IN THE HIGH COURT OF NEW ZEALAND
TAURANGA REGISTRY

CIV 2008-470-52

BETWEEN	VICTORIA KEY LIMITED Plaintiff
AND	DANNY ANDREW LUSBY Defendant

Hearing: 11 June 2009

Appearances: Mr Kettelwell for Plaintiff
Mr K J Patterson for Defendant

Judgment: 26 June 2009 at 4.30 p.m.

JUDGMENT OF ASSOCIATE JUDGE DOOGUE

This judgment was delivered by me on
26.06.09 at 4.30 p.m*, pursuant to*
Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date……

Counsel:
Sharpe Tudhope, Private Bag 12020, Tauranga – by facsimile - 07 578 5133

Mr K J Patterson, P O Box 13006, Tauranga

[1] On or about 10 January 2007 the plaintiff and the defendant entered into two Sale and Purchase Agreements in respects of Units 3 and 7 of the Victoria Key Development at Hamurana Road, Omokoroa. The sale and purchase agreements were on the 7th edition of the agreement for sale and purchase of real estate form approved by the Real Estate Institute of New Zealand and the Auckland District Law Society, with the addition of further terms of sale. I will make reference to some of the provisions of the standard form agreement in the course of my judgment.

[2] The Purchase Price for Unit 3 was $532,000.00. The Purchase Price for Unit 7 was $522,500.00. A deposit of $5000.00 was payable respectively for each of the units upon signing the Agreements.

[3] Clause 16.1 and 16.2 of the agreements on which attention has been focused by the present application read as follows in both agreements:

> 16.1 This Agreement is conditional upon the Vendor obtaining:
>
> a. The Consents on terms and conditions which are acceptable to the Vendor in its sole and absolute discretion.
>
> Date for fulfilment: 30 June 2008
>
> This condition is inserted for the sole benefit of the Vendor.
>
> b. Funding and sufficient pre-sale of 35 units comprising the Development which shall allow the Vendor to commence and undertake the Development.
>
> Date for fulfilment: 30 June 2008
>
> c. Practical Completion and a search copy of the net title being available for searching at Land Information New Zealand.
>
> Date for fulfilment: 30 June 2009

[4] On 15th January 2007 the solicitors for the purchaser wrote to the vendor's solicitors as follows:

> In terms of the agreements, would your client agree to varying the contract as follows:
>
> 1. The reinstatement of General Terms of sale 5.2, 5.3 and 5.4.

2. Amending clause 16.1(a) so that the agreement is conditional on the purchaser approving the conditions of any resource consent that may issue.

3. The inclusion of a condition making the final plans and specifications subject to the purchaser's approval.

…

[5] On 16th January 2007 the plaintiff's solicitors responded to that letter (see page 269 of the plaintiff's bundle) and confirmed acceptance of the second and third paragraphs. It declined to reinstate the general terms of sale contained in paragraphs 5.2, 5.3 and 5.4.

[6] By letter of 19th October 2007 the plaintiff's solicitor supplied a copy of the resource consent that had been issued and requested that the defendant give their approval to the resource consent conditions under Clause 16.1.a.

[7] The respondent's solicitor wrote to the plaintiff's solicitor on 27th November 2007 (see page 271 of the plaintiff's bundle) stating that with respect to Units 3 and 7, they required copies of the drawings and plans referred to in the resource consent. They also sought details of the proposed fencing and the "legal agreement" referred to elsewhere in the contract.

[8] On 6 December 2007, as requested, the plaintiff's solicitors sent the drawings and plans to the defendant. It also responded to the fencing concerns. It further requested confirmation that the resource consent condition had been satisfied. [Annexed at "D" of the Affidavit of Cherie Mary Farrington, sworn 6 April 2009].

[9] On 7th December the defendant's solicitors wrote again to the plaintiff's solicitors in respect of Units 3 and 7, confirming that they had sent a copy of the letter received from the plaintiff's solicitor to their client and they were awaiting further instructions (see page 272).

[10] On 7 December 2007 the solicitors for the purchasers wrote to their counterpart solicitors asking for information about position of boundaries on plans which had been supplied to them. They also asked for information about land on the other side of the road where the development was taking place – Haumarana Road.

These were apparently the only queries that the solicitors for the purchaser sent to their counterparts which might be seen to be related to the matter of resource consent approval and plans and specification approval. The solicitors for the vendor replied to that letter 11 December 2007.

