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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CP.1009/89

BETWEEN FLETCHER DEVELOPMENT AND CONSTRUCTION LIMITED

Plaintiff

AND NEW ZEALAND RAILWAYS CORPORATION

Defendant

Hearing: 15 August 1989

Counsel: Mr Parmenter for the Plaintiff
Mr Rennie and Mr Drumm for the Defendant

Judgment: 1 September 1989.
~~August 1989~~

JUDGMENT OF MASTER TOWLE

This was an application for summary judgment brought by the plaintiff for return of an amount of $900,000 paid pursuant to an agreement for sale and purchase of a block of land near Otahuhu which has not proceeded. It arises in the following circumstances. It may be convenient to refer to the plaintiff and defendant as "Fletchers" and "Railways" respectively.

During the 1980's Railways, as part of its re-organisation, found that it no longer had use for a

large block of land in Massey Road Otahuhu adjoining the old Railway Workshops. Before the agreement to which proceeding relates was entered into, Fletchers had become the owners of a block of land which it might be best to refer to as "stage 1" of the development and became interested in negotiating with Railways for the purchase of an additional adjoining area for Stage 2 of the development.

As a result of negotiations carried on between the parties early in 1988, an agreement for sale and purchase was drawn up relating to the Stage 2 development under which Fletchers agreed to buy the land for a price of $2 million dollars plus GST. A deposit of $150,000 was payable upon the signing of the agreement and a further $150,000 on the date on which Fletchers Board gave its formal approval to the purchase. A further $600,000 was payable on the 1 July 1988 and the balance was to become payable in one sum in cash on the possession date which was defined as being 10 working days after the date on which Fletchers was notified that a separate title to the land in Stage 2 had issued. Although the copy of the agreement filed with Fletchers application for summary judgment had a date inserted of the 9 June 1988 I am satisfied from other affidavit evidence that the agreement was duly executed by both parties and the first $150,000 paid by

the 31 March 1988. The agreement was on the ordinary form of agreement for sale and purchase used by solicitors in Auckland and contained the following printed condition :

> "7.2 In relation to every financial condition and, if this contract is expressed to be subject to any other condition(s) then in relation to each such condition the following shall apply unless otherwise expressly provided :
>
> 1. The condition shall be a condition subsequent
>
> 2. If the condition is not fulfilled by the date for fulfilment (time being of the essence) either party may at any time before the condition is fulfilled or waived avoid this contract by giving notice in writing to the other and upon avoidance of the contract the purchaser shall be entitled to the return of his deposit and any other monies paid by him and neither party shall have any right or claim against the other."
>
> The underlining is mine.

Two further special conditions included in the agreement should be recorded:

> "15.1 This agreement is conditional on the vendor obtaining within one year of the date of this agreement the issue by the land registry office at Auckland of a separate title for the land."

> "22 This agreement is conditional upon the Board of Directors of Fletchers determining that a proposed development of the land comprises a commercially acceptable and viable project by 4 p.m. on the day 30 days after the date of execution of this agreement by both parties."

After the agreement had been signed at the end of March 1988 Fletcher's solicitors wrote to Railway's solicitors on the 26 April referring to Clause 22 and indicating that the project was under active consideration in Fletcher's Head Office but that it would not be possible to place the matter before its Board within the time specified in the agreement. An extension was sought for 1 month from the 30 April in order to satisfy the condition in Clause 22. That request was confirmed the following day on the 29 April by Railway's solicitors, the condition being that a further deposit of $50,000 would be paid which was duly done on the same day. The matter came before Fletcher's Board towards the end of May. Approval was given to the purchase to satisfy Clause 22. The further deposit of $100,000 was paid on the 31 May and likewise the next payment of $600,000 due on the 1 July was paid by Fletchers in accordance with the agreement.

In accordance with the agreement Railways were obliged to arrange for Stage 2 to be surveyed in preparation for the formal deposit of a new plan to enable separate title to issue. The costs of the survey were to be met by Railways but because Fletchers had previously used the firm of Babbage Partners Limited as surveyors it was agreed that Railways should use the

same firm because of this intimate involvement with the surveying of Stage 1. That firm was accordingly instructed by Railways on the 8 June 1988. The agreement also recorded that the purchase price of $2 million had been calculated on an anticipated final area of 5.3 hectares and a firm price agreed of $37.735 per square metre. It was the intention that on the passing of the title to the land the exact purchase price would be re-calculated on the square meterage basis as determined by the final survey.

