IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV 2009 409 000454

BETWEEN	FOWLER DEVELOPMENTS LIMITED Plaintiff
AND	CRAIG JAMES ROBERTSON First Defendant
AND	DELTA ASSETS LIMITED Second Defendant
AND	PETER JOHN CARR AND TINA MARIA CARR Third Defendants

Hearing: 12 August 2009

Appearances: G M Brodie for Plaintiff
D M Lester for Defendants

Judgment: 17 December 2009 at 11am

JUDGMENT OF ASSOCIATE JUDGE OSBORNE
As to summary judgment application

Introduction

[1] This case concerns contracts to buy properties at Seafield Lagoon. The plaintiff marketed Seafield Lagoon as a "sensational lagoon area environment" offering unique waterfront living adjacent to a wildlife reserve in Brooklands, epitomising a complete lifestyle where lagoon views, wildlife and peaceful living combine to provide a truly welcoming environment. The defendants have refused to settle their purchases. They say that the lagoon development as represented simply does not exist. The third defendants say that the situation on-site is nothing like that

described by the plaintiff's principal, John Fowler. They say that the area where the waterways were supposedly to run is a swamp containing stagnant water.

[2] This is a summary judgment application. The fundamental issue is whether these circumstances give rise to an arguable defence.

Summary judgment – the principles

[3] The starting point for a plaintiff's summary judgment application is r 12.2 High Court Rules, which requires that the plaintiff satisfy the Court that the defendant has no defence to any cause of action in the statement of claim or to a particular cause of action.

[4] Before turning to some particular issues which arise in relation to this case, I summarise the general principles which I adopt in relation to the application:

(a) The onus is on the plaintiff seeking summary judgment to show that there is no arguable defence. The Court must be left without any real doubt or uncertainty on the matter.

(b) The Court will not hesitate to decide questions of law where appropriate.

(c) The Court will not attempt to resolve genuine conflicts of evidence or to assess the credibility of statements and affidavits.

(d) In determining whether there is a genuine and relevant conflict of facts, the Court is entitled to examine and reject spurious defences or plainly contrived factual conflicts. It is not required to accept uncritically every statement put before it, however equivocal, imprecise, inconsistent with undisputed contemporary documents or other statements, or inherently improbable.

(e) In weighing these matters, the Court will take a robust approach and enter judgment even where there may be differences on certain factual matters if the lack of a tenable defence is plain on the material before the Court.

(f) Once the Court is satisfied that there is no defence, the Court retains a discretion to refuse summary judgment but does so in the context of the general purpose of the High Court Rules which provide for the just, speedy and inexpensive determination of proceedings.

The contracts in this case

[5] The plaintiff sues three sets of defendants for specific performance of contracts to purchase lots at Seafield Lagoon – the first defendant (Mr Robertson) for Lot 12; the second defendant (Delta Assets Limited) for Lots 29 and 30; and the third defendants (Mr and Mrs Carr) for Lot 14. The proceeding as against the second defendant is stayed because Delta Assets Limited was placed in liquidation on 31 July 2009.

[6] The contracts are on the standard REINZ/ADLS form of Agreement for Sale and Purchase, 8th ed. 2006. The Carr contract was entered into in February 2008; the Robertson contract in March 2008. The purchase price in each case was $260,000.00. The further terms of sale included the completion of the subdivision. Settlement was to occur five working days after the date on which title issued. In each case title issued on 2 December 2008. Five working days was therefore 9 December 2008. The defendants did not settle on 9 December 2008.

[7] Pursuant to the standard terms of the contract, the plaintiff's solicitors issued settlement notices to each defendant on 9 December 2008. The settlement notices expired on 9 January 2009. The defendants still did not settle.

[8] On 10 March 2009 the plaintiff issued this proceeding for specific performance.

The grounds of opposition

[9] The defendants' central ground of opposition was put in this way:

> That they were induced to enter into their respective contracts by a misrepresentation as to the qualities and attributes of the sub-division, in particular that their Lots were to be adjacent to and have a view over a lagoon to be created as part of the sub-division. That lagoon has not been created and is presently a series of stagnant ponds. The plaintiff's depiction of the Development also carried the implied representation that all necessary consent and funding was in place and/or available to complete the Development as marketed. Such was not the case.

