1618 (3) NZLR

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

A.967/81

954

BETWEEN JOHN ERNEST MORETON and PETER CRAIG both of Tauranga, Company Directors

Plaintiffs

Appeal reported [1986] 2 NZLR

A N D MONTROSE LIMITED (IN LIQUIDATION) a duly incorporated company having its registered office at Auckland and carrying on business as a Property Developer

Defendant

AND

A.473/82

BETWEEN JOHN ERNEST MORETON and PETER CRAIG both of Tauranga, Company Directors

Plaintiffs

A N D NEW ZEALAND INSURANCE COMPANY LIMITED a duly incorporated company having its registered office in Auckland, Insurance Company, NATIONAL MUTUAL FIRE INSURANCE COMPANY LIMITED a duly incorporated company having its registered office at Wellington, Insurance Company, INSURANCE COMPANY OF NORTH AMERICA LIMITED a duly incorporated company having its registered office at Wellington, Insurers

First Defendants

A N D MONTROSE LIMITED (IN LIQUIDATION) a duly incorporated company having its registered office at Auckland and carrying on business as a Property Developer

Second Defendant

Hearing: 25, 26 June 1984

Judgment: 6 August 1984

Counsel: D F Dugdale and M A Gilbert for plaintiffs
S C Ennor and M Corry for Montrose Limited

JUDGMENT OF HENRY, J.

By consent of the parties, these two actions were heard together. Both are brought by the Plaintiffs as purchasers under an agreement for sale and purchase of a property situated at Tauranga; A.967/81 being for specific performance of that agreement and A.473/82 being a claim of entitlement to the proceeds from a fire insurance policy covering the building on the property, based on the provisions of The Fires Prevention (Metropolis) Act 1774 (U.K.). There was a further separate action relating to the insurance policy which has been compromised, and the funds representing that compromise are now held on trust pending determination of these present actions. As a consequence, the First Defendants in A.473/82 did not seek separate representation.

The property in question is situated at the junction of Cameron Road, Wharfe Street and Selwyn Street, Tauranga. The land is comprised in three Certificates of Title, and had on it a large colonial type building constructed about 1888. It had initially been a family residence and then converted into a private hotel. In 1973 or 1974 the building was partially but quite severely damaged by fire. That fire damage was not repaired and the property remained unoccupied and unused from that time onwards.

In 1980 the Defendant company, Montrose Limited, which was basically a Griffiths family holding, the family having been the original owners of the property, decided to sell and it was put up for auction. The reserve was not reached, and subsequently the Plaintiffs became interested and entered into negotiations to purchase. In particular, two conferences were held by the parties, which resulted in the execution of an agreement for sale and purchase on 24 February 1981. After execution, on that very night of 24/25 February 1981, the main building was seriously damaged by a further fire, as a result of which the authorities required its complete demolition, which was duly carried out, leaving the site vacant apart from three small outbuildings.

The terms of the agreement relevant to these actions are :

"1. Purchase price is TWO HUNDRED AND FIFTEEN THOUSAND DOLLARS ($215,000.00) subject to Clause 20 hereof:

(a) The Purchaser upon the signing of this Agreement shall pay to the Vendor or his agent as a deposit and in part payment of purchase money the sum of ONE THOUSAND DOLLARS ($1,000.00)

(b) The balance of purchase price shall be paid or satisfied as follows :

(i) As to the further sum of $24,000.00 on the date of possession which shall be seven days after this contract becomes unconditional

(ii) As to the further sum of $75,000.00 three months after this contract becomes unconditional (hereinafter called "the date of settlement") when title shall be transferred

(iii) As to the balance as more particularly provided in Clause 19 hereof.

And if from any cause whatever (save the default of the Vendor) any portion of the purchase money shall not be paid upon the due date the purchaser shall pay to the Vendor interest at the rate of 16 per centum per annum on the portion of the purchase money so unpaid from the due date until payment thereof but neverthelss this stipulation is without prejudice to any of the Vendor's rights or remedies under this Agreement."

"19. The balance of the purchase price, namely $115,000.00 (which figure shall be subject to any necessary adjustments pursuant to Clause 20 hereof) shall be secured to the Vendor by the Purchaser executing a second mortgage over the property hereby sold, such mortgage to be on terms normally employed in like cases by the Solicitors for the Vendor with the following specific provisions :-

(a) Subject to Clause 20 hereof the term shall be two-and-a-half years from the date of settlement.

