IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2008-404-006058

BETWEEN	DBCL DEVELOPMENTS LIMITED Plaintiff
AND	NEW SEASON INVESTMENTS LIMITED Defendant

Hearing: 12 June 2009

Counsel: V Withy for plaintiff
K F Gould for defendant

Judgment: 24 June 2009 at 2:00pm

JUDGMENT OF ASSOCIATE JUDGE ABBOTT

This judgment was delivered by me 24 June 2009 at 2:00pm,
pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Solicitors:
Lee Salmon Long, PO Box 2026, Auckland 1140 for plaintiff
Bruce A J Stuart, PO Box 185, Clevedon Auckland 2248 for defendant

[1] This case concerns a dispute between vendor and purchaser of a property over the time taken by the vendor to complete a subdivision. The dispute is before the Court on an application by the plaintiff vendor for summary judgment for damages after the defendant purchaser failed to complete the purchase.

[2] The defendant claims to have cancelled the agreement prior to settlement on the grounds of unreasonable delay in completing the subdivision.

[3] The Court has to determine whether the defendant has an arguable defence. The principal issue in that respect is whether s 225 of the Resource Management Act 1991 (expressly incorporated into the contract) can be construed as setting a time-frame within which the vendor had to complete the subdivision and obtain issue of title for the property. If not, and the contract therefore has no fixed date for performance, the Court has to decide whether there has been unreasonable delay by the vendor in completing the subdivision and whether this issue can be decided on a summary judgment application.

Background

[4] At the relevant times the plaintiff DBCL Developments Limited (DBCL) was the owner of land situated at 1 Waiari Road, Takanini.

[5] On 2 July 2007 DBCL entered into an agreement to sell Lot 2 of a proposed subdivision of the land to the defendant New Season Investments Limited (New Season) for $210,000. The agreement was drawn up on the standard REINZ/ADLS form (8th Edition 2006) but with the addition of special terms relating to completion of subdivision work (clause 15) deposit of subdivision plan and issue of titles (clause 17) and possession and settlement (clause 18). The effect of these special terms was that DBCL warranted to complete the subdivision prior to settlement and undertook to deposit the subdivision plan and request issue of title promptly after obtaining all necessary subdivisional consents, and the parties agreed that settlement was to take place 5 working days after the subdivided title became available.

[6] DBCL had started the subdivisional process prior to execution of the agreement. It obtained the necessary resource consent in September 2007 and proceeded to carry out work in accordance with that consent (including construction of a driveway to the lot being sold, being the rear lot of two). Part way through work on the driveway the design for a retaining wall had to be changed. DBCL also had difficulties finding a contractor familiar with and able to construct the particular form of driveway required by the building consent (due partially to the fact that it ran in part under the drip line of a native tree). DBCL says that it kept New Season informed, from time to time, on progress with the subdivision. New Season has not challenged that fact in evidence.

[7] On 18 April 2008 New Season issued a notice to DBCL requiring settlement within 12 working days, and making time "of the essence". DBCL promptly challenged that notice in a letter dated 21 April 2008 sent by its solicitors. In that letter it denied that it was in default under the agreement. It said that it had kept New Season abreast of progress with the subdivision and was proceeding as quickly as possible. It added:

> The Council had originally requested construction of a retaining wall along a boundary to the property. It has reassessed this requirement and a crib wall is now to be constructed instead. Our client is waiting on quotes for this wall and expects work to begin in the near future. Construction of a driveway and erection of a fence will follow and our client will then apply for the s224C certificate.
>
> Drains and services have been installed.
>
> We note our letter to you of 19 July 2007 and confirm that the provisions relating to the subdivision are warranties and no time is specified, in the agreement, for completion of the subdivision. Our client is nevertheless proceeding with the subdivision as quickly as possible.

[8] New Season subsequently withdrew its notice without commenting on the matter stated in the letter of 21 April 2008.