The defendants then provided a closely related ground of opposition, namely that the plaintiff was not entitled to specific performance because of its conduct concerning the depiction of the sub-division and the qualities of the sections as depicted to the defendants when compared to the Lots now on offer.

Misrepresentation as a defence the evidence

The representations

[10] The plaintiff began marketing the sub-division in 2007. The sub-division was named "Seafield Lagoon".

[11] The following evidence comes from the affidavits of Messrs Robertson and Carr. In a summary judgment context I treat it as evidence which may be accepted by a trial court and therefore constitutes arguable facts.

[12] Mr Robertson had access to at least three sources of information from the plaintiff:

- A set of pages making up a brochure on the plaintiff's website, which carried a pictorial representation of Seafield Lagoon with houses looking over an attractive lagoon area containing islands amongst channels. All the defendants' lots are shown as having uninterrupted views of the lagoon area. There is a notation which reads "artists'

impression all information and details to be confirmed". There is a bold statement which reads **"SENSATIONAL LAGOON AREA ENVIRONMENT".** (As well as obtaining a copy of the picture from the plaintiff's website, Mr Robertson was given a copy of the picture by Bill Twiss, the plaintiff's agent, prior to entering into the contract).

- The plaintiff also placed a large billboard outside the development with a very similar picture to that described above.

- The plaintiff also published a brochure entitled "Seafield Lagoon Brooklands". Under a heading "Prized Land, Pure Air, Lifestyle Options" the brochure states that "This exciting new development that comprises 32 residential sections, offers unique waterfront living adjacent to a wildlife reserve in Brooklands".

[13] In February 2008, after Mr Robertson's company had entered into its two contracts but before Mr Robertson entered into his personal contract, and before the third defendants entered theirs, the City Council issued on 19 February 2008 its sub-division consent for the development. At least Mr Robertson's solicitors received a copy of the consent in February. The consent detailed the lagoon under the title "Salt Marsh". Detailed provisions are included as to the formation and independent operation of the salt marsh, including the excavation of channels and the provision of island areas. Plans attached reflect the island/channel plan.

[14] Mr Robertson deposes that before he signed up he was told by the agent, Bill Twiss, that all consents for the development were in place.

[15] Mr Carr deposes that he and his wife met the plaintiff's principal, John Fowler, at Mr Fowler's house in order to discuss a purchase. Mr Fowler showed them architectural drawings on the lagoon area and of the entrance to the sub-division. Mr Fowler spoke of a substantial sculpture costing approximately $30,000.00 to be erected at the entrance way. Mr Fowler told them that he not the Council was in control of the lagoon area and that what was in the picture from the

colour brochure (above [12]) was what the Carrs would get. Mr Fowler also told them that he was going to enhance the section's waterfront view by increasing the area between the lagoon and the road on the lagoon side. Water levels were discussed and Mr Fowler assured the Carrs that water would be at a good level at low tide. Mr Fowler assured the Carrs that when the time came to settle everything in the sub-division would be finished.

The entry into the contracts

[16] Mr Robertson says that the fact that the sections were to overlook the lagoon was a key factor in his (and his company's) decision to enter the contracts to buy the sections. Mr Robertson does not state expressly that he entered the contract in reliance upon what was said by Mr Fowler and in the advertising material. It is, however, implicit in what he says that the lagoon area as described was key to his decision.

[17] Mr Fowler in his affidavit in support of the application for summary judgment simply produced the contracts in question and deposed that he did not believe the defendants had any defence to the plaintiff's claim. Neither he nor Mr Twiss gave any further evidence as to the plaintiff's advertising material or their own discussions with potential buyers. In the absence of any such evidence from the plaintiff, and against the background of the promotional material which the defendants received, the discussions of which the defendants speak are credible.