(b) Subject to Clause 20 hereof interest shall be payable quarterly as from the date of settlement at 17 per centum per annum reducible to 15 per centum per annum for prompt payment.

(c) The first mortgage over the said property shall not exceed an amount which, together with the amount owing under the Vendor's mortgage, is greater than 75% of the value of the said property from time to time as determined by a registered Valuer in the employ of Eves Coxhead Associates provided that if the said firm shall not have a registered Valuer in its employ then such valuation shall be carried out by such registered Valuer as the Vendor may nominate. Any such Valuer is hereinafter referred to as "the said Valuer".

(d) The Vendor will at the request and expense of the Purchaser give priority to any first mortgage within the limits hereinbefore referred to and any improvements made by the Purchaser to the said property shall entitle the Purchaser to raise a larger first mortgage within the limits above referred to.

(e) The Purchaser shall also be entitled to raise a first mortgage in excess of the said limits provided that at the Purchaser's expense the Purchaser provides to the Vendor additional security by way of first or second mortgages for any deficiency resulting from such excess over another propertyu or properties providing security approved by the Vendor (which approval shall not be arbitrarily or unreasonably withheld) and provided that the value of such substituted security as determined by the said Valuer shall be such that the mortgage to the Vendor together with anyi prior charges shall not exceed 75% of such value.

(f) The purchaser shall be entitled to transfer the property hereby sold subject to the mortgage to the Vendor provided that :-

(i) Any purchaser shall first be approved by the Vendor (which approval shall not be arbitrarily or unreasonably withheld).

(ii) The margin of security for the Vendor as hereinbefore defined shall be maintained.

(iii) In any event the Purchaser shall repay any amount for which collateral security had been taken pursuant to the provisions hereinbefore contained by reason of the main security having been reduced below the margins hereinbefore stipulated and any such collateral security shall thereupon be released.

(g) The Purchaser shall be entitled to a release from the said mortgage of any one or more of the following allotments referred to in the Schedule hereto, namely Allotments 370 and 371 and Part Allotment 372, provided that the amount owing under the mortgage is reduced so as to maintain the said margin of security in respect of the remainder of the land remaining within the security."

"20. The Purchaser shall have the option (to be exercised by notice in writing to the vendor at least seven days before the date of settlement) of changing the terms of the mortgage referred to in Clause 19 hereof by deleting the provision as to payment of interest and/or reducing the term to 2 years. In the event of the purchaser exercising the option to delete the said interest provision then :-

(a) If the term of the said mortgage is reduced to 2 years, the total purchase price payable by the Purchaser shall be increased to $252,000.00 and the amount secured by the said mortgage to $152,000.00

(b) If the term of the said mortgage remains at two-and-a-half years the total purchase price payable by the Purchaser shall be increased to $263,500.00 and the amount secured by the said mortgage to $163,500.00.

The remaining provisions of Clause 19 shall continue to be applicable to the said mortgage."

"22. The Purchasers will forthwith undertake a feasability study to satisfy themselves that they can develop the property economically as a private hospital, rest home and hotel. They will provide the Vendors with written reports of their progress if requested not more frequently than calendar monthly. The agreement is conditional on their being satisfied by 20 May 1981 that they can economically so develop the property. Provided such condition is satisfied by such date and :-

1. The Purchasers have provided written reports as hereinbefore required and;

2. Have made reasonable progress in applying for such town planning permission, licences and permits as they shall require for such development, then this agreement shall be conditional for such further time (not exceeding one month or such longer period as the vendor may from time to time agree upon) as shall be reasonably needed to obtain such permission, licences and permits

Should either of the above conditions not be satisfied then this agreement shall be null and void provided the Purchasers shall not receive a refund of the first deposit of $1,000.00 which shall be absolutely forfeited to the Vendor."

"23. Notwithstanding that the said John Ernest MORETON and Peter CRAIG may nominate another purchaser, they shall remain personally liable to the Vendor for performance of all the Purchaser's obligations hereunder and shall also guarantee performance of the terms and

> conditions of any mortgage to the Vendor given pursuant to the agreement."