[9] On 3 July 2008 New Season issued a second notice in which it identified DBCL's obligations under the contract in relation to completing the subdivision and depositing a survey plan to allow separate certificates of title to be issued ahead of settlement, and said that DBCL was in breach of the agreement for failing to comply

within a reasonable time with the four specified obligations. It gave notice that it was making time of the essence, and requiring compliance within twelve working days.

[10] DBCL responded immediately (through its solicitors) by letter also dated 3 July 2008 stating (amongst other things):

> Our client is not in breach of the agreement for sale and purchase dated 2 July 2007 for the reasons as basically set out in our letter to you dated 21 April 2008 following issue of the last notice.
>
> ….
>
> Notwithstanding the above, and furthermore, we point out that in terms of s225(2)(b), Resource Management Act 1991 the period after which your client may seek to rescind the contract if reasonable progress has not been made towards submission of the survey plan for deposit or deposit of the plan, has not yet expired. The resource consent for the subdivision was granted for the subdivision by the Council on 11 September 2007 and therefore the 2 year period under s225(2)(b) does not expire until 10 September 2009. Although 1 year has expired since the contract was signed the relevant date for the purposes of s225(2)(b) is the **later of** the expiration of 2 years from the date of the recourse [sic] consent or 1 year after the date of the agreement.

[11] New Season this time did not withdraw its notice. On 21 July 2008 its solicitor wrote to DBCL's solicitors cancelling the contract for non-compliance with the notice of 3 July 2008.

[12] DBCL did not accept that cancellation. It continued with the steps to complete the subdivision and obtain issue of separate title. On 18 August 2008 its solicitors wrote to New Season's solicitor advising that the titles had issued and requiring settlement to take place on 25 August 2008.

[13] New Season did not respond to that notice and did not settle. On 29 August 2008 DBCL issued a settlement notice requiring New Season to settle within 12 working days. New Season did not comply with that notice.

[14] DBCL issued the present proceeding on 15 September 2008 seeking specific performance but stating in the alternative that if it subsequently elected to cancel the agreement it would seek damages for breach.

[15] DBCL attempted to resell the property. It was unable to secure another purchaser. In December 2008, to crystalise matters, DBCL agreed to sell the property to a related company for $160,000. That sum was the higher of two valuations obtained from independent registered valuers. DBCL subsequently amended its claim and its application for summary judgment to seek damages for the loss on resale and costs of resale.

Principles for summary judgment

[16] Counsel did not present submissions on the principles which the Court applies in determining an application for summary judgment. They are well understood and can be found in the leading cases *Pemberton v Chappell* [1987] 1 NZLR 1, *Bilbie Dymock Corp. v Patel* (1987) 1 PRNZ 84 (CA), and more recently *Jowada Holdings Limited v Cullen Investments Limited* CA 248/02 5 June 2003. The following are relevant to the present application:

a) It is for the plaintiff to show that there is no real defence to the claim;

b) The Court will not attempt to resolve genuine conflicts of evidence, or to assess the credibility of statements made in affidavits; but

c) The Court must balance caution that there not be any prejudice to a defendant with a robust and realistic attitude when called for by the facts of the case.

Does the contract provide a time for completing the subdivision?

[17] New Season purported to cancel its agreement with DBCL on the grounds of non-compliance with its notice of 3 July 2008. In that notice New Season required DBCL to comply with the obligations under the agreement, which it had identified in the following passage:

> You are in breach of the agreement in that you have failed within a reasonable time period to:

- Obtain completion of the subdivision, and
- Obtain issue of the section 224C certificate; and
- Deposit the survey plan at LINZ, and
- Advise the Purchaser that a title search in respect of the subdivision is available on the Landonline database.

