IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV 2008 409 1712

BETWEEN	DRIFTWOOD DEVELOPMENTS LIMITED Plaintiff
AND	PIMLICO PROPERTIES LIMITED Defendant

Hearing: 17 February 2009

Appearances: D Lester for Plaintiff
P J Woods for Defendant

Judgment: 19 February 2009

JUDGMENT OF ASSOCIATE JUDGE CHRISTIANSEN

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[1] The plaintiff seeks summary judgment to recover the deposits paid to the defendant pursuant to two agreements for sale and purchase. The agreements relate to two lots at Lake Hayes, Queenstown. Each is dated 18 April 2007 and is on the Auckland District Law Society's 7th Edition Form.

[2] The two deposits paid total $226,500.00. The defendant vendor claims to have forfeited these upon its purported cancellation of each agreement following the issue of settlement notices on 13 November 2007.

[3] The plaintiff says the defendant was not ready, willing and able to settle in terms of the agreements, and thus not able to issue a settlement notice, and, therefore, its cancellation was invalid. The plaintiff treated the purported cancellation as a repudiation and has itself cancelled, hence the claim for the return of the deposits.

[4] The plaintiff's challenge to the defendant's issue of settlement notices arises due to the alleged failure by the defendant to install communal facilities prior to settlement.

[5] The defendant claims the agreements should be rectified to record that the defendant was purchasing from the developer (Meadow 3 Limited) and that the terms and conditions of the agreements were the same as those between the defendant and the developer. Therefore, the agreements should record that the developer, not the defendant, was obliged to provide the communal facilities. Therefore, the defendant had no obligation to provide the communal facilities. Alternatively, if rectification is not allowed, the communal facilities were immaterial to the contract. It follows the settlement notices were effective and the defendant's cancellation of the agreements was valid, and the defendant was entitled to forfeit the deposits.

Overview of issues

[6] It is agreed the defendant should have been ready, willing and able to settle when the settlement notices issued. The plaintiff says the defendant was not in that position at that time.

[7] The defendant says the communal facilities were being built by the developer and the plaintiff's agreement ought to be rectified to absolve the defendant from responsibility for providing those facilities to the plaintiff. If rectification is made then that is the end of the plaintiff's claim in this proceeding. But, even if rectification is not available, the defendants says equity should intervene to prevent the plaintiff from avoiding its obligations to have completed settlement even though the communal facilities were not available at that time.

[8] The first issue, namely rectification, involves an examination of the parties' contractual history concerning the development in question. The second issue involves an assessment of the materiality of the communal facilities agreed to be provided.

Background

[9] The properties were part of a rural residential subdivision of farmland comprising about 100 hectares at Lake Hayes, Queenstown.

[10] The agreements proscribed the provision of communal facilities. Under 'definitions' these were described as:

> All land, natural features, buildings, plant, equipment, facilities and amenities including any private roads, private ways, trails and walkways within Threepwood Farm owned, leased, licensed or otherwise held, levied or operated in whole or in part by the society from time to time including those facilities from time to time transferred to the society (which may include the Golf Course).

[11] Purchasers were to receive a separate title for each lot occupied and as well an interest as a tenant in common in the adjacent farmland which was to be leased.

[12] Clause 19 detailed the vendor's subdivision obligations. These included:

> 19.5 The Vendor shall prior to settlement, install (to form part of the Communal Facilities):
>
> (a) new stock proof fencing and suitable farm buildings on the Farm Land;
>
> (b) a residents' clubhouse (fitted out for use) at an appropriate location on the Farm land to be nominated by the Vendor; and
>
> (c) one astro-turf tennis court and one petanque court at an appropriate location on the Farm Land to be nominated by the Vendor; and
>
> (d) A children's play area and barbeque area at an appropriate location on the Farm Land to be nominated by the Vendor; and
>
> (e) Letterboxes for each of the Lots and Lodge Lots and suitable rubbish receptacles at both entrance ways to Threepwood Farm, (being Ladies Mile and Slopehill Road entrance ways);
>
> and in addition shall have constructed and formed the walking tracks for residents use on the Farm Land as required under the Landscape Plan.