About a month after the survey work began it was discovered that a pumping station which had been erected by Fletchers close to the boundary between Stage 1 and Stage 2 was in fact encroaching slightly on to Railways land. Discussions took place between the parties about the 3 and 4 August 1988 as a result of which it was agreed that the land on which the offending portion of the pumphouse stood should be excluded from the new certificate of title. The survey had shown that the area of encroachment amounted to a mere 8 square metres which may be compared with a total of approximately 53,000 square metres which was the area of Stage 2 which was eventually to be established by the survey.

The minor change was agreed without any formal record being made of it or any correspondence between the

parties solicitors and was obviously a sensible decision on the spot in relation to the practicalities of the matter whereby the parties envisaged that Fletchers would become the owners of all the land in both Stages 1 and 2.

The surveyors then continued to complete the survey work which had by the 16 September reached the stage of being checked, completed and returned to the Railways Auckland Office for lodging with the Department of Lands and Survey. The evidence shows there was a delay until the 8 November before the survey plans were lodged. They were approved by the Department on the 16 December and Railways notified of this before Christmas.

There appears to have been no communication whatsoever between the solicitors for the two parties during the last few months of 1988 or the first few weeks of 1989. It is evident from the affidavits that Fletchers must have undergone a change of mind concerning the wisdom of its intended purchase, for without warning on the late afternoon of the 31 March 1989 which was the last day in terms of the agreement within which the new title had to have issued, Fletcher's solicitors sent a letter to the Railway's solicitors in which they said :

> "Pursuant to Clause 15.1 of this agreement it is conditional upon your client obtaining, within one year of the date of this agreement, the issue

> by the Land Registry Office at Auckland of a separate title for the land. One year has now lapsed since the contract was signed and we believe that no separate title has yet issued. Our instructions are that the agreement is therefore cancelled and we now give notice to that effect."

The letter asked for the return of the deposit.

That letter must have come as a bomb-shell to Railways who replied through their solicitors on the 5 April rejecting Fletcher's claim to be entitled to cancel the contract and suggesting that Fletchers' actions had waived time being of the essence in relation to the availability of the new certificate of title. The letter went on to refer to the initial extension of time granted to enable Fletcher's Board to give approval to the purchase agreement and to the episode involving the encroachment and the need to adjust the boundary in the area of the pumping station. It was claimed that the first action had led to one month's delay in the surveyors being instructed and that the incident relating to the discovery and settlement of the encroachment had caused further delay. The letter went on to say :

> "The Corporation considers that the actions of Fletchers and its contractors have constituted a waiver of the time of the essence provisions of the agreement so that the Corporation is entitled to a reasonable extension of time for satisfaction of the condition in Clause 15.1 of the agreement. We consider that a reasonable extension of time would be 10 weeks representing the 1 months extension for Board approval plus the additional 6 weeks it took Fletcher's

surveyors to supply amended plans as the result of the error in locating the pumping station."

The letter went on to indicate that Railways had been advised that the new title would issue within approximately the next 2 weeks and ended by rejecting Fletcher's purported cancellation of the agreement.

The new title in fact was issued on the 10 April 1989. There is no evidence that any further communication was sent by Railways to Fletchers in terms of the agreement calling it upon to settle within 10 working days of that date but on the 15 May these present proceedings were issued by Fletchers seeking recovery of the full amount of its various deposits totalling $900,000 plus interest at 11% under the Judicature Act calculated from the 3 April 1989 being the Monday following the date of expiry of Clause 15.1 and the demand for the return of the monies paid.

In its notice of opposition to the application for summary judgment the defendant raised two grounds :

1. That Fletchers had entered into possession and taken title to part of the land which it was to purchase under the agreement by virtue of the arrangement made to adjust the boundary to exclude the 8 square metres on which the pumping station stood, and

2. That in seeking to rely upon Clause 15.1 of the agreement Fletchers was endeavouring to take advantage of its own wrong, namely the delays caused by Fletcher's wrongful act in erecting the building on part of the land.

It was common ground that there was no formal recording of the arrangement relating to the rectification of the boundary and the adjusted area to be surveyed and the arrangement made was in no sense a variation of the terms of the agreement as was the case over the extended time granted for Fletchers to give its Board's approval. There is certainly nothing in writing to show that Fletchers at any time waived its right to rely upon Clause 15.1 as being an integral part of the agreement with a clearly identified time expressed as being of the essence in relation to the obligations by Railways over the title. I do not believe that the facts as I have recorded them are in dispute and at the hearing it was not seriously put forward that the initial delay of one month (which was of course fully accepted by Railways) had any material effect on the survey arrangements. I am also satisfied that such delays and additional expense as were caused by the need to make a modification of the survey plans once the encroachment was discovered were quite minimal, but that there were substantial and not fully explained

delays on the part of Railways in having the plans lodged for approval. It must of course also be recorded that although Railways decided to use the surveyors from Babbages for good practical reasons, they were engaged by Railways in terms of its obligations under the agreement and the pace of their activities was solely in the control of Railways.