[18] DBCL's obligations in respect of these matters are to be found expressly in clauses 15.0, 17.1 and 18.0 of the agreement:

> **Subdivision Work**
>
> **15.0** The Vendor warrants that it shall, prior to settlement, at its sole expenses in all respects:
>
> - Obtain a Resource consent to subdivide the land in accordance with the scheme plan of subdivision ("the Resource Consent")
> - Complete the subdivision in accordance with such resource consent
> - Obtain a certificate from the Papakura District Council ("the Council") pursuant to section 224C of the Resource Management Act ("224C Certificate")
>
> In completing the subdivision in accordance with this clause the Vendor shall comply with all requirements imposed by the Council in the Resource Consent and any further amendments they may impose during the course of the subdivision including but not limited to installing all roading, footpaths, reticulation of stormwater and sewage services, water supply, electricity, gas and telephone services to the intent that the subdivision is complete and is ready upon settlement to commence construction of residential dwellings.
>
> **Deposit of Subdivision Plan and Issue of Titles**
>
> **17.1** The vendor shall with all due speed after obtaining all statutory, regulatory and territorial authority consents required for the completion of the subdivision and at the vendor's expense deposit with Land Information New Zealand a survey plan to cause separate certificates of title to be issued.
>
> **Possession & Settlement**
>
> **18.0** It is acknowledged and accepted by all parties that possession and settlement shall take place five (5) working days after the date that the purchaser is advised by the vendor that a title search in respect of such subdivision, is available in the landonline database.

[19] Counsel for New Season argued that as the contract contained no express stipulation as to the time within which these obligations were to be completed, the law will imply an obligation to perform or fulfil the obligation within a reasonable time. This will usually require notice making time of the essence and the obligation will not usually be found to be breached until there has been reasonable time for compliance: *Parsot v Greig Developments Limited* HC AK CIV 2006-404-5164, 6 March 2008, Allan J, particularly at paras [73] - [78], following *Mt Pleasant Estates Co Ltd v Withell* [1996] 3 NZLR 324. Counsel submitted that the critical questions of whether it had been reasonable for New Season to make time of the essence (*Behzadi v Shaftsbury Hotels Limited* [1992] Ch 1) and whether DBCL had been given a reasonable time to complete its obligations under clauses 15.0 and 17.1 (*Parsot* at para [75]) were not matters for this summary judgment application. He referred to evidence filed by a consulting engineer that the delay in completion of the subdivision was unreasonable, and submitted that it should be a matter for trial as to whether reasons advanced for delay in completing subdivision work made the delay excusable.

[20] Counsel for DBCL challenged the contention that the agreement did not provide a time period for completing these obligations (so as to bring in the common rules referred to in *Mt Pleasant* and *Parsot*). She accepted that there was no time frame for performance within clauses 15.0 and 17.1, but submitted that a time frame is implied into the agreement by s 225 (2)(b) of the Resource Management Act 1991:

> **225 Agreement to sell land or building before deposit of plan**
>
> **….**
>
> **(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:
>
> ….
>
> (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.

[21] This term is also expressly incorporated into the agreement by clause 8.6:

> If this agreement relates to a transaction to which section 225 of the Resource Management Act 1991 applies then this agreement is subject to the appropriate condition(s) imposed by that section.

[22] She submitted that s 225 (2)(b) of the Resource Management Act and clause 8.6 of the agreement together provided an express time frame for performance of DBCL's obligations under clauses 15.0 and 17.1 (there being no other conflicting express or implied time frames). She submitted that New Season could not, as a matter of law, issue a notice purporting to make time of the essence, or purporting to cancel the agreement, prior to 10 September 2009 (being the later of the two dates prescribed under s 225(2)(b)).

[23] The present application turns on whether s 225 of the Resource Management Act, as imported by clause 8.6 of the agreement, provides a time frame for performance of the obligations identified in New Season's notice of 3 July 2008. If not, the contract is silent and the principles in *Mt Pleasant* (which were affirmed by the Supreme Court in *Steele v Serepisos* [2007] 1 NZLR 1 (and in *Parsot*) apply.