[18] Of concern in a summary judgment context is the fact that Mr Fowler in his affidavit evidence did not reveal a discussion which Mr Carr records in this way:

> About a month after Titles issued Mr Fowler rang me and pressured me to settle. I refused to settle due to the unfinished work on the Lagoon area and the unfinished entryway to the Lagoon. I am very concerned that the Lagoon area will not be finished as I understand Mr Fowler has relocated to Australia.
>
> Mr Fowler was well aware of my concerns as on 8 December 2008 his Solicitor sent my Solicitor a letter setting out why Mr Fowler considers that, notwithstanding the fact that the Lagoon was not finished we were obliged to settle.

[19] Mr Carr's evidence stands unchallenged. Further, the 8 December 2008 letter from Williams McKenzie (the plaintiff's solicitor), to which Mr Carr refers, contains an argument that a purchaser is required to settle in full without deduction even when the purchaser may have some kind of claim for compensation or damages for misdescription. Not only does Mr Carr give evidence of having made his concerns known to the plaintiff – the content of the plaintiff's solicitor's letter as early as 8 December 2008 strongly indicates that by then the plaintiff was aware of issues over alleged misdescription.

What would the defendants have received at settlement?

[20] Mr Fowler gives no evidence as to the state of completion of the physical works in the sub-division. He simply refers to the issue of titles.

[21] Mr Carr says this in relation to the time when titles issued:

> When Titles did issue in late 2008 the Lagoon development as represented did not exist. The situation on site in nothing like that described to us by Mr Fowler. The area where the waterways are supposedly to run is a swamp containing stagnant water.

[22] Mr Robertson provides further background. He refers to publicity in May 2008 when ECan issued a stop work instruction with the consequence that the project came to a halt. What emerges is that while sub-division consent and land use consent may have been dealt with by the City Council, the applicant still needed necessary consents from ECan in relation to the lagoon. A newspaper report of a meeting held between City Council and ECan representatives, a local MP, Mr Fowler and Brooklands residents reports Mr Fowler as having told residents that he had understood he had all the appropriate permits and approvals to build the waterways and the weir to control water coming into his project whereas ECan were disputing that. ECan are reported as having given verbal instructions to stop work and are reported to be working through the process of a written instruction to cease work. In any event, Mr Robertson records that no further work took place in the development after May 2008 apart from a landscaper who took over weed control. Mr Robertson says that the next thing which occurred was the issuing of titles.

[23] Mr Robertson deposes that when titles issued the lagoon development as represented did not exist. He deposes that it is not a "sensational lagoon area environment" and he says that there remain considerable resource management issues unresolved associated with getting the lagoon into a functioning state. He says that the area where the waterways were supposedly to run looks like a swamp and contains significant areas of stagnant water, creating a breeding ground for mosquitoes. He says that the titles the plaintiff is trying to force upon the defendants bear no resemblance to the properties represented and advertised to the defendants and which he believed they were purchasing.

[24] He refers to a letter dated 17 February 2009 sent to the plaintiff's solicitor by which he gave notice of the cancellation of his contract.

[25] It is again an unsatisfactory aspect of the evidence of Mr Fowler that when he swore his affidavit on 24 February 2009 and the plaintiff's proceeding was filed on 10 March 2009 he made no reference to the fact that his solicitor had a week earlier received notice of cancellation.

[26] Mr and Mrs Carr initially did not take steps in writing to cancel their contract. Mr Carr deposes that he is sure that in his telephone conversation with Mr Fowler a month after titles issued he made it clear to Mr Fowler that he did not wish to proceed with the purchase. He says that if there is any doubt whether that amounted to cancellation, his affidavit can now serve as formal notice of cancellation.

Other issues with the development – driveways

[27] Mr Robertson, but not the Carrs, raised issues in his evidence as to the failure of the plaintiff to provide driveways in a particular way. He says that he had asked for confirmation from the agent that the driveways were to be two lane and had requested that the driveway to Lot 29 be on the eastern side of the section. He said that the agent had agreed to the request before the agreement became unconditional. For the plaintiff, Mr Brodie submitted that even if made out any breach in relation to the driveway would be of insufficient magnitude to justify cancellation. He further

submitted that cl 5.4 and cl 6.4 of the standard contract (to which I will return) preclude cancellation for any such breach.

