IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

CIV 2008-019-1404

BETWEEN	SPIJKERMAN AND SPIJKERMAN Plaintiff
AND	FEATHERSTONE PARK DEVELOPMENTS LIMITED First Defendant
AND	MCCAW LEWIS CHAPMAN Second Defendant

Hearing: 9 June 2009

Counsel: S. Hood and A. Heinrich for plaintiff
J.A. McGillvray for First Defendant
No appearance by Second Defendant

Judgment: 11 June 2009

JUDGMENT OF ASSOCIATE JUDGE FAIRE
[on application for summary judgment]

This judgment was delivered by me on 12 June 2009 at 4:30pm
Pursuant to Rule 11.5 of the High Court Rules.

Deputy Registrar
Date……..

Solicitors: Norris Ward McKinnon, Private Bag 3098, Hamilton for plaintiff
Tompkins Wake, PO Box 258, Hamilton for first defendant

[1] The plaintiffs apply for summary judgment. Counsel confirmed that the relief sought was:

a) Judgment for a deposit paid in respect of a sale and purchase contract; and

b) The net interest earned on the deposit whilst it was held in the second defendant's solicitor's trust account.

[2] The plaintiffs and the first defendant are parties to a sale and purchase contract in respect of Lots 79, 80, 81 and 82 of a development undertaken by the first defendant. The development is accessed from River Road in Hamilton. It forms part of the St Petersburg Estate.

[3] The first defendant purchased the 17.5ha property in 2004. It presented to the Hamilton City Council a subdivision proposal for approximately 90 lots. It commenced marketing the sections for sale once the Scheme Plan was available in June 2005.

[4] The first defendant's director has provided a detailed chronology of the various steps that were undertaken. The first step involved the lodging of a Resource Consent to subdivide with the Hamilton City Council in March 2005. The chronology concludes with the release of a certificate pursuant to s224 of the Resource Management Act 1991 on 29 August 2008. That was followed by the lodging of the plans with Land Information New Zealand (LINZ) and the issue of titles for the sections contained in the sale and purchase contract on 20 September 2008.

[5] The sale and purchase contract was executed on 21 July 2005. A deposit of $57,000, which was required, was paid.

[6] The agreement provided for the deposit to be invested in an interest-bearing trust account with the second defendant. The second defendant was required, pursuant to the agreement, to hold the deposit and net interest on trust as a

stakeholder, for the benefit of both the plaintiff and the first defendant, until the subdivision plan was deposited at (LINZ). The agreement then provided that the second defendant would pay the deposit and the net interest to the first defendant when the first defendant obtained deposit of the subdivision plan at LINZ. If, however, the first defendant was not able to obtain deposit of the subdivision plan at LINZ, the agreement made provision for either party to give notice cancelling the agreement. In the event that that occurred, the second defendant was required to repay the deposit and the net interest to the plaintiff. The second defendant took no part in the hearing. It abides the decision of the Court. It regards itself as a stakeholder. It has sought interpleader relief.

[7] At issue in this case is the question of whether or not the plaintiff is entitled to a refund of the deposit and the net interest earned on it.

[8] The plaintiff gave notice asserting that it had cancelled the contract on 21 July 2008; that is, three years after entering into the contract.

[9] The plaintiff's entitlement to cancel the contract requires a consideration of three specific provisions contained in the contract, namely clauses 4.3, 4.4 and 4.5 of the contract. For completeness sake, I now set out those clauses:

> 4.3 **No Time Period:** The Developer will use its best endeavours and do all things reasonably necessary to ensure the deposit of the Subdivision Plan at LINZ at the earliest possible date. The Developer is not obliged to obtain deposit of the Subdivision Plan by any fixed date, nor will the Purchaser be entitled to make any claim against the Vendor for any delays which may occur in the deposit of the Subdivision Plan and the issue of the title for the Lot.
>
> 4.4 **Sunset:** If for any reason the Developer has not been able to obtain deposit of the Subdivision Plan at LINZ within the time period specified in clause 4.5.2 (time being of the essence) then either party may by notice in writing to the other cancel this agreement and upon cancellation the purchaser will be entitled to a refund of the Deposit paid and neither party will have any further claims or rights against the other.
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> 4.5 **Section 225 Resource Management Act 1991:** In consideration of the Vendor entering into this agreement with the Purchaser, the Purchaser:
>
> > 4.5.1 agrees that the Purchaser has contracted out of the provisions of section 225(2)(a) of the Resource Management Act 1991 and waives the right to the 14 day cancellation provision set out therein; and

> 4.5.2 agrees that the provisions of section 225(2)(b) of the Resource Management Act 1991 are modified to provide for a period of three years from the date of this agreement, this variation being agreed due to the nature of the Works required to be undertaken by the Developer to complete the Development.

[10] At issue in this case is the time at which the right to cancel arises.

