteen days. Only after that cou the notice properly be given. In fact the notice was deliver to Mr Diehl's office at about 4.45 p.m. on 24 October, which

prior to the expiration of the fourteen day period. Time was, therefore, never correctly made of the essence. As is observed in Stonham on Vendor and Purchaser at p. 744 -

> " Where a party is not so entitled ... to make time of the essence, by giving an appropriate notice, a notice purporting to do so is a mere idle formality. "

Having reached this conclusion I do not need to consider the separate question of whether the period of five days allowed before time was to become of the essence was a reasonable period, although I am bound to say that if I had had to determine the question I should have found it very difficult to say that five days was sufficient, particularly as it was a period which included a long weekend.

In view of what I have said it is apparent that, if application for specific performance had been made once it became known that the defendant refused to complete, a decree must certainly have been made. The real question in this case is whether the delay which was allowed to occur between 1 November 1974, when the defendant first refused to complete, and 15 October 1975, when the writ was issued, is sufficient to defeat the remedy sought. This is to be considered upon the basis of the defence of laches, and upon the separate basis of the exercise of the Court's discretion. I deal first with the defence of laches.

The general rule applying to this defence was set out by Cleary J. in delivering the judgment of the Court of Appeal in Welsh v. Nilsson (1961) N.Z.L.R. 644, when he said, at pp. 659-660:-

> " The principles applicable to the doctrine of laches have been described in a frequently cited passage from the judgment in Lindsay Petroleum Co. v. Hurd (1874) L.R. 5 P.C. 221: 'Now the doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which

> it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are, the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy' (ibid., 239). "

There are a number of cases of equitable relief being granted after very long periods of delay, even up to twenty-six years. These are conveniently collected in Meagher Gummow and Lehane on Equity Doctrines and Remedies at p. 662, para. 3614. Where the equitable relief sought is specific performance, however, the position has been rather different. The cases dealing with this are nearly all old ones, but they consistently state the principle that in specific performance it is necessary to act promptly. Delays which have been held to preclude the granting of specific performance have include those of eleven months (Pollard v. Clayton (1855) 1 K. & J. 4 69 E.R. 540), one year (Watson v. Reid (1830) 1 Russ. & M. 23 39 E.R. 91), five months (Burdham v. Llewellyn (1873) 21 W.R. 570 and 766), and three and a half months (Glasbrook v. Richardson (1874) W.R. 51). In the more recent decision of t High Court of Australia, Fitzgerald v. Masters (1956) 95 C.L. 420, specific performance was granted notwithstanding a delay of sixteen years, but that was an unusual case in which the contract was never abandoned. A distinction is drawn in the joint judgment of Dixon C.J. and Fullagar J. at p. 433, where they said:-

> " We were referred to cases, of which Southcomb v. Bishop of Exeter (1847) 6 Ha. 213 (67 E.R. 1145) is an example, in which specific performance has been refused after a delay of even a few months. But special circumstances have existed in such cases as these. The typical case is the case where the vendor has purported to rescind for breach of contract

> such cases the purchaser who wishes to attack the validity of the rescission must always come very promptly to a court of equity. It is natural and reasonable that this should be required of him, for the vendor is not to be placed indefinitely in the position of not knowing whether he can safely deal with the property in question on the footing that the contract has ceased to exist. "

This passage is an affirmation of the principle appearing in the earlier cases cited. Although in some of the cases the decision has apparently proceeded upon the basis of mere delay alone, upon a reading of the judgments this rarely seems to have been the case. One is, therefore, drawn back to the two circumstances referred to in the extract from Lindsay Petroleum Company v. Hurd, which I have set out earlier, namel "the length of the delay and the nature of the acts done durin the interval, which might affect either party and cause a balance of justice or injustice".

It must be observed at once that although the defendant remained adamant as from 29 October 1974 that he wou not continue with the transaction, he took no steps for the removal of either of the caveats which were effectively preventing him from reselling. Overriding all other consideration however, is the complete inaction of the plaintiff. The plaintiff herself knew nothing of what was happening and believed that, having received a profit of $500 on a resale to Vibrapac, the whole matter was concluded. It is by no means always the case that a person is to be identified with the action or inaction of his solicitor. The present case is not one of those where a solicitor has been inactive in spite of the continued promptings of his client. In cases such as that it has often been held that the client should not have to bear the consequences of the solicitor's inactivity. In the presen case, however, I do not think the position as between the parties should rest upon the accident that the plaintiff was not informed of the position. The plaintiff's solicitor was aware and conscious of the situation throughout and the rights

of the parties must be determined on the basis of what he did or did not do on the plaintiff's behalf.

It is true, as I have already said, that the defendant took no step for the removal of the caveats. I am unaware of the reason for that. That did not, however, inhib him from taking some action with regard to resale. He, in fa completed a resale to the Griffiths as early as 27 December 1974. No doubt, if that transaction had proceeded, the quest of removal of the caveats would have required attention. Tha transaction lapsed, however, for reasons which were explained The defendant then endeavoured to resell to Vibrapac. It is apparent that the defendant regarded himself as free to deal with the land and, to the knowledge of Mr Diehl, was endeavou ing to resell. Notwithstanding all this, Mr Diehl did nothin It may be that he hoped the transaction would ultimately be revived, and he may also have said something to Mr Brunton al these lines, but he did nothing, even by way of a formal noti that specific performance would be sought, until 4 August 197 One is left with the impression that he would not have acted even then had it not been for the spur of the proposed action by Vibrapac. Moreover, as early as 16 December 1974 he accept a refund of the deposit without comment. In these circumstanc I cannot accept that a decree for specific performance is an appropriate remedy. I think this is all the more the case whe it is recalled that the whole situation has arisen out of the fact that the plaintiff failed to settle on the contractual da of settlement.