[28] By reason of the conclusion I will reach in relation to other grounds, it will become unnecessary for me to rule on this argument.

Grounds of defence available at summary judgment level

[29] For the plaintiff, Mr Brodie conceded that in the summary judgment context the factual allegations made by the defendants as to the state of the "lagoon" have to be accepted as arguable. This means that it is arguable that the subject properties bear no resemblance to those represented and advertised, with the "lagoon" in fact looking like a swamp with significant areas of stagnant water.

[30] Equally, Mr Brodie did not suggest that on those facts the plaintiff's conduct might not arguably constitute a misrepresentation. On the contrary, his legal submissions were predicated upon the basis that is was arguable that the claim of a sensational lagoon development was a misdescription. I consider the concession for summary judgment purposes appropriately made. While there are future-looking aspects to the lagoon advertising, there are at least arguably also representations as to existing facts. It is a matter for examination at trial whether the development as portrayed was "realistic, reasonable and attainable" to apply the formulation in *N.Z Motor Bodies Limited v Emslie* [1985] 2 NZLR 569, at 595.

Did the defendants elect to affirm?

[31] Leaving aside rights of cancellation, Mr Brodie submitted that the structure of the standard form agreement means that when vendors issue settlement notices, purchasers are placed on their election whether or cancel or affirm. More particularly the submission was structured in this way. The evidence indicates that all matters complained of by the defendants as giving rise to a right of cancellation were known at the date of settlement. Once the time for settlement has been and

gone, any ability to cancel is lost. Support for this comes from *Sale of Land* D W McMorland, 2nd ed. 2000 at p 256 para 8.22(a) where it is said (emphasis added):

> If breach of a warranty or undertaking is established, the purchaser will have certain remedies and must decide which of these to exercise. If cancellation is one of these, **the purchaser must elect on or before the settlement date whether or not to cancel**.

The effect of a settlement notice (making time of the essence for settlement) is therefore to put the purchaser to that election.

[32] In the case of both defendants, the settlement date as defined by the contract became 9 December 2009. When the plaintiff delivered its settlement notices, the date for settlement under those became 9 January 2009.

[33] Mr Robertson gave his notice of cancellation on 17 February 2009. The Carrs gave written notice through Mr Carr's affidavit sworn 13 May 2009 (although Mr Carr's evidence is that he is sure he had made it clear to Mr Fowler in their telephone discussion in January 2008 that he did not wish to proceed with the purchase).

[34] Against this background, Mr Brodie submits that the right of cancellation, even if it existed, was lost by election.

[35] I accept Mr Lester's submission that, particularly in a summary judgment context, it cannot be said on the information before the Court that the defendants each affirmed the contract. I make this finding for these reasons:

(a) Professor McMorland's observation as to an election arises in relation to the purchaser's remedies for breach of the warranties and undertakings under cl 6.4 of the REINZ/ADLS form. It is not suggested to apply to a situation of misrepresentation giving rise to the right of cancellation under s8 Contractual Remedies Act 1979.

(b) This summary judgment context is not the occasion to analyse whether the legal position as enunciated by Professor McMorland is

as unequivocal as it appears stated – even as to warranty and undertaking breaches under cl 6.4.

(c) Clauses 9.4 and 9.5 of the contract provide that it is the party giving a settlement notice which acquires the right to cancel if the other side does not comply. In the present case it was the vendor, not the purchaser, who gave the settlement notice. The concept that the purchaser must by the settlement date make an election as to cancellation (or affirmation) is not without difficulty.