> 19.6 The Vendor and Purchaser acknowledge that the Communal Facilities shall be transferred to the Society to be held for the benefit of the owners of the Lots and the Lodge Lots to enable all of those owners to have the use in common with all other owners of those Lots and Lodge Lots.
>
> 19.7 To the extent that the terms and provisions of the Lease affect the enjoyment of the Communal Facilities referred to in clause 19.5 the areas of the Farm Land on which those Communal Facilities are situated shall be surrendered and released from the terms of the Lease.

[13] These agreements, as earlier noted, are dated 18 April 2007. They are not the only contracts between the parties concerning the two lots in question. Rather, they are the second replacement agreements, the parties having completed earlier agreements, the first in December 2004 (the original agreements) and the second (the first replacement agreements) in April 2006.

[14] Although the sale price has remained constant over the course of the agreement changes, there have been circumstances arise to explain the need for the replacement agreements.

[15] The original agreements contained no clause similar to clause 19.5, referred to above, i.e., for the provision of community facilities.

[16] Ms Quigley, for the plaintiff, deposes that the developer had faced delays in completing the development and had negotiated new contracts with the various purchasers for that reason. She said presumably the developer was facing difficulties in getting titles within a timely way, and so wanted the replacement agreements to avoid purchasers cancelling as a result.

[17] The provision of community facilities was included for the first time in the first replacement agreements. Before then, Mr Seque, of the defendant, had written to purchasers to whom the defendant had onsold subdivision lots it had acquired from the developer. In Mr Seque's letter to Mr & Mrs Quigley, of the plaintiff, he notes:

> In the time since the original agreements for sale and purchase were entered, the developers have reviewed the manner in which Threepwood is to be run

in the longer term and in addition, the amenities to be provided on the property.

They have elected to apply for resource consent to create a small golf course on land adjoining Threepwood. If the consent application is approved, it is their intention that the golf course will become part of the communal land, able to be enjoyed by all Threepwood owners. They have also applied at the same time for four additional residential lots on the golf course land which will become part of Threepwood farm. Please note that the inclusion of the golf course is wholly conditional upon obtaining resource consent on terms and conditions satisfactory to the developers. They are confident that approval is likely to be achieved.

The developer has also lodged an application with the council to vary the existing resource consent to take account of the proposed new structure and to clarify a number of minor ambiguous matters in the current consent.

As a result of this, it has been determined that changes to the existing agreements are required as:

- The governance of the farm land (which may include the golf course) can be better achieved through an incorporated Society (being the Threepwood Farm Residents Association Inc) than through the company structure in the existing agreement.

- The existing agreements make no reference to the possible inclusion of the golf course and four more lots, and

- It is anticipated that the revised Resource Consent will provide for the incorporated Society to own and manage the communal facilities.

Accordingly, we have been forwarded the enclosed revised Agreement for Sale and Purchase which requires your signature (after taking due legal advice) and we would request that you:

1. Execute the replacement Agreement for Sale and Purchase and return it to this office or directly to Kundig Associates; and

2. Agree that upon execution of the new Agreement for Sale and Purchase the previous agreement is cancelled.

It is necessary that all purchasers agree to the new Incorporated Society management structure and the revised agreement. It is therefore vitally necessary that you complete and return this agreement as soon as possible.

We appreciate your assistance in signing and returning this Agreement as soon as possible and look forward to its return

[18] Mr Seque deposes that he did not refer to the communal facilities in his letter to Mr & Mrs Quigley because he considered them immaterial as:

(a) The purchase price remained the same.

(b) Each purchaser was merely going to have the right to use the facilities and have no ownership of them.

(c) The facilities were going to be located on the Ladies Mile side of the development, i.e., out of sight and over the hill from the plaintiff's lots.

(d) In the scheme of things the facilities represented a small fraction of the total development costs.

(e) The facilities would have "very little, if any, impact on the value or saleability of the section".

[19] Mr Seque advises being informed by the developer of the development cost of about $29,000,000.00, and a facility cost estimate of less than $500,000.00.

[20] The reason for the second replacement agreements is perhaps best explained by the addition of a new clause 14 under the heading "Further Terms Of Sale", as follows:

> 14. In consideration of the benefit to be derived by the purchaser as a result of the changes to management structure and enhancement to the amenities available in connection with the property introduced in this agreement, the parties hereby agree that the agreement between the parties in relation to the property dated 27 April 2006 shall be at an end (following execution of this agreement) and neither party shall have rights against the other party in relation to that earlier agreement.