In view of this I do not need to go on and consider the question of whether I should exercise my discretion agains the plaintiff. I must, however, assess the damages to which t plaintiff is entitled.

The principle upon which damages are to be calculat in such a case was very carefully examined by McMullin J. in Souster v. Epsom Plumbing Contractors Limited (1974) 2 N.Z.L.R.

repudiation by the vendor upon an allegation that the purchaser had failed to complete upon the date finally fixed for settlement. McMullin J., in following the decisions of Megarry J. in Wroth v. Tyler (1874) Ch. 30, and of Scholl J. in Bosaid v. Andry (1963) V.L.R. 465, said at p. 521:-

> " Where a party seeks a decree of specific performance, he is in fact approbating the contract and seeking damages as an alternative remedy. With perfect consistency such a plaintiff is entitled to maintain at the hearing of the action that the contract is on foot (and it does remain on foot until the moment when specific performance is refused and damages are awarded instead). The logic in the judgment of Scholl J. would be hard to refute, for if the damages are to be regarded as damages for the loss of a bargain brought to an end by the action of the Court in refusing specific performance there is only one time at which they should be determined, and that is when the bargain for which they are intended as compensation is brought to an end. Until the contract is brought to an end by the action of the Court, the contract remains on foot. "

If I am to apply that reasoning to the present case then the measure of damages must be $6,500, which is the difference between the contract price of $3,500 and the value of the land at the date of hearing, namely $10,000. But neither Souster's case nor either of the cases cited in it, to which I have just referred, were cases of inordinate delay on the part of the plaintiff. The sharp inflation in the value of land which has taken place over the last few years makes the date of assessment of damages a matter of considerable importance. I do not differ for a moment from the reasoning adopted by McMullin J. in Souster's case, but I am persuaded that the result cannot be rigidly applied.

It is of interest to observe the process of reasoning followed by Megarry J. in his judgment in Wroth v. Tyler. He started a discussion of this subject at p. 56 in this way:-

> " That brings me to the fifth main point. If Bain v. Fothergill does not apply, what is the measure of damages? It was common ground that the normal rule is that the general

basically measured by the difference between the contract price and the market price of the land at the date of the breach, normally the date fixed for completion. On the facts of this case, the damages under this rule would be of the order of £1,500. The real issue was whether that rule applies to this case, or whether some other rule applies. "

A little later, at p. 57, he said:-

" The rule requiring damages to be ascertained as at the date of the breach does not seem to be inflexible, and in any case the rule may be one which, though normally carrying out the principle, does on occasion fail to do so; and on those occasions the rule may have to be modified so as to accord with the principle. "

Both these passages were references to the assessment of damage at common law. Megarry J. then went on to refer to the right to award damages under Lord Cairns' Act (which is the basis upon which I am at present contemplating an award), and at pp. 57 - 58 said:-

" The Act itself has been repealed, but in Leeds Industrial Co-operative Society Ltd. v. Slack (1924) A.C. 851 the House of Lords established that statute has maintained in force the jurisdiction conferred by section 2. I should say that Fry on Specific Performance, 6th ed. (1921), p. 602, states:

' It is apprehended that where damages are awarded under this Act in substitution for specific performance, the measure of damages would be the same as in an action at common law for breach of the contract. So, where the damages at common law would be nominal, they would also, it is submitted, be nominal under the statute. '

That, however, was written before the Leeds case had been decided, though there were other authorities on the point which perhaps had not been borne in mind.

In the case before me, the Leeds case is both relevant and important. It shows that Lord Cairns' Act extended the field of damages. "

As I read Wroth v. Tyler and, indeed, all the other cases, they represent an attempt to adhere to the general principle that a party sustaining a loss by reason of breach of contract is, so far as money can do it, to be placed in the same situation with respect to damages as if the contract had been performed (Robinson v. Harman (1848) 1 Exch. 850). I

McMullin J, in Souster's case was ever intended to enable a plaintiff, who has been guilty of inordinate delay, to profit out of that delay because of the effects of inflation. I thi the proper course for me to follow is to assess the damages u the principle in Souster's case, but diminished by an appropr amount to allow for the plaintiff's delay.

From the date of breach to the date of hearing was slightly over two years. Approximately one year of that was to the difficulty of obtaining a fixture. This was the fault of neither party. The plaintiff's delay was almost a year and therefore, I propose to assess the damages upon the basis of the likely date of hearing if that delay had not occurred. Fortunately the valuer called by the plaintiff gave differing values of the land as at November 1974, 1975, and 1976. Those were $6,750, $8,400, and $10,000, respectively. I think that if the plaintiff had acted with reasonable promptitude a hearin could have been expected by about November 1975. I therefore fix the damages at $4,900, being the difference between the value at November 1975 ($8,400) and the contract price of $3,500.

There will accordingly be judgment for the plaintiff for $4,900, together with costs according to scale and disburse ments and witnesses' expenses as fixed by the Registrar.

Solicitors: J.M. Hanan, DUNEDIN, for Plaintiff

Baylee, Brunton & Mitchell, DUNEDIN, for Defendan