(d) Mr Lester noted correctly – by reference to the judgment of Venning J in *Tapp v Galway* (2007) 8 NZCPR 684 at [38] – that affirmation requires a firm and settled choice. As his Honour observed in *Tapp v Galway*, at [39], each case of alleged affirmation must depend on its own facts. In the context of the summary judgment application, it is at least arguable that the evidence does not point to a firm and settled choice. In Mr Carr's case, his telephone discussion a month after titles had issued (on 2 December 2008) and therefore possibly before the settlement notices expired (on 9 January 2009) might be considered to reasonably indicate there was a choice not to proceed. The 8 December 2008 letter sent by the plaintiff's solicitor to Mr Robertson's solicitor contained the proposition that "the Court has held that a purchaser is not relieved from the obligation to settle merely because the purchaser may have some kind of claim for compensation or damages from misdescription". There may be an inference that the plaintiff or its representatives knew that Mr Robertson viewed himself as relieved of the obligation to settle.

[36] The defendants are entitled to argue that they did not affirm their contracts either on 9 December 2008 or on 9 January 2009. They may at trial be able to establish that far from affirming the contracts they were either equivocal as to whether the contracts proceeded or not or unequivocally opposed to the contracts proceeding.

Did cl 6.5 limit the defendants' remedies for misrepresentation limited by the contract?

[37] The defendants say, and have filed a statement of defence alleging, that they are entitled to cancel their contracts as the plaintiff did not complete the waterways and lagoon area as represented by the vendor. As I have said, it is arguable that within that allegation there is a misrepresentation of fact.

[38] The remedies under s8 Contractual Remedies Act 1979 are available both when the parties have expressly or impliedly agreed that the truth of any representation is essential to the party cancelling and when the effect of the misrepresentation or breach is to substantially reduce the benefit of the contract to the cancelling party.

[39] Given the terms in which this sub-division was presented to purchasers, it is arguable that the vendor, by delivering a property in the surroundings described by the defendants, would be substantially reducing the benefit of the contract to the cancelling parties. Mr Brodie did not suggest otherwise.

[40] Mr Brodie submitted that the contracts in this case make specific provision for a remedy in respect of misrepresentation. He invoked s5 Contractual Remedies Act 1979 which provides:

> **5. Remedy provided in contract**
>
> If a contract expressly provides for a remedy in respect of misrepresentation or repudiation or breach of contract or makes express provision for any of the other matters to which sections 6 to 10 of this Act relate, those sections shall have effect subject to that provision.

[41] Mr Brodie submitted first that cl 6.5 of the contracts (in standard form) is an express term of the contract within the meaning of s5 of the Act.

[42] Section 6.5 of the contract provided that:

> Breach of any warranty or undertaking contained in this clause does not defer the obligation to settle. Settlement shall be without prejudice to any rights or remedies available to the parties at law or in equity, including but

> not limited to the right to cancel this agreement under the Contractual Remedies Act 1979.

Mr Brodie submitted that cl 6.5 cannot mean anything other than that if, at the settlement date under the contract, the buyer has not cancelled, then the buyer is required to settle. The buyer's obligation can then be enforced by specific performance (pursuant to cl 9.4(1)(a) of the contract).

[43] In my judgment, it is at the very least arguable that cl 6.5 does not assist the plaintiff on the facts of this case. It may be that the matter is even clearer than that but in the context of a summary judgment application it is sufficient that the matter is arguable. It is arguable for these reasons:

(a) Clause 6.5 is concerned only with warranties or undertakings contained in cl 6. Clause 6 contains in sub-clauses 6.1, 6.2, 6.3 and 6.4 a series of warranties and undertakings in standard form. Unsurprisingly, none of them relates to the express representations relied upon by the defendants in this case. Accordingly, cl 6.5 is not a contract expressly providing for the remedy that would apply in respect of the misrepresentations alleged in this case.

(b) Secondly, cl 6.5 in any event provides that the settlement which is not deferred by reason of cl 6.5 is without prejudice to right of cancellation under the Contractual Remedies Act 1979. The remedy of cancellation, far from being removed by the express provisions of the contract, is expressly preserved by cl 6.5.

(c) Thirdly, while cl 8(5) of the Act takes away the right of cancellation where the cancelling party has affirmed the contract, the defendants have a good argument that they have not affirmed in this case.