[11] There are two competing interpretations advanced in respect of the contract in relation to the central issue.

[12] For the plaintiff purchaser it is contended that either the plaintiff purchaser or vendor first defendant may cancel the contract if the vendor first defendant has not deposited the subdivision plan within three years of the date of the agreement.

[13] If the plaintiff purchaser's contention is correct, then the plaintiff is entitled, by the operation of clause 4.4, to a refund of the deposit paid.

[14] The alternative and contrary contention is that the vendor or purchaser may cancel the contract if the vendor has not deposited the plan within three years from the date of the contract and if the vendor has not made reasonable progress towards submitting a survey plan to the territorial authority for its approval, or has not deposited the survey plan within a reasonable time after the date of its approval.

[15] It is acknowledged by the plaintiff that if the alternative interpretation is correct, then the question of the right to cancellation is not an appropriate matter for the entry of summary judgment.

[16] This is an application for summary judgment.

[17] The Court's approach to an application for summary judgment can be shortly summarised. That general approach does not seem to have been altered by the change in wording which has been introduced with r 12.2 of the High Court Rules. Rule 12.2, as did its predecessor r 136, requires that a plaintiff satisfy the Court that the defendant has no defence.

[18] In *Pemberton v Chappell* [1987] 1 NZLR 1 at 3 the Court of appeal said as follows:

> In this context the words "no defence" have reference to the absence of any real question to be tried. That notion has been expressed in a variety of ways, as for example, no bona fide defence, o reasonable ground of defence, no fairly arguable defence.

[19] The Court added at 4:

> Satisfaction here indicates that the Court is confident, sure, convinced, is persuaded to the point of belief, is left without any real doubt or uncertainty. …

[20] And further at 4:

> Where the only arguable defence is a question of law which is clear cut and does not require findings of disputed facts or the ascertainment of further facts, the Court should normally decide it on the application of summary judgment, just as it will do on an application to strike out a claim or defence before trial on the ground that it raises no cause of action or no defence.

[21] The Court of Appeal in *Tilialo v Contractors Bonding Limited* CA50/93 15 April 1994 at 7 raised a caution and said:

> The Courts must of course be alert to the possibility of injustice in cases in which some material facts to establish a defence are not capable of proof without interlocutory procedures such as discovery and interrogatories. That does not mean that defendants are to be allowed to speculate on possible defences which might emerge but for which no realistic evidential basis is put forward.

[22] When asked to construe a contract, the starting position is a consideration of the words used by the parties in the contract to see if they are susceptible of more than one meaning. *Quainoo v NZ Breweries Ltd* [1991] 1 NZLR 161, 165.

[23] However, one must not overlook the fact that the inquiry is: what meaning does the document convey to the reasonable person having the background facts? When approaching the task, the starting point is the summary that Lord Hoffmann gave in *Investor Compensation Scheme v West Bromwich Building Society* [1998] 1 All ER 98, 114-115 which was approved by the New Zealand Court of Appeal in *Boat Park Ltd v Hutchinson* [1999] 2 NZLR 74, 82:

The principles may be summarised as follows.

(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.

(2) The background was famously referred to by Lord Wilberforce as the 'matrix of fact', but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.

(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.

(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax (see *Mannai Investment Co Ltd v Eagle Star life Assurance Co Ltd* [1997] 3 All ER 352, [1997] 2 WLR 945).

(5) The 'rule' that words should be given their 'natural and ordinary meaning' reflects the commonsense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in *Antaios Cia naviera SA v Salen Rederierna AB, The Antaois* [1984] 3 All ER 229 at 233, [1985] AC 191 at 201:

> '… if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense.'"

[24] Where it is necessary to go to the background, it will not be appropriate to determine the meaning on an interlocutory application. *Westpac Banking Corporation v MM Kembla (NZ) Ltd* [2001] 2 NZLR 298, 315. In that case the appropriate course is to dismiss the summary judgment application and allow the matter to be determined at trial.

[25] Mr Hood, in his carefully prepared submissions, submitted that the plain meaning of clause 4.4 entitled either party to cancel the contract three years after it was entered into if, for any reason, the first defendant developer has not been able to obtain deposit of the subdivision plan at LINZ. He submitted that that position arose because of:

a) The fact that clause 4.4 refers to "the time period" specified in clause 4.5.2;

b) Clause 4.5.2 specifies a time period of three years; and

c) Clause 4.4 makes time "of the essence".

[26] Mr Hood submitted that clause 4.4, a sunset clause, had as its purpose the need to give the parties certainty and finality as to their rights to cancel the contract. He submitted that his interpretation was harmonious with the rights granted by the modification of s225(2)(b) of the Resource Management Act 1991.