[11] On 11 December 2007, the plaintiff's solicitors responded to the defendant's letter of 7 December 2007 confirming the correct boundary and that there were no plans for the neighbouring land. [Annexed at "F" of the Affidavit of Cherie Mary Farrington, sworn 6 April 2009].

[12] On 18 December 2007, in a telephone call, the defendant's solicitor confirmed that the defendant had all the information required to confirm the resource consents and plans. On 15 January 2008, a fax was sent by the plaintiff's solicitors to confirm this and it was further requested that there be confirmation of approval of the resource consent. [Annexed at "G" and "H" of the Affidavit of Cherie Mary Farrington, sworn 6 April 2009].

[13] In a letter dated 17 January 2008, the purchaser's solicitors wrote to those acting for the vendor:

> Victoria Key Limited to Lusby and D and S Investments Limited – Units 7, 15 and 53
>
> Our clients instruct that clause 16.1a has been fulfilled.

[14] That letter did not confirm clause 16.1(a) in relation to Unit 3.

[15] Over a year later, on 5 March 2009, the solicitors for the purchaser wrote to the vendor's solicitors advising in relation to Unit 3:

> Our client does not approve the terms and conditions of the resource consent as required under Clause 16.1(a). The date for fulfilment of that clause has now passed. Furthermore the contract is conditional on our client approving the final plans and specifications which he has not. The contract is therefore at an end. Please arrange release of the deposit to our office together with interest.

[16] As to Unit 7 the notice that the purchaser's solicitors gave to the vendor's solicitors, again dated 5 March 2009 was:

> The contract is conditional on our client approving the final plans and specifications, which he has not. The contract is therefore at an end. Please arrange release of the deposit to our office together with interest.

[17] In order to decide whether the summary judgment application brought by the plaintiff can be defeated, I must assess whether the contentions contained in the letters that I have just quoted are correct.

[18] The grounds given for cancelling the agreement in respect of Unit 3 are more expansive than those for Unit 7. The notice relating to the former contract makes reference to the fact that there had been no approval under Clause 16.1 (a). It is factually correct that no explicit acceptance was ever forthcoming from the purchaser's solicitors.

[19] The agreement to vary the contracts (which was in effect what occurred) had the effect of making Clause 16.1 (a) available to the purchaser in the sense that the agreement then became:

> Conditional on the purchaser approving the conditions of any resource consent that may issue.

[20] The purchaser never gave such approval in respect of Lot 3. In fact, as I have noted, the letter of 5 March 2009 expressly negatived approval of the terms, conditions of the resource consent in relation to Unit 3.

[21] A number of different arguments have been raised by the vendors, which would seek to get round this difficulty.

[22] Plaintiff's counsel then goes on to refer to the fact that the defendant was provided with 'all necessary information to approve both Clause 16.1(a) and final plans and specifications on 11 December 2008. But the material to which counsel for the plaintiff drew my attention to were communications from the plaintiff's solicitors to the defendants and, significantly, were not communications in the other direction.

[23] Counsel for the plaintiff told me that no time limit had been fixed for the fulfilment of Clause 16.1(a) or the approval of the resource consents or the final plans and specifications and that in that circumstance the Court would imply a term that the variations be fulfilled within a reasonable time.

[24] For his part, Mr Patterson for the defendant drew my attention to Clause 8.7(6) of the contract

[25] He submitted that no notice of waiver which complied with Clause 8.7(6) had ever in fact been given to the plaintiff by the defendant.

Issues

[26] At the conclusion of the argument before me, it was apparent that there were two live issues in regard to the Unit 3 agreement and one relating to Unit 7.

[27] As to Unit 3 the issues are whether the defendant was entitled to cancel because:

a) The vendor had not obtained resource consent on terms which were acceptable to the purchaser (Clause 16.1(a);

b) The “plans and specifications” for Unit 3 in their final form were not acceptable to the defendant.

[28] As to Unit 7, the same issue arises as in “b” above.

[29] Before I consider the issues further, it is necessary that I say something additional about the approach to be adopted to summary judgment applications.