Following the fire the Plaintiffs applied in writing, dated 25 February 1981, to the Tauranga City Council - and received by it on 26 February 1981 - for planning consent to convert the building into a tourist hotel or rest home, and submitted plans in support of that application. The plans appear to be those which had earlier been prepared by or on behalf of Montrose Limited. The Council acknowledged the application, but advised that the destruction of the building required details of the proposed buildings and use and development of the site, which of course the earlier plans did not cover by reason of their being based on the old existing building. No further steps in this regard were undertaken by the Plaintiffs.

On 23 March 1981 the Plaintiffs, through their solicitors, gave notice to the insurers of their interest under the agreement of sale and purchase, having earlier, on 19 May, written to the solicitors for Montrose Limited stating, inter alia:

> "We are instructed to advise you in terms of Clause 22 of the agreement that the Purchasers have undertaken a feasibility study and are satisfied that they can develop the property economically as a private hospital, rest home and hotel. The Purchasers do not at this stage require to make any further proposals with Town Planning permission, licences or permits and so

> do not seek any further time in which to obtain these. We are therefore instructed to advise you that the agreement is now unconditional. If it is necessary for the Purchasers to waive any of the requirements of Clause 22 they hereby so do."

That letter was formally acknowledged by the Company's solicitors, by letter of the same date by the secretary of one of the partners of that firm, and then on 26 May a further letter was written by them to the Plaintiffs' solicitors in which the Plaintiffs' entitlement to proceed with the transaction was denied, and it was claimed that the contract was at an end. Nothing now turns on tender of the purchase monies, nor on the ability of the Plaintiffs to complete settlement pursuant to the terms of the agreement. It is common ground between the parties that the conditions set out in Clause 22 of the agreement were not in fact fulfilled timeously, and that the Plaintiffs' entitlement to relief under both Actions is dependent upon their unilateral right to waive those conditions.

Clause 22 effectively contains two conditions. The first is that the purchasers be satisfied by 20 May 1981 "that they can economically so develop the property" - that is, as a private hospital, rest-home or hotel. The second is that they obtain such town planning permission, licences and permits as they require for the development.

Those conditions are conditions which operate not to prevent the creation of the contract, but to suspend the operation of the obligation or obligations to complete the transaction. That this is so, is made clear by those provisions in clause 22 which impose immediate obligations on the vendors, and that which requires forfeiture of the first deposit of $1000.00 upon the agreement becoming null and void for non-fulfilment of the conditions.

The substantive issue as to the Plaintiffs' entitlement to waive the conditions depends upon whether the provisions were solely for their own benefit. The authorities establishing that as the appropriate test are collected and referred to by Richmond J. in Daubney v Kerr [1962] NZLR 319, at p.322. Reference can also be made to the judgment of McCarthy J. in Scott v Rania [1966] NZLR 527, 534, and that of Brightman J. in Heron Garage Properties Limited v Moss & Anor [1974] 1 WLR 148; [1974] 1 All ER 421. That principle is now well-established, although its basis is not entirely clear. It has been suggested (for example, by Newton J. in Gough Bay Holdings Limited v Tyrwhitt-Drake [1976] VR 195; McLelland J. in Turnstila Pty Ltd v North Shore Gas Co Ltd (1981) ANZ Conv R 121) that the basis is the implication of a term enabling such a party to waive. Whatever be its true rationale, what is in question is the construction of the particular contract, from which it must be determined whether or not

the condition is for the sole or exclusive benefit of the party claiming the right to waive. It is also now established that in construing such a contract, evidence of surrounding circumstances is admissible (Donaldson & Anor v Tracy & Anor [1951] NZLR 684; Crofts and Matsas v Gus Properties Ltd 1 NZCPR 332; Gough Bay Holdings Ltd v Tyrwhitt-Drake (supra)).

It seems to me that in deciding the question whether a condition may be for the benefit of a party, a relevant enquiry must be whether its fulfilment would or could be of benefit to him. The whole purpose of inserting a condition in a contract is to require the existence of a particular set of circumstances, in the absence of which a party does not intend to be bound to proceed with the transaction. It must therefore follow that a provision which does not relate to the right or the obligation to proceed is not relevant to an enquiry as to whether a condition was inserted for the sole benefit of one party. It is therefore necessary to consider what are the benefits which could be said to result to the vendor from the inclusion of those conditions.