[21] Gone from that agreement is a provision which had been included, certainly in the first agreement between the parties dated December 2004. That clause (which I will refer to as 'the owner in equity' clause)had stated:

> IT IS HEREBY AGREED AND DECLARED:
>
> 1. That the vendor is the owner in equity of the land the subject of this Agreement as purchaser of the said land under a certain Agreement for Sale and Purchase dated 17th day of December 2004 made between Meadow 3 Limited as vendor and the vendor hereunder (as purchaser) ("the prior agreement") relating to the sale and purchase of lands at Lake Hayes including the land subject to and conditional

upon contemporaneous settlement being effected under the prior Agreement and under this Agreement.

2. ...

3. That all of the provisions of the prior Agreement (other than those relating to the payment of monies by the purchaser named in the prior Agreement) are hereby incorporated in and form part of this Agreement and shall (with all necessary modifications) be binding on both the above named vendor and the above named purchaser.

[22] Mr Seque deposes that the omission of that clause in the replacement agreements was an error and due to a "mistake". Clearly so, he says, because the defendant had no involvement in the development of the lots and was not responsible for, or had control over, the construction of the communal facilities – a fact known to the plaintiff.

[23] The purpose of the second replacement agreement is provided in detail by a letter which accompanied the agreements for sale and purchase. The letter stated:

Dear Purchaser,

SALE AND PURCHASE AGREEMENT – THREEPWOOD

Enclosed is a proposed new agreement for the purchase of your lot at Threepwood. On signing this agreement it will replace the existing agreement. The Agreement for Sale and Purchase for the Threepwood subdivision has been revised for two reasons:

1 A resource consent has been applied for in respect of adjoining land to obtain approval to create a 9-hold golf course and 4 additional residential lots. If approved the golf course will become part of Threepwood Communal Facilities and be available to all lot owners.

2 The farming activities on the farm land forming part of the property are a business and this needs a taxable entity to operate the activities. The proposed new structure will see the existing residents association be that taxable entity, with land ownership to be held by the lot owners in undivided shares via a custodian company. This will simplify all issues relating to goods and services tax.

3 The revised agreement does not alter:

3.1 The lot and other benefits being purchased; or

3.2 The price payable (except for the proposed reduction in purchase price as set out in paragraph 6, subject to acceptance by all existing purchasers); or

3.3 The amenities and other benefits under the existing agreement.

4. The changes are:

4.1 Meadow 3 Limited or its nominee will lease all of the Land (including residential lots, but excluding the land that contains the communal facilities) to the existing incorporated society, Threepwood Farm Residents Association Incorporated ("the Society") under a lease ("Farm Lease") to be executed prior to settlement.

4.2 The residential lot purchased will be farmed as part of the farming operations until the purchaser requires exclusive occupation rights to it. Then it will be excluded from the land being farmed ("Farm Land") and the Farm Lease.

4.3 If the resource consents are obtained for the golf course together with four additional residential lots they will be incorporated into Threepwood and the golf course will become a communal facility and assets for all lot owners.

4.4 All the owners of the residential lots will also own (as an undivided share in proportion to the number of owners of residential lots) the Farm Land via the custodian company Threepwood Custodians Limited which will hold the Farm Land as bare trustee for the owners. The Custodian company will lease the Farm Land to the Society. The Society, of which all lot owners will be members, will carry on the farming business.

4.5 When any lot is sold the purchaser will be required to become a member of the incorporated society (as previously) but will also obtain an undivided share in the Farm Land.

4.6 The remaining communal facilities (which are excluded from the Farm Land and will include the Golf Course, if approved) will be held in the incorporated society for the benefit of the owners.

5. The above changes are to more clearly reflect the way in which Threepwood will operate as a community that owns it own roads, infrastructure, services and farming activity. The changes do not alter the existing rights or obligations of a purchaser under the present agreement.