Summary judgment principles

[30] I intend to be guided by the following statement of principle taken from the judgment in *Pemberton v Chappell* at page 3, where Somers J said:

> At the end of the day r 136 requires that the plaintiff "satisfies the Court that a defendant has no defence". 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, no reasonable ground of defence, no fairly arguable defence. See eg *Wallingford v Mutual Society* (1880) 5 App Cas 685, 693; *Fancourt v Mercantile Credits Ltd* (1983) 154 CLR 87, 99*; Orme v De Boyette* [1981] 1 NZLR 576. On this the plaintiff is to satisfy the Court; he has the persuasive burden. 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.

[31] I therefore propose to apply the following general principles, which apply to all applications for summary judgment:

a) The Plaintiff must satisfy the Court that the Defendant has no arguable defence to the claims brought against him.

b) It is generally not possible to determine disputed issues of fact based on affidavit evidence alone, particularly when issues of credibility arise.

c) Although the Court should adopt a robust approach, nevertheless summary judgment may be inappropriate where the ultimate determination turns on a judgment which can only properly be reached after a full hearing of all the evidence.

Unit 3

[32] Additional matters must be canvassed before the issues in regard to Unit 3 can be resolved. I will commence with a consideration of the arguments that I heard in respect to the first of the two issues that arise in regard to Unit 3. I have already referred to the notice of cancellation at [13] above. In this part of my judgment I will deal with the arguments for the plaintiffs that the purchaser does not in fact have the right to cancel.

Did the purchaser in seeking an extension of date for settlement, waive his entitlement to cancel for non-approval of the resource consents?

[33] Mr Kettelwell, for the vendor, argued on this part of the case centred on a letter which on 12 November 2008 the solicitors for the plaintiff wrote to those acting for the defendant to advise that title had issued in respect of Unit 3.

[34] The following day the solicitors for the purchaser replied acknowledging receipt of the letter and the enclosures and said:

> Our clients would like to request an extension to the settlement date under both agreements until 1 December 2008. Please liase with your clients and advise.

[35] It was Mr Kettelwell's submission that by writing this letter, the purchaser's solicitors waived any reliance upon resource management considerations.

[36] Mr Patterson on the other hand noted, first of all, that the standard form provision contained in the agreement for sale and purchase at 8.7 contained in the following condition:

> (6) At any time before this agreement is avoided the purchaser may waive any financial condition and either party may waive any condition inserted for the sole benefit of that party. Any waiver must be by notice (emphasise added).

[37] Mr Patterson submitted that implied waivers of the kind that the vendor sought to rely on here were not available. I consider that that submission is correct. In case that conclusion is wrong, I will consider other aspects of waiver.

[38] At paragraph 37 of the plaintiff's submission the following submission is made:

> 37. It is submitted that the Defendant waivered [sic] and/or implied by way of conduct confirmation of satisfaction of clause 16.1(a) in relation to unit 3 and the approval of the resource consents and final plans and specifications in relation to both units 3 and 7.
>
> 38. No time limit was fixed for the fulfilment of clause 16.1(a) or the approval of the resource consents and final plans and specifications. As such the courts will imply a term that the variations be fulfilled within a reasonable time.

[39] I interpolate at this point that in fact the agreement mentions a "date for fulfilment of clause 16.1(a)" of 30 June 08. It seems likely that that date referred to the date when the consent was obtained and not to the date for the parties approving the consents.

[40] To continue, plaintiff's counsel submitted:

39. Waiver has been defined in the context of a condition as to time by the Court of Appeal:

> Waiver in this context occurs where the party entitled to insist on strict compliance with provisions as to time leads the other party to understand or assume that such provision will not be insisted upon. This may occur when the party otherwise entitled to insist on adherence to a stipulation as to time does some act inconsistent with his continued insistence on strict compliance. *New Zealand Railways Corporation v Fletcher Development and Construction Ltd* (1990) 1 NZ ConvC 190,464 at 190,467.

40. After requesting further information the Defendant was provided with all necessary information to approve both clause 16.1(a) and final plans and specifications on 11 December 2008. In an email dated 19 December 2007 and a letter dated 15 January 2009, it is recorded that the Defendant's solicitors had received all information necessary so as the final plans and specifications and resource consent could be approved. [Annexed at "G", and "H" of the Affidavit of Cherie Mary Farrington, sworn 6 April 2009].

41. It is submitted therefore that clause 16.1(a) and the approval of the final plans and specifications should have been satisfied a reasonable time after 11 December 2007.