1. The express obligation of the Purchasers to undertake a Feasibility Study and to provide written reports to the vendor if requested:

On the face of it, it is perhaps an attractive argument to contend that because these obligations undoubtedly benefit

the vendor, and because they are inextricably bound up with the conditions, it therefore follows that the conditions do, at least indirectly, confer a benefit on the vendor. However, on analysis of the clause, I do not think that is the true position. What clause 22 does is to provide for the happening of two events before the purchasers could be called upon to complete. The vendor could not call for completion if the purchasers were not satisfied they could economically develop the property, or if the requisite permission, licences and permits were not obtained, provided they had undertaken the feasibility study and had supplied the requested written reports. If the purchasers failed in either of these respects, then they could be compelled to complete in the same way as could a purchaser in a "subject to finance" contract who has not taken reasonable steps to obtain his finance.

In Gange v Sullivan (1966) 116 CLR 418, an agreement for the sale of land was subject to local council development approval, and it was held that the condition was for the benefit of the purchaser and could be waived by him. Barwick C.J., at pp.429-430, said :

> "But, although the condition was for the benefit of the appellant, it was not, as it were, open ended. The appellant was required to make an application for the requisite approval within a stated time and to complete the purchase within a time computed from the date of receipt of such approval. Thus, in my opinion, the appellant could not be compelled to

> complete if no approval conformable to the condition was received by 31st May, if he made the appropriate application within the stipulated time and took all other necessary steps to obtain that approval. If he failed in these respects he could be compelled to complete, unless the respondent had waived the appellant's breach in not having applied in time, or in otherwise failing to take necessary steps. But, being a condition for his benefit, the appellant, in my opinion, could waive it and require the vendor to complete notwithstanding that no approval satisfying the condition had been received in time."

In my opinion, the same reasoning applies here. The positive obligations were undertaken as part of, and only as part of, the benefit given the purchasers by the conditions. Once the conditions ceased to apply, be it because of fulfilment or because of waiver by the purchasers, the obligations ceased to exist. They were operative only during such times as the contract remained conditional. To apply the test propounded by Hutchison J. in Donaldson & Anor v Tracey & Anor [1951] NZLR 684, 693, what prejudice in this respect would there be to the vendor if the conditions were not in the contract? The answer, in my opinion, must be none. The purpose of the positive obligations was to restrict the availability to the purchasers of the escape-door provided by the conditions, but their existence did not open that door to the vendor.

2. Forfeiture of the Deposit:

In my opinion, this provision is nothing more than a consequence of non-fulfilment of either condition, the purpose of it being to give some measure of compensation to the vendor for having been conditionally bound and therefore restricted in pursuing other avenues of sale during the interim period. It does not purport to confer any right on the vendor relating to the continuance, termination or enforceability of the contract, and therefore does not evidence any benefit accruing to the vendor from the conditions, nor, in my view, can it give rise to an implication that the parties intended that the purchasers could not waive fulfilment. The removal of the conditions has not prejudiced the vendor's right of forfeiture.

3. The contract is expressed to become null and void if the conditions are not satisfied:

It was not suggested by counsel for either paty that this provision was to be construed as merely making the contract voidable, whether at the instance of the purchaser or the vendor, or either of them. Although there is support to so construe a provision declaring a contract to be void (e.g. Gange v Sullivan (1966) 116 CLR 418, 429), I do not consider that in this contract the words meant other than what they said - namely, that the contract ended if the conditions were not satisfied within the

specified time limits. The provision does, however, I think, create some difficulty for the purchasers. In the Turnstila case, McLelland J. held that a provision entitling vendor and purchaser to rescind on non-fulfilment of a condition, negatives the right of the purchaser to waive. Also, in the Heron Garage case, Brightman J. was influenced by the fact that the clause in question was expressed to confer rights on both parties to determine the contract.

In principle, it would seem logical that if a contract expressly creates a right of termination in favour of a party on the non-happening of some event, that right should not be taken away unilaterally by the other party to the contract. To do so would be to defeat its express terms, and therefore there is no room to imply the necessary term, nor can it be said that the condition did not benefit both parties. The benefit is that the conditions provided an escape-door which was available to both. In Charles Lodge Pty Ltd v Menahem [1966] VR 161) the Full Court of Victoria held that a clause declaring a contract void if a planning condition was not met entitled both vendor and purchaser to rescind for non-fulfilment. The position in this contract is slightly different, in that no express (or implied) right to rescind is given either party, but rather there is an automatic termination in the event of non-fulfilment.