[24] Counsel for New Season submitted that s 225 had no application upon the present facts. He submitted that it applied where a vendor had not made reasonable progress towards submitting a survey plan, or had not deposited the survey plan within a reasonable time. He argued that New Season's complaint was that DBCL had not completed the subdivision in accordance with the resource consent. He submitted that DBCL's argument as to a more general application of s 225 was illogical as it would allow DBCL to sit back and do nothing towards the subdivision for two years before New Season would be able to cancel the agreement.

[25] The argument of counsel for New Season in effect seeks to separate the physical work on the subdivision from the other obligations under clause 15.0 (obtaining a resource consent prior to the subdivision work, and obtaining a certificate at the conclusion of the work). He needed to present the argument in this way as his engineering expert expressed the opinion that the overall timeline for

completion of the subdivision was unexceptional (if there was no pressure on DBCL to complete it) but the five months that it took to construct the accessway was exceptional.

[26] It is artificial to separate out one aspect of the steps identified under clause 15.0 from the others when considering a time frame for undertaking those obligations. They all revolve around establishing and meeting local authority requirements for the subdivision. The facts of this case illustrate their interdependence, as the original consent had to be varied as a consequence of ground conditions found when earthworks commenced (this being a significant factor in the delay in completing the subdivision work).

[27] This interpretation of clause 15.0 is consistent with the statutory provisions in the Resource Management Act for approval of the survey plan and deposit of that plan:

a) An owner of the land may submit a survey plan to the territorial authority for approval if the owner has a current subdivision consent (s 223 (1)(a)) and (subject to exceptions which do not apply here) the territorial authority shall approve that plan if it is satisfied that the plan conforms with the subdivision consent;

b) A certificate signed by the local authority that it has approved the survey plan and that all conditions of the subdivision consent have been complied with (or otherwise met) is required before a survey plan can be deposited under the Land Transfer Act 1952 (s 224(c));

c) Any agreement to sell land that is part of a subdivision for which a survey plan has not been approved, is subject to a condition that the survey plan will be deposited under the Land Transfer Act 1952 (s 225 (1)).

[28] These statutory provisions provide a general context for the time frames for recission of an agreement for delay to be found in s 225 (2)(b).

[29] I find that the parties have made express provision for performance of the obligations under clause 15.0 and 17.1 by their agreement to incorporate the conditions in s 225 of the Resource Management Act. It would be inconsistent with that term to permit New Season to give notice making time of the essence in respect of any matter leading to submission of the survey plan to the territorial authority for its approval before the expiry of the later of two years from grant of the resource consent or one year from the date of the agreement. It makes no sense to separate out the obligation for completing subdivision work from the time-frame for submitting a survey plan for approval or depositing the survey plan where completion of the subdivision work is essential to approval and a pre-requisite to deposit of the survey plan.

[30] Counsel for New Season argued that this would be illogical, and would allow DBCL to do nothing for the whole of that period. I do not accept that argument. Parliament, and the parties to this contract, have both recognised the potential for delays in obtaining and complying with resource consents. It has been said that s 225 cannot be negatived for public policy reasons: McMorland *Sale of Land* (2000) at para 3.26. Allowing New Season to separate out the physical subdivision work from the other steps would introduce an artificiality that would be counter to the purposes of s 225.

Was there unreasonable delay in completing the subdivision?

[31] This issue arises only if New Season was entitled to issue its notice of 3 July 2008. As I have found that it was not, I do not need to address this issue. However, as counsel made submissions on the point, I will address it briefly.

[32] If parties have not agreed to a time by which an obligation under the contract is to be satisfied, it will be implied by law that the obligation is to be satisfied within a reasonable time. What that reasonable time is will depend on the circumstances of the case. The Court will have to assess whether the delay gives rise to a reasonable inference that the party concerned did not intend to perform its contractual obligations. It will not normally find repudiation unless notice has been given making time of the essence for satisfaction of the obligation, and allowing

reasonable time from the giving of that notice for it to be satisfied: *Mt Pleasant; Steele;* and *Parsot*.