[41] First, any waiver, at least waiver based on representation, must be based on clear and unequivocal evidence of an unambiguous representation: *Conner v Pukerau Store Limited* [1981] 1 NZLR 384, per Cooke J applying, at page 386, the Privy Counsel decision in *Neylon v Dickens* [1978] 2 NZLR 35.

[42] The present case does not involve an express representation but the vendor depends on the proposition that the course of conduct which the purchaser embarked upon was inconsistent with a reservation of an intention to possibly later cancel the contract on the grounds that the resource consent terms were unacceptable. I interpolate that logically, an implied representation arising from conduct should, like an express representation, also be unambiguous and clear. In essence, the vendor has to show that the suggested inconsistency between what the contract said and what the purchaser did, gives rise an inference that the purchaser no longer intended to rely upon any issue concerning the resource consent terms as a basis for cancelling the contract. Adopting that approach, in my opinion the alleged inference is not sufficiently clearly established. The reason I hold that view is that the suggested inference was only one of at least two possible inferences that could be drawn. The other available inference was that the purchaser might or might not proceed with the

purchase, and was signalling that if he did decide to proceed he would need an extension of time for meeting the finance clause. In other words, I do not consider that such an inference is sufficiently unequivocal that it would be reasonable for the vendor to view it as a representation that the purchaser would not cancel the contract on grounds that included the unacceptability of the resource consent terms.

[43] Next, it is clear from the authorities that a party who seeks to rely upon the waiver must have been induced to act in some way as a result of the waiver. The suggested ways in which the asserted waiver here is claimed to have influenced the actions of the vendor are unconvincing in my view and I do not accept for the purposes of summary judgment that the vendor has satisfied this element.

The argument that purchaser's failure to include Unit 3 when approving the resource consents was due to a typographical mistake

[44] The next aspect of the case relating to Unit 3 concerns whether the vendor's solicitors approved (on their behalf) the conditions in Clause 16.1(a). It was common ground that the purchaser did not expressly approve the terms and conditions upon which the resource consents were obtained. By contrast, they did give express approval in the case of Unit 7 and other units that the purchaser was going to buy.

[45] Mr Kettelwell submitted that the omission to include Unit 3 was merely a typographical error and that I should therefore read the critical letter of 17 January 2008 as if it applied to Unit 3 as well.

[46] The letter in question reads so far as is relevant:

> **Victoria Quay Limited to Lusby and D & S Investments Limited – Units 7, 15 and 53**
>
> Our clients instruct that Clause 16.1(a) has been fulfilled.

[47] Clause 8.7 of the standard terms of agreement which apply in this case provides:

> 8.7 If this agreement is expressed to be subject either to the above or to any other condition(s), then in relation to each such condition the following shall apply unless otherwise expressly provided:

(3) Time for fulfilment of any condition and any extended time for fulfilment to a fixed date shall be of the essence.

(4) The condition shall be deemed to be not fulfilled until notice of fulfilment has been served by one party on the other party.

[48] A consideration of this clause makes it clear that it is the question of whether a notice was given which is important and not the reasons why a party to the contract might have omitted to give notice. Mr Kettelwell may be correct that the failure to give a notice confirming clause 16.1(a) was due to a typographical error. But that does not take matters any further. In the end, for whatever reason, no notice was given and therefore it remained open to the purchaser to decline to approve the resource consent conditions. There is no provision of the contract dealing with omissions of this kind due to typographical errors. There is no justification for the Court treating such errors as being in a special class and, in effect, dispensing with the need for actual notice where failure to give it was due to a typographical error.

[49] I have not said anything about the point in time at which the right to cancel for non-approval of clause 16.1(a) might expire. One can understand the reason why at some point a party would be entitled to expect the other party would give a notice of non-approval. That is because it would not be conducive to certainty under the contract if a party were entitled to keep his or her options open indefinitely. That is, it would seem logical that the counter-party to the contract would be entitled to insist on the purchaser giving notice one way or the other.

[50] Mr Patterson said that the purchaser could give notice right up until the time when called upon by the other party to settle the contract. That may or may not be correct. It seems to me that one possibility is that because time was at large for notification of satisfaction or otherwise of this condition, it may have been possible for the vendor to make time of the essence for notification by the purchaser of approval or otherwise. But that was not done in this case.