I have had submissions addressed to me by both counsel on the question of waiver. I have had no evidence placed before me that has been any formal transfer of the title to the 8 square metres taken place or indeed that Railways has been in any way materially prejudiced by its agreement to accept the minor boundary adjustment which might bring one to the conclusion that Fletchers was trying to take advantage of its own wrong doing in erecting the pumping station across the boundary. There is no evidence to show when the pumping station building was erected and it seems very possible that this may have been done before the agreement for sale and purchase was ever entered into. I accept the general proposition in Hallsburys Law of England 4th Ed. Vol.9 para.572 that any oral variation of a contract required by law to be evidenced in writing is ineffective and I can find no evidence to persuade me that there was any variation of the original agreement agreed between the parties that in return for Railways

agreeing to give up the 8 square metres of land Fletchers in turn would declare the main agreement unconditional. The settlement of the minor boundary change cannot in my assessment be viewed as a part performance of the agreement for sale and purchase and the only practical effect from Railways point of view from the excision of the 8 square metres is that the purchase price might have been reduced by 8 times the agreed square meterage rate of $37.735 per square metre or a total of only just over $300. There is no evidence before the Court as to the additional survey costs attributable to the minor boundary adjustment but these can hardly have been more than very modest.

I believe the proposition to be sound that one party cannot unilaterally waive the benefit of a condition in an agreement unless it is inserted solely for his benefit. (See for example Morton & Craig v Montrose Limited (In Liquidation) [1986] 2 NZLR, 496. I believe that the terms relating to the obligation upon Railways to supply a title to the Stage 2 development area within one year from the date of the agreement was inserted for the benefit of both parties and not for Fletchers alone and I simply am unable to find any evidence to support the proposition that Fletchers ever gave any indication either expressed or implied that it

was no longer intending to rely upon condition on Clause 15.1.

Counsel for the defendant relied upon the decision in Scott v Rania [1966] NZLR 527 from which a relevant passage in the portion of the judgment of McCarthy J at page 534 may be quoted :

> "Notwithstanding that a condition .... has not been fulfilled, a party through whose default that non-fulfilment has occurred, if that is the case, may not assert non-fulfilment, for it is a settled principle of law of great antiquity and authority that in these matters no one can take advantage of the existence of a state of things which his default has produced."

I was also referred by him to a portion of the judgment of Lord Denning MR in W J Alan & Co Limited v El Nasr Export & Import Company (1972) 2 QB 189 at page 213 where he said :

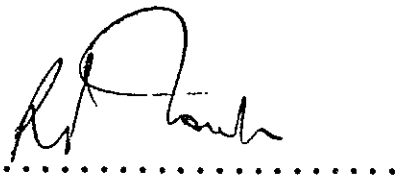
> "The principle of waiver is simply this : if one party, by his conduct, leads another to believe that the strict legal rights arising under the contract will not be insisted upon, intending that the other party should act on that belief, and he does act on it, then the first party will not afterwards be allowed to insist on the strict legal rights when it would be inequitable for him to do so."

Looking at the matter as best I can I simply cannot find that there has been any clear evidence or unambiguous representation which might have been given by Fletchers to Railways that it no longer intended to rely upon Clause 15.1. There is nothing in the evidence to show that there was any serious delay caused by the

minor survey adjustment, far less to suggest that such delay that did occur had any practical effect upon Railways' ability to have the survey work completed in time. It s handling of the matter appears to have been done somewhat lackadaisically.

I am constrained in a summary judgment application to show a robust attitude in dealing with defences of this nature but must temper that robustness with a proper regard for judicial caution. I find that the factual situation such as I have outlined is quite insufficient to persuade me that Railways has a reasonably arguable defence to the Fletcher's claim for reimbursement in full of the monies paid under the contract or that there was any waiver by Fletchers of its rights to rely upon the clear and unequivocal provisions of the agreement.

The application for the return of the monies paid accordingly succeeds. There will be judgment for the plaintiff Fletchers in an amount of $900,000 together with interest at 11% calculated on this sum from the 3 April 1989 until the date of judgment. In addition I allow costs of $2,000 and disbursements to be fixed by the Registrar.



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(Master R P Towle)

Solicitors :

Brandon Brookfield, Auckland, for the Plaintiff
Kensington Swan, Auckland, for the Defendant

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BETWEEN FLETCHER DEVELOPMENT AND CONSTRUCTION LIMITED

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JUDGMENT OF MASTER TOWLE

Copy Judgment appealed.

Copy posted to Defendants by Registrar. Wahv. 1/9/89.