Nor is the position here similar to that in Sandra Investments Pty Ltd v Booth (1983) 50 ALR 385, in which the High Court of Australia held that where a contract gives the purchaser an express option to cancel if a condition as to planning approval was not met, he could exercise that right unilaterally as a matter of contract. The fact that this contract ceases on non-fulfilment, I think, evidences, as in Charles Lodge, an intention that the purchasers could not unilaterally prevent that consequence which therefore indicates, that depending on other relevant factors, the conditions may have been intended to benefit the vendor as well as the purchasers.

4. The mortgage back to the vendor:

By reason of this, the vendor will retain an interest in the land. The mortgage, second in priority, is substantial, the principal being $115,000.00 or perhaps more at the option of the purchasers. At the time of sale, the property was unused because of the earlier fire damage, but it had been a private hotel. Its proposed development by the purchasers was for a hospital, rest-home or hotel, and the second condition in clause 22 of the contract required the availability of appropriate licences and permits. The use to which such a property can be put can well have some impact on its value, and thus on the security should it be mortgaged. It is relevant not only to the probable viability of the

development by the purchasers and their consequent ability to service the mortgages, but also to any re-sale should that necessity eventuate in the future. I do not think the fact that there is no obligation on the purchasers to complete any development negates this reasoning - a point specifically dealt with by Brightman J. in the Heron Garage case. The vendor here has, by virtue of its agreement to leave part of the purchase price on mortgage, retained an interest in the land which interest could be affected by the use to which the property could lawfully be put as well as the use to which it actually is put. In my opinion this factor, taken in conjunction with the contract providing that it becomes null and void on non-fulfilment, shows that the conditions were not intended for the sole benefit of the purchasers, nor was it the intention of the parties that those conditions could be waived by them unilaterally.

Accordingly, in my judgment the purported waiver by the purchasers was ineffective in law and, the conditions not having been fulfilled by 20 May 1981, the agreement was at an end. It follows that both the action for specific performance and the action relating to the insurance monies must fail.

It is, however, I think, desirable for me to record my findings in relation to matters which would have required determination had the waiver been

effective. As regards A.967/81, I would have thought it appropriate to issue a decree for specific performance of the agreement, there being no circumstances which would have rendered an enforcement of the bargain unfair or unjust. Mr Dugdale submitted that there should, in such event, be an abatement of the purchase price to allow for the destruction of the buildings. The Court has power to make such a condition if the circumstances so require (Spry on Equitable Remedies (2nd edn.) at p.291).

Evidence was called from a Valuer, Mr Pratt, who made an assessment of the 1981 value of the buildings at $50,000.00. This was necessarily very much in the nature of an assessment, because he had made no inspection of the buildings before the fire. No details of his valuation were given, and I have difficulty in accepting that the exercise he carried out could amount to adequate proof of value as at 1981. Apart from that, I am not satisfied on the evidence that the value of the property after the fire was less than its value as vacant land; and certainly its value on that latter basis was shown to be at least as much as the purchase price, and probably more. It is true that a purchaser in these circumstances is entitled to his bargain, but in this case the evidence does not establish that there was a loss of bargain by reason of the destruction such as would require, in the interests of fairness, an abatement of the purchase price.

The question of abatement would not, of course, arise if the purchasers' claim (under A.473/82) to the insurance monies were to succeed. On the other hand, I can see no justification for requiring the purchasers to pay interest on the balance of the purchase price, and I would not have been prepared to make any such condition on a decree for specific performance.

As regards A.473/82, the first question is whether the purchasers were persons interested in the building within the meaning of s.83 of the Fires Prevention (Metropolis) Act 1774, thereby entitling them to require the application of the insurance monies to the reinstatement of the buildings. As purchasers, in the context of this case they have no contractual entitlement to the proceeds of the policies of insurance, and any possible rights are resticted to the 1774 statute.

It was first argued that the Act does not apply in New Zealand. The application of the Act, and of s.83 in particular, was considered in detail by Edwards J. in Cleland & Ors v The South British Insurance Company (1890) 9 NZLR 177, where it was held that the section was applicable. The Act was applied by Sim J. in Searl v South British Insurance Company [1916] NZLR 137, although the point was not argued at trial. It was also applied by Smith J. in Auckland City Council v Mercantile & General Insurance Co. Ltd [1930] NZLR 809.