Submission that defendant not entitled to cancel on foregoing grounds because he was not acting in good faith

[51] The issue here may be stated in the following way:

> Was the purchaser entitled to rely on his right to approve the resource consent and the plans and specifications and conditions when he was really attempting to get out of the contract for different reasons, viz., his inability to finance the purchase?

[52] Mr Kettlewell submitted that the purchaser did not act in good faith when disapproving the resource consents and the final specifications and conditions.

[53] He made the following submission:

> 6. The Defendant's counsel says at paragraph 24(d) that the conditions were not satisfied. It is submitted that what needs to be borne in mind here is that the Courts are inclined to an objective test so far as possible – see McMorland, *Sale of Land*, 2nd Ed, 2000 at pp142-143:
>
> "The concern is to prevent a party being able to use such a subjective wording as an unfettered route of escape from the contract, perhaps for completely unrelated reasons. If that could happen, the effect would be that one party was bound by the contract while the other effectively was not."

[54] It was submitted for the plaintiff that the real reason why Mr Lusby declined to approve the conditions was that he could not raise sufficient finance to complete the transaction. But because he did not have the protection of a "subject to finance" clause, the vendor surmises, he invoked lack of satisfaction with the plans and specifications as his ostensible reason for not completing when he did not have any genuine concern on that score.

[55] In my view the only material which the plaintiff can rely on in support of its submission that the defendant was not acting in good faith when he purported to cancel Unit 3 is because of the fact that his cancellation letter was sent on 5 March 2009 and that there is other evidence that at about that time he was having trouble obtaining finance. Mr Kettelwell relied on the fact that on 19 December 2008 Mr Lusby was attempting to arrange finance, as is evidenced by the following occurrence:

a. Then on 19 December 2008, David Hart of Loan Market Home Finance Brokers emailed one of the directors of the Plaintiff and also copied in the Defendant, saying:

"Hi Brian.

I am currently acting for Dan Lusby arranging finance for the settlement of the Omokoroa properties. I am waiting to hear from both Westpac and Sovereign. Both lenders are absolutely snowed under with applications and there are delays in getting answers from them. I will be in touch as soon as we get it sorted."

[emphasis added]

[56] The above evidence does indicate that the purchaser had left it until late in the day to get finance but the inferences to be drawn from the evidence do not extend to showing that the purchaser was unable to obtain finance. However, the fact that the purchaser had not yet raised finance as late as 19 December 2008 is sufficient to infer that he knew he would not be able to get finance and needed an "out" from the contract. Thus, this led him to decline to approve the resource consent conditions and the final specifications and plans.

[57] There is no reason why the Court should not give effect to the contractual provision included in the contract giving the purchaser the right to disapprove the contract under the plans and specifications clause.

[58] In my view, the ultimate issue for enquiry is what the actual reasons were for declining to approve and then determining whether those grounds were or were not bona fide when reviewed in the overall context of the case. That issue cannot be satisfactorily resolved on an application for summary judgment.

Conclusion on right to cancel Unit 3 sale on resource consent approval ground

[59] In the end, the plaintiff has not persuaded me that the purchaser did not in fact have the right to cancel based upon clause 16.1(a) at the time when he purported to cancel, in March 2009. I think it is reasonably arguable that this ground remained open to the purchaser right up until the time of settlement. That is sufficient to

dispose of the point and I do not intend to express a concluded view on that aspect of the matter in the present judgment.

Unit 7

[60] The position so far as it relates to Unit 7 is different from Unit 3. In relation to Unit 7, unlike Unit 3, the defendant approved the resource consents. This affects the arguments that are available to the defendant with relation to the Unit 7 agreement.

[61] The plaintiff's submission, when logically analysed, seems to reduce to three propositions:

a) The defendant's request for extension of time was logically inconsistent with a later disapproval of the final plans and specifications;

b) The defendant's explicit approval of the resource consents was logically inconsistent with a later disapproval of the final plans and specifications;

c) The good faith point.

The defendant's request for extension of time was logically inconsistent with a later disapproval of the final plans and specifications;

[62] I have already dealt with an identical argument in relation to Unit 3 and rejected it. I now do so again in relation to Unit 7 for the same reasons.

The defendant's explicit approval of the resource consents was logically inconsistent with a later disapproval of the final plans and specifications;

[63] The argument advanced by the vendor was that it was logically untenable for the purchaser, having approved the conditions of the resource consent to then claim that the 'final plans and specifications' were not approved.