6. Meadow 3 is conscious that it has previously requested its purchasers to sign a replacement agreement in the past, and so, wishes to compensate purchasers for any inconvenience this proposed change causes. Accordingly, subject to the agreement of all existing purchasers (about 20) Meadow 3 is prepared to offer a reduction in the purchase price of $**** if you accept the replacement agreement by signing and returning it to us at your

> earliest convenience. We will confirm acceptance of all purchasers (if forthcoming) as soon as possible after that.

[24] By letter dated 10 May 2007 the developer wrote to Mr & Mrs Quigley with an update regarding development progress. The letter included:

> There now appears that due to matters outside the control of Meadow 3 and Pimlico Properties Limited, it may be that titles will not be issued by 30 June 2007. While the documents are ready to be launched for stage one titles (and the survey plan approved for stage one), it is possible that s 224 certification will not be issued in time for the 30 June deadline to be met. As such if necessary we (Meadow 3 Limited as developer and Pimlico Properties Limited as vendor) will have to rely on the existing agreement (that has no restriction time frame) if required. However it is our strong preference that we proceed with the replacement agreement (that provide purchaser with the benefit of a reduction in purchase price and other benefits) provided that all purchasers agree to an extension of the 30 June 2007 date for another 6 months.
>
> …
>
> Accordingly we seek your agreement to the extension of the date of satisfaction…from 30 June 2007 to 31 December 2007.
>
> If this is in order please record your formal agreement to the variation of the Replacement Agreement by signing copies of each of the enclosed letters..

[25] In a subsequent letter from the developer's solicitors dated 23 October 2007 the plaintiff was advised:

> We confirm we act for Meadow 3 Limited who has entered into a number of Agreements for Sale and Purchase for lots at Threepwood to Pimlico Properties Limited. We understand that you act for a number of "end purchasers" of some of these lots.
>
> We enclose a copy of a letter sent to the solicitor for Pimlico Properties Limited on 19 February 2007 advising purchasers of the expected delay in constructing the communal facilities as set out in clause 19.5 of the Agreements and requesting that any purchasers having concerns should notify us immediately. On the basis that no concerns were heard our client has delayed constructing the facilities but remains committed to doing so following settlement. Letters of undertaking from Meadow 3 Limited to your clients and purchaser are being prepared and will be signed and sent to you as soon as possible.
>
> We are aware there are concerns by some of the purchasers that the communal facilities may not be constructed following settlement.
>
> ….

> Please advise urgently if your purchaser clients will proceed on this basis. You will need to advise us immediately so that we can obtain execution of the bond by Westpac before the end of the week.

[26] The reference to the Westpac bond related to a bond of $1 million as cover in the event the communal facilities were not completed within two years.

[27] The evidence is that the plaintiff has never agreed to settle its purchases without the communal facilities having been constructed. Ms L A Quigley, for the plaintiff, deposes:

> This is a high level subdivision in a prestigious area and as far as I was concerned the lifestyle benefits of the Development would not be consistent if major construction work on the Development continued in other parts of the farm.

The defendant's case

Rectification

[28] It is clear the Court may alter the recorded terms of a written contract if those terms do not conform to the true agreement of the parties. Rectification will be considered when it can be shown that the written instrument does not properly reflect the continuing intentions of the parties at the time of the execution of the document.

[29] For the defendant Mr K G Seque deposed that:

(a) The omission of the 'owner in equity clause' in the replacement agreements was a mistake

(b) The plaintiff was aware that in all agreements the further terms of sale were those between the developer and the defendant, and that

(i) The defendant had no involvement in the development of the lots and was not the developer; and

(ii) The defendant was not responsible for, and had no control over, the construction of the communal facilities.

[30] Mrs Quigley acknowledges the plaintiff was aware the developer was physically carrying out the development works. Further, and prior to signing the amended agreements, the developer met with the plaintiff's directors on site on 11 January 2007. Also, the plaintiff's directors have raised queries directly with the developer in the past.

[31] The defendant's position is that it was the common intention of the parties that the further terms and conditions clause was to be the same as that included in the agreement for sale and purchase between the developer and the defendant. A necessary modification to clause 19.5 should record that the developer and not the defendant was obliged to provide the communal facilities.

Materiality of communal facilities

[32] Mr Paulson submits the test for material default is that it must be sufficiently serious to either:

(a) Disentitle the defendant from obtaining specific performance; or

(b) Entitle the plaintiff to cancel.