[27] Section 225(2)(b) of the Resource Management Act 1991 provides:

> (2) Subject to subsection (1), any agreement to sell any allotment in a proposed subdivision made before the appropriate survey plan is approved under section 223 shall be deemed to be made subject to the following conditions:
>
> (a) …
>
> (b) that the purchaser may, at any time after the expiration of 2 years after the date of granting of the resource consent or one year after the date of the agreement, whichever is the later, by notice in writing to the vendor, rescind the contract if the vendor has not made reasonable progress towards

> submitting a survey plan to the territorial authority for its approval or has not deposited the survey plan within a reasonable time after the date of its approval.

[28] Mr McGillvray submitted that this was not an appropriate case for summary judgment because the Court should have access to the matrix fact, which he noted could include access to post contracted conduct. *Gibbons Holdings v Wholesale Distributors* [2008] 1 NZLR 227, 52, 59-60 and 63. He submitted, in my view correctly, that the plain meaning of the contract is not that as advanced by the plaintiff. In doing so he emphasised, again correctly, that it is not necessary for the first defendant to convince the Court on this interlocutory application that the first defendant's interpretation is necessarily correct. What is sufficient is to show that there is a potential defence to the plaintiff's interpretation, which therefore should be determined at trial.

[29] He drew attention to the fact that Part 4 of the subject contract deals, in clauses 4.1 to 4.5, predominantly with the first defendant's obligations in relation to the completion of the development. Clause 4.3 imposes an obligation on the first defendant to use best endeavours to do all things reasonably necessary to ensure the deposit of the subdivision plan at LINZ at the earliest possible date. He noted that the clause does not oblige the first defendant to obtain the deposit of the subdivision plan by any fixed date. He submitted, correctly, that when I construe this contract I should consider the document as a whole and I should interpret the contract in a way that brings the words used into harmony with other clauses in the contract. He noted that the natural meaning of clause 4.3, which imposes the best endeavours obligation, is broadly consistent with the requirement of reasonable progress under s225 of the Resource Management Act 1991. He submitted that there was an inconsistency in an interpretation which led to the position where the parties agreed, in clause 4.3, that it was not necessary to deposit the plan by any fixed date, but then on the plaintiff's interpretation, give an absolute right to cancel if the plan was not deposited by a fixed date.

[30] He next asked the question: What does clause 4.4 mean?

[31] When I consider the relationship between clause 4.4 and clause 4.52, I conclude that the interpretation advanced by Mr Hood, which in effect provides that clause 4.4, by referring to clause 4.52, simply means three years from the date of the contract is not correct. The reason for that conclusion is that it leads to a lack of harmony between clause 4.4 and clause 4.52. That is because the rights given to the parties under s225(2)(b) of the Resource Management Act 1991, as modified by clause 4.5.2, expressly provide a right to rescind at or after the expiry of three years from the date of the agreement if the vendor has not made reasonable progress, or in the other alternative has not deposited the survey plan within a reasonable time. The condition attaching to the right to give a notice to rescind would be totally superfluous if the plaintiff's interpretation of clause 4.4 was accepted. In short, the plaintiff's interpretation would indicate a lack of harmony between two clauses in the contract. I do not see any significance in the reference in the Resource Manage Act to a right to rescind and the term now used in contracts following the enactment of the Contractual Remedies Act 1979 of cancellation.

[32] As I have reached that conclusion, it is clear to me that this is not an appropriate case to enter summary judgment on the plaintiff's application.

[33] I raised with counsel whether there was any particular reason why there had been no cross-application for summary judgment by the defendant. Mr MacGillvray rightly pointed out that the question of interpretation in this case might well be assisted by the matrix of facts, which could only be established on a trial. His second, and compelling, reason however is that the sale and purchase contract did not yet give a right to the first defendant vendor to call for settlement because the settlement date as defined in the definition section of the contract and in clause 3.3 of the contract is to be twelve months from the date that the vendor gives the purchaser written notice that a search copy, as defined by s172A of the Land Transfer Act 1952, of the new Estate and Fee Simple Certificate of Title for the lot, is available.

[34] Accordingly, it is not yet appropriate to consider any application by the defendant for specific performance.

Orders

[35] I order as follows:

a) The application for summary judgment is dismissed.

b) A statement of defence to the plaintiff's statement of claim shall be filed and served within ten working days of the issue of this judgment.

c) The plaintiff and the first defendant shall file and serve affidavits of documents within twenty working days of the issue of this judgment.

d) A case management conference shall be held by telephone with counsel at 12.20am on 18 August 2009. The following matters will be addressed at that time:

i) Disposal of or allocation of a fixture for any outstanding interlocutory application;

ii) Settlement, and whether a judicial settlement conference or a mediation should be ordered;

iii) Trial duration, the fixing of a trial date, and the making of any special trial directions that are required.

Counsel shall file and serve memoranda dealing with these items two working days before the conference.

Costs

[36] In line with the approach approved by the Court of Appeal in *NZI Bank Ltd v Philpott* [1990] 2 NZLR 403, I reserve costs.

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J.A. Faire
Associate Judge