[64] I observe that if this intention, which the plaintiffs attribute to the parties, is to be adopted, then it follows that Clause 3 of the letter of 5 January (paragraph [6] above) was redundant. If by approving the resource consent approvals, the purchaser was to be taken to approve the final plans and specifications, why did the parties include a separate clause dealing with the latter subject? For this reason, I would not be prepared to come to such conclusion unless it was unavoidable.

[65] As it happens, I do not consider that the provisions are to be interpreted in the way in which Mr Kettelwell submitted. Quite simply, the two conditions can live side by side if they are interpreted in such a way as to limit clause 2 of the letter of 15 January 2007 to all aspects of the conditions but not the final plans and specifications. The advantage to the purchaser of adopting such a course would be that he would not be forced to give approval to the plans and specifications at the relatively early stage where resource consent was being sought. Instead, he could keep his options open against the possibility that the plans and specifications might change.

[66] On the other hand, such a conclusion would have the following consequences. If the plans and specifications never changed from those on which the resource consent was based, the purchaser could approve those plans and specifications (when approving resource consents) but then at a much later point signify his disapproval of those conditions. Such an interpretation could waste time and possibly expenditure and I would be slow to agree that the Court should interpret the contract in such a way.

[67] I consider that the most likely reason for including the provision was to reserve to the purchaser the right to subsequently disapprove the plans and specifications subsequent to resource consent application, if those plans and specifications had materially changed. Such an interpretation would explain the use of the word ‘final’ in the phrase ‘final plans and specifications’. It is not clear to me, on the basis of the limited argument that I have heard, what the position might be if the plans and specifications never changed so that the plans and specifications in their final form were no different from those on which the resource consent was

based. I suppose that the very question of whether they had changed could well be a matter that the purchaser might want to have the opportunity to consider.

[68] The question of construing of the clause in question is not one on which a final view can be expressed at the summary judgment stage. I consider that guidance is to be obtained from the decision of Asher J in *Wealand International (NZ) Ltd v Safe Kids in Daily Supervision Ltd* HC AK CIV 2008-404-004658, 3 December 2008. Asher J's remarks were in the different context of an application to set aside a statutory demand but they nonetheless have force when considering how the Court is to resolve the meaning and effect of the parties' contractual arrangements in this case. Asher J said:

> [28] The issue of interpretation being difficult, it will be necessary for the purposes of interpretation to turn to the background circumstances as an aid to interpretation. Another condition in the agreement states that the grant will be paid in accordance with New Zealand employment laws. Mr Hucker submits that in terms of s 12(A) of the Wages Protection Act it would be unlawful in New Zealand to spend the grant other than on third party expenses. How this Act featured in the parties' thinking lead-up to the agreement is not known. Indeed, there is very little reference in the affidavits to the commercial background to the agreement.

[69] My conclusion is that the seeming inconsistency in the defendant's conduct that the plaintiff has seized on has not been established.

[70] But there are other problems with the plaintiff's argument. It is apparent that there was a lack of precision in the agreement as to the date by which the purchaser had to approve the resource consents and the date for approval of plans and specifications. Secondly, it would seem that these conditions gave rise to separate "stand-alone" grounds of cancellation available to the purchaser. For the Court to draw the inferences that the vendor has urged would involve interpreting the contract so as to conclude that the purchaser could potentially lose his express contractual right to disapprove the plans and specifications, on the grounds that he ought to have exercised his right at an earlier stage. That is to say, the plaintiff would have to show that the right to cancel on the resource consent and plans and specifications grounds was part of a suite of conditions to which he had to respond consistently or face the consequence that he might be deemed to have impliedly declined to exercise

his right if he failed to disapprove other unrelated clauses in the contract. The contract does not say that this is what the parties have agreed on. There are no obvious reasons why the Court should infer that is what the parties must have meant. Indeed, I have tried to summarise reasons to the contrary in paragraph [67].

[71] To summarise, it is possible to suggest a reason why the parties included both a provision that the purchaser would have the right to approve the resource consents and an additional right to approve/disapprove the final plans and specifications. Firm views cannot be expressed on this aspect without argument on the point and the possible consideration of evidence as to matters of background which would explain why the contractual provisions were structured in the way they were. But the interpretation that the purchaser contends for cannot be dismissed as far-fetched.