[33] As to the latter, sufficient seriousness has been codified in respect of cancellation for misrepresentation or breach by s 7(4) Contractual Remedies Act 1979. Under the general law similar substantiality rules have evolved which restrict the right to cancel.

[34] Mr Seque's uncontradicted evidence includes:

(a) The first agreement did not include the communal facilities.

(b) The communal facilities were included without any increase in price.

(c) The communal facilities had no bearing on the plaintiff's ability to build on, or on sell the lots.

(d) All services had been provided to each lot, and the club house facilities were to be located on the proposed golf course, a considerable distance from the plaintiff's lots.

(e) The bonded undertaking (provided by the developer) in effect guaranteed the club house facilities would be built in due course.

[35] For the defendant it is submitted that the plaintiff has not produced any evidence that the lack of the communal facilities, as at the settlement date, was at all material. The plaintiff could have required the contract to have been subject to and conditional upon the construction of the communal facilities, but did not do so. Accordingly, if the defendant was in breach it was immaterial and did not disentitle the defendant from serving the settlement notices.

[36] If, on the evidence available to this Court, the defendant has an arguable defence on either issue, then summary judgment must be refused.

Considerations

[37] The issue concerns the parties' agreement for the provision of communal facilities. The plaintiff was aware Meadow 3 Limited was actually carrying out the physical works on the subdivision, and had entered into agreements for sale and purchase with the defendant which, in turn, had on-sold those lots to "end purchasers", including the plaintiff.

[38] Ms Quigley described the subdivision as being "a high level subdivision in a prestigious area" – and so it does appear. As much is reinforced by a plan exhibited by Mr Seque which contained the following:

> Threepwood's lodge and associated accommodation and facilities will create a luxurious retreat for visitors and a focal point for residents, providing sophisticated amenities in a superb setting.

[39] Clause 19.5 required the defendant prior to settlement to install certain detailed communal facilities which were then to be transferred to the residents to enable common use.

[40] The agreement provided either party could issue a settlement notice if the sale was not settled on the settlement date. However, such notice was effective only if the serving party was in all material respects ready, able and willing to proceed. Unless the settlement notice is valid there can be no effective cancellation relied upon in consequence of its issue.

[41] The validity of a settlement notice depends upon its reliance upon a contractual entitlement to issue. If a vendor gives an erroneous Notice, he can hardly be regarded as ready, willing and able to settle. Willingness to settle must be willingness to settle in terms of a Notice which accurately reflects the contract (*Stewart v Davis* [1995] 3 NZLR 604 Tipping J).

[42] The defendant relies upon the decision of the Court of Appeal in *Regalwood Holdings v Property Ventures Investment Limited*, itself an appeal of a judgment of mine in CIV 2007 409 1069, 19 December 2007.

[43] In that case the Court of Appeal accepted a vendor could issue a settlement notice even if it was in default. In that case, of course, the vendor had the protection of clause 6.5 of the agreement for sale and purchase which provided:

> Breach of any warranty or undertaking contained in this clause does not defer the obligation to settle.

[44] In this case the plaintiff claims the breach was not of the kind protected by clause 6.5.

[45] The defendant's position is that it was the developer and not the defendant who was responsible to construct the communal facilities – further, that the defendant had no obligation to provide the communal facilities prior to settlement. The original agreements for sale and purchase between the plaintiff and the defendant included an express provision that the vendor was the owner in equity of the land, and that the terms of its agreement with Meadow 3 Limited were

incorporated and formed part of the agreement between the plaintiff and the defendant. The defendant says it was due to an error that that provision was not incorporated in the replacement agreements, and therefore the existing agreements failed to accurately record the parties' common intention. The defendant claims to be entitled to rectification or relief under the Contractual Mistakes Act.

[46] In my view ,though the defendant may have been an owner in equity, it undertook clear contractual obligations as vendor. By those it was required to be in a position to settle in terms of its obligations to the purchaser. There is some force, I think, to Mr Lester's argument that the rights of the parties to this proceeding are governed by their agreement. The vendor cannot pick and chose which obligations it has accepted as vendor it will comply with. It sometimes happens that a vendor will contract to do something in the future it presently has no means to achieve, as it is for a vendor to contract to sell something it does not, in fact, presently own.