Counsel were unable to refer me to any authority wherein it had been held the Act was not applicable in New Zealand, and I would be very hesitant in now reaching a conclusion different from that reached by Edwards J. in Cleland, even if I thought it was wrongly decided, which I do not. Section 2 of The English Laws Act 1908 states :

> "2. The laws of England as existing on the 14th day of January 1840, so far as applicable to the circumstances of New Zealand, and in so far as the same were in force in New Zealand immediately before the commencement of this Act, shall be deemed to continue in force in New Zealand and shall continue to be therein applied in the administration of justice accordingly."

The 1774 statute was in force in England as at 14 January 1840. It is settled law that its provisions are of general application in England (MacGillivray & Parkington on Insurance Law (7th edn.) para.1686). Doubts as to its application in Scotland and Ireland are, I think, irrelevant as s.2 of The English Laws Act 1908 is concerned with the "laws of England". The law of England is that the 1774 statute applies generally, and not with any restriction as to locality. It was then argued that the statute was not "applicable to the circumstances of New Zealand", particularly because of the reference in it to governors and directors of an insurance office. In my view possible machinery difficulties, or difficulties in applying the particular details of a statute do not prevent the operation or the applicability

of it to New Zealand. As Johnston J. said in <u>Highett</u> v <u>McDonald</u> (1878) 3 Jur.N.S. 102, 104 :

> "And it seems to me that with respect to the statute law of England the question is not whether the whole of a particular statute, or chapter of a statute, can be applied in the Colony, but whether the particular enactment, duly interpreted and construed by the context and the preamble of the Act, is capable of being applied or not."

The general purpose of s.83 was, I think, clearly applicable to the New Zealand situation at the relevant date, and I can see no real problem in the application of its provisions. It is therefore, in my opinion, in force in this country.

Section 86 was also referred to, which prohibits an action against any person on whose estate a fire has accidentally begun. I do not think that section has any application whatever to the present situation. This is an action claiming entitlement to monies payable under fire insurance policies, and quite outside the ambit of s.86.

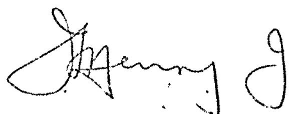
The next question is whether, assuming (contrary to what I have decided) the purchasers were entitled to waive the conditions, they had standing to invoke the provisions of s.83. It is common ground that at the time of the fire the property was at the risk of the vendor.

Were the purchasers then persons "interested in" the buildings? A purchaser under a simple unconditional contract is a person interested (Royal Insurance Co Ltd v Mylius (1926) 38 CLR 477). Here, at the time of the fire the contract was still conditional. The matter is by no means free from difficulty, but it seems to me that in principle it could not be said that the purchasers then had an equitable interest in the land and buildings. There was no obligation under the contract to buy and sell, and specific performance could not then be granted. There had, in fact, been no waiver of the condition and in my view it cannot be said that the equitable estate had passed to the purchasers. The time had not been reached when either party was under an obligation to complete the transaction, a position which would only arise either on fulfilment of the conditions or on waiver by the purchasers. Until one of those events occurred, there could be no passing of risk, no passing of the equitable estate and, in my view, no obtaining by the purchasers of an interest enabling them to invoke s.83.

I have given consideration to the judgment of Goff J. in Wood Preservation Ltd v Prior [1969] 1 WLR 1077; [1968] 2 All ER 849, in which it was held that the beneficial interest in shares had passed to a purchaser under a conditional contract, although the condition had not at the relevant time been waived by him.

That was a taxation case, and the learned Judge likened the position to that of a vendor who had become a trustee of shares for a purchaser on the strength of the purchaser's right to call for specific performance. I do not think that analogy is appropriate to the present circumstances involving the sale and purchase of realty. In no proper sense was the vendor here holding the property on trust for the purchasers - there was, in my view, an inchoate contract pending either fulfilment or, if available, waiver of the conditions. Also the special facts of <u>Wood Preservation</u> are emphasized in the Court of Appeal judgments ([1969] 1 All ER 364), it being held that the <u>vendor</u> did not retain beneficial ownership <u>within the meaning of the particular statute</u>. It is therefore distinguishable, and does not detract from what I consider to be the general principle as to passing of an equitable interest. It follows therefore that even if the conditions were for the sole benefit of the purchasers, the action under the 1774 statute could not succeed.

The Defendants are therefore entitled to judgment in both actions, together with costs, in respect of which counsel are invited to submit a memorandum if necessary.



<u>Solicitors</u>:

Murray Dillon Gooch & Partners, Tauranga, for Plaintiffs
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