[72] I shall deal first with the alleged failure to raise problems about the plans and specifications previously.

Good faith

[73] I have already made partial reference to the submissions of Counsel for plaintiff on this point (see paragraph [54] above). It will be helpful at this point to quote more extensively from them.

[74] Counsel said:

> 8. The Defendant's purported cancellation pursuant to the plans and specifications clause is not bona fide. The defendant has provided no evidence of why he was dissatisfied with the plans and specifications.
>
> 9. Rather, it is clear from the documents before the Court that reason that the Plaintiff was attempting to cancel the agreement was due to a lack of finance. This is because:
>
> a. There can be no doubt that the Defendant confirmed confirmation of satisfaction with clause 16.1(a) in respect of Unit 7 because this was expressly done in the Annan & Co letter of 17 January 2008.
>
> b. On 8 October 2007, the Plaintiff's solicitor wrote to the Defendant's solicitor enclosing a copy of the Code Compliance Certificates in respect of the units. No issue was taken with the state or form of the building which had,

by that point, been built in accordance with the plans and specifications provided to the Defendant the previous year.

c. Similarly, on 13 October 2008, the Plaintiff's solicitors wrote to the Defendant's solicitors enclosing a Certificate of Practical Completion in respect of the units and again no issue was taken with the shape or form of the building.

d. Then on 12 November 2008, the Plaintiff's solicitors wrote to the Defendant's solicitors enclosing a copy of the titles for the units. Again, no issue was raised with the form of the building.

e. Then on 13 November 2008, the Defendant's solicitors wrote to the Plaintiff's solicitors requesting an extension to the settlement date under both agreements. This was duly granted.

f. Then on 19 December 2008, David Hart of Loan Market Home Finance Brokers emailed one of the directors of the Plaintiff and also copied in the Defendant, saying:

"Hi Brian.

I am currently acting for Dan Lusby arranging finance for the settlement of the Omokoroa properties. I am waiting to hear from both Westpac and Sovereign. Both lenders are absolutely snowed under with applications and there are delays in getting answers from them. I will be in touch as soon as we get it sorted."

[emphasis added]

10. It is clear from the documentation before the Court that the Defendant:

a. Was struggling with obtaining finance rather than with being satisfied as to the plans and specifications.

b. That the Defendant's attempt to cancel the agreements arose from his failure to obtain finance rather than any misgivings he had with the plans and specifications.

[75] I again accept as I did in relation to Unit 3, that the power to cancel required to be exercised in good faith. The issue, is whether the defendant in giving notice of cancellation in March 2009 was acting in good faith. I accept, too, that it is for the plaintiff to affirmatively establish an absence of good faith to the point that the Court is satisfied that it is not reasonably open to the defendant to rely on his purported cancellation of contract.

[76] The evidence shows that as late as three months before the cancellation – that is, in December 2008 - the defendant had yet to arrange finance. That is really the extent of the evidence. We do not know if the application for finance was successful. It probably was not but the point is not certain. It is not possible for the Court to assess whether there was any substance to the cancellation based on the plans and specifications point because the defendant never offered any elaboration of. But that he did not do so is not to be held against him: he was not required to give reasons why he did not approve.

[77] Apart from the fact that the cancellation followed fairly soon after an attempt to raise finance was made, there is little assistance to be had by way of evidence and legitimate inferences from the evidence to resolve the point. My conclusion is that all this results in an information "vacuum" on the issue of whether the defendant acted bona fide in cancelling the Unit 7 agreement on the grounds of non-approval of the plans and specifications. That counts against the plaintiff who must prove the point and not against the defendant.

[78] For these reasons, I conclude that the plaintiff has not succeeded in establishing that the defendant's purported cancellation of the Unit 7 agreement was invalid.

Conclusion

[79] I am not persuaded that the defendant has no arguable defence to the claims brought against him. The application for summary judgment is dismissed. Costs are reserved. I would suggest that the parties confer on the matter of costs. They should be able to resolve them without any order of the Court being necessary. If my expectation is wrong, I will deal with the matter on oral argument at 9 a.m. on a suitable date. Counsel are also requested to confer on an appropriate timetable for advancing the proceedings from this point and they should, if agreed, submit a consent memorandum for my consideration. Alternatively, the Registrar is to place this matter in a suitable Chambers List after making enquiry from counsel.

_____

J.P. Doogue
Associate Judge