[47] So too in this case the defendant contracted to sell lots it had no involvement in the development of. As a general proposition the defendant cannot seek to rely on the terms of the contract against the plaintiff if it is not bound by all terms of that contract in respect of the settlement it has sought to force.

[48] I agree with Mr Lester's assessment that the "owner in equity" clause was inserted to make it clear that the contract between the defendant and the "end purchaser" was:

> …conditional upon contemporaneous settlement being effected under the prior agreement (being the Meadow 3 agreement) and under this agreement

In that respect it is an entirely conventional clause to deal with the situation where a vendor is having difficulty getting title from a developer. In any event, the effect of that provision is not to make the developer the vendor under the original agreement. Indeed, the first part of the 'owners in equity' clause clearly expresses the defendant to be the vendor.

[49] The Court does not have a copy of the contract between the defendant and Meadow 3. The Court knows nothing about the agreement between those parties

regarding an obligation to provide communal facilities. It is the case that in the original agreement signed by the plaintiff in 2004 there was not the special condition now relied upon by the plaintiff in this case. The agreements signed in 2007 contained a provision for communal facilities that was not contained in the original agreements. It is clear the replacement agreements were intended to bring an end to prior agreements and, further, that the consideration for entering into the new agreements was that the further benefits and "enhancement to the amenities available" which were being provided. The letter accompanying the replacement agreement refers to the agreement being redocumented for two reasons, one of which was the creation of a nine hole golf course, and says "if approved the golf course will become part of the Threepwood communal facilities and be available to all lot owners". I accept Mr Lester's submission that the subsequent agreements were expressly intended to confer new benefits on the purchasers. I detect in those letters encouraging purchasers to sign the variations to the agreements, the offer of inducements and a sense of urgency in the prompting.

[50] Mr Woods submits for the defendant that the contract was not conditional upon communal facilities. However, it appears plain enough that the provision of communal facilities was a pre-condition of settlement, for they had to be in place before a settlement notice issued, rather than being a matter upon which the conditionality of the agreement depended. I do not accept it is arguable that the failure to provide a club house, tennis court and petanque area were matters of a minor nature. Indeed, the offer of a bond $1 million to complete communal facilities might suggest the facilities in question were of a substantial kind. The availability of "sophisticated amenities in a superb setting" was a point of sale advertising emphasis.

[51] If the defendant agreed to the developer requiring settlement before the provision of facilities which the defendant agreed should be in place prior to settlement, then that is a consequence to be faced by the defendant, for there is no evidence the plaintiff ever agreed to compromise on its right to require those facilities to be in place prior to settlement.

[52] I have earlier referred to Mr Woods' reference to the materiality test. Mr Seque referred to the developer's estimate of the cost of providing communal facilities, by comparison to the overall development cost. I think this is the wrong approach. Rather, the comparison, if any, that ought to be made, is the value of the communal facilities by comparison to a purchaser's cost of subdivision lot. After all, the communal facilities provide the same amenity to each property owner.

[53] Equity might condone a breach when the seriousness of the breach amounts to little more than mis-description. In my assessment, the provision of community facilities was not a minor matter. Rather, I think they were important as an inducement to encourage purchasers to complete replacement agreements.

[54] Ms Quigley deposed that she rejected the offer of the Westpac bond. I infer she was not prepared to agree to defer enjoyment of the communal facilities for up to two years. Even then there was no certainty of the provision of those facilities, for the fall back position was a cash payment for distribution to property owners. Meanwhile, the absence of those facilities might impact on individual property lot values.

[55] The contract was clearly conditional upon the provision of those facilities. The defendant's settlement notice requiring settlement without the facilities being in place was, therefore, invalid. The defendant had no entitlement to forfeit the deposit and, therefore, must refund those deposits.

[56] There is no arguable case for these matters to be determined by trial.

Judgment

[57] Judgment is granted to the plaintiff in the sum of $226,500.00, together with interest thereon on at the Judicature Act rate, from date of forfeiture until the date of this judgment.

[58] Costs are awarded to the plaintiff on a Category 2B basis, together with disbursements as fixed by the Registrar.