[33] Counsel for New Season argued that the question whether the delay gave rise to an inference that DBCL did not intend to carry out the obligations set out in the notice of 3 July 2008 could not be answered without an inquiry into the facts. This included having regard to the opposing expert evidence, as occurred in *Parsot*. He submitted that this could not be undertaken on a summary judgment application.

[34] This is a case where the Court should take a robust and realistic approach to the facts, notwithstanding the opinion expressed by New Season's expert engineer that the time taken to complete the subdivision work was unreasonable. The critical issue is not whether the expert believes that the work could have been done differently, or more expeditiously, but whether the way in which it was undertaken allows a reasonable inference that DBCL did not intend to carry out its obligations. In my view that inference cannot reasonably be drawn on the facts before the Court, and further exploration of the facts related to the carrying out of the subdivision work is unlikely to allow that inference to be drawn. I come to this view on the basis of the following facts in particular:

a) There was no suggestion that DBCL had not tried to satisfy the conditions of the agreement through the period from 2 July 2009 until applying for the s 224(c) certificate on 4 July 2009 (on completion of the physical works.

b) New Season's expert said that overall the time taken to complete the subdivision was unexceptional, if there was no pressure on the subdivider to complete. However, he added that the five months taken to complete the driveway was exceptional. He took the view that a month was an appropriate allowance for that work. Although he initially expressed that view before he knew of the reasons given by DBCL for the delay, he maintained that view notwithstanding those reasons (he did not say why he made no further allowance after

learning of the reasons). This was the only evidence given by New Season to support its opposition.

c) The only evidence of pressure on the subdivider to complete prior to the notice of 3 July 2008 was the notice given by New Season on 18 April 2008, which was withdrawn on 28 April 2008. The statement by DBCL's solicitor (in his fax letter of 21 April 2008) that BDCL had kept New Season "abreast of progress with the subdivision" was not challenged in the letter withdrawing the notice, nor in any evidence given on this application.

d) DBCL has provided evidence from its director and the surveyor engaged to carry out the survey work and deposit of the plan. They have described the steps taken to comply with clauses 15.0, 17.1 and 18.0). They identified two matters that contributed substantially to the five months that it took to complete the subdivision work.

e) The first of these matters was that when the contractor commenced work in February 2008 the intended driveway was found to be on filled land. This necessitated an application to amend the resource consent (a wooden retaining wall could not be used and ended up being replaced by a concrete keystone wall). The amendment to the resource consent was not approved until late April.

f) The second matter was that, on recommendation of the territorial authority's arborist, the resource consent contained a condition that a particular permeable surface (called GEOCEL) be used on the driveway under the dripline of a large native tree. This design was new to the surveyor, the officers of the territorial authority, and to contractors approached by DBCL. DBCL had difficulty finding a contractor who was willing to undertake the work.

g) DBCL's director has given evidence that an earthmoving contractor commenced work in May 2008 (under the amended resource consent),

> other contractors came in June to undertake concrete work and the keystone retaining wall, and the earthmoving contractor returned in late June to complete the work.

[35] As I have said, even if it could be said that DBCL could have managed the work more efficiently, these facts do not allow an inference that DBCL did not intend to complete its obligations. The delays cannot be construed as repudiatory of the agreement even if the time taken to complete the driveway could be singled out from the time taken to complete all of the work required to complete the subdivision.

Decision

[36] DBCL has satisfied me that New Season does not have an arguable defence. New Season did not challenge the quantum of DBCL's claim in the event of a finding that it does not have an arguable defence. I enter judgment for DBCL against New Season accordingly for $59,797.39 as sought in its amended statement of claim, together with interest at the rate prescribed under the Judicature Act 1908 from 5 December 2008 to date of judgment.

[37] As the successful party, DBCL is entitled to costs. The amount of the claim is within the jurisdiction of the District Court. I award costs to DBCL on a 2B basis but in accordance with the District Court scale.

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Associate Judge Abbott