[44] The plaintiff's argument as to the removal of the right of cancellation based on cl 6.5 therefore cannot succeed at summary judgment level. In reaching this conclusion I have considered but set to one side a further submission by Mr Lester that the contract also preserves the right of cancellation by virtue of a non-merger

clause (cl 10). Clause 10.1 provides (amongst other things) that the obligations of the parties in the agreement shall not merge with settlement. The natural reading of that clause is that it deals with obligations and not remedies such as a right to cancel. Given my earlier finding, it is unnecessary for me to consider that submission further.

Did cl 5.4 limit the defendants' remedies for misrepresentation?

[45] In the alternative, Mr Brodie relied on the provisions of cl 5.4 of the contract. That clause reads:

> ...except as expressly set forth in this agreement, no error, omission, mis-description of the property or the title shall annul the sale but compensation, if demanded in writing before settlement but not otherwise, shall be made or given as the case may require.

[46] Mr Brodie submitted that the provisions of cl 5.4 in this case mean that the alleged misdescription of the characteristics of the property can sound only in compensation. The right of cancellation is removed because "no misdescription shall annul the sale". Mr Brodie's submission overlooked the rule in *Flight v Booth* (1834) 1 Bing NC 370; 131 ER 1160. The following passage in Professor McMorland's *Sale of Land*, p 239, para 8.12, correctly summarises the legal position:

> ...However the effect of s 5 must be read in the light of the effect of the interpretation placed by the courts upon cl 5.4 and the allowed ambit of its operation. Because under the rule in **Flight v Booth** the vendor cannot rely upon cl 5.4 to compel a purchaser to take a property which is substantially different from that described in the contract, and because that rule is similar, if not identical, in scope to s7(4)(b) of the Act, the clause does not conflict with the statutory right of cancellation in s7. It may also be that the parties have, in the particular case, expressly or impliedly agreed that the performance of the vendor's obligation as to title is essential. Therefore, in those circumstances where the vendor is unable to rely on the clause, the purchaser retains the right of cancellation under the Act.

[47] The misdescription relied upon by the defendants in this case is of the properties, upon the basis that the properties were to be part of Seafield Lagoon, a "sensational lagoon area environment". The defendants have an at least arguable case that what the plaintiff seeks to transfer to them is substantially different from

that described if not different in relation to an essential matter, so that the rights of cancellation under s5 of the Contractual Remedies Act 1979 remain.

[48] I do not need to consider a further issue as to whether the reference in cl 5.4 of the contract to "misdescription of the property or title" extends to misdescriptions outside the express terms of the contract. There may be a tenable argument that the cl 5.4 reference to "error, omission or misdescription" is to things stated in or omitted from express contractual descriptions. Counsel did not make submissions on this issue and I refrain from concluding whether this is an arguable response to the plaintiff's cl 5.4 submission.

[49] Mr Lester submitted that there was a further answer to the plaintiff's cl 5.4 arguments, in the decision of the Court of Appeal in *Property Ventures Investments Ltd v Regalwood Holdings Limited* [2009] 1 NZLR 481. Mr Lester placed particular reliance upon the following passage from the judgment of the Court, delivered by Glazebrook J, at [14]:

> We doubt whether a misdescription in the context of cl 5, which is headed "Title, boundaries and requisitions", extends beyond matters relating to title or boundaries.

Mr Brodie submitted that I should not apply that statement of the law as it is obiter and open to criticism: see for example the article "*Misdescription misunderstood*" R Thomas [2009] NZLJ 7. At the time the submissions in this case were presented to me it was known that the Court of Appeal decision in *Property Ventures Investments Ltd v Regalwood Holdings* had been appealed. It was (and remains) possible that the decision on appeal would provide legal certainty on the point in question. While the appeal hearing has been heard, the Supreme Court's decision remains reserved. Given the conclusion I have reached in favour of the defendants on other points, I do not consider it appropriate to await the Supreme Court decision. As the law stands at the time of this summary judgment application, the defendants have at least an arguable response on this point based on the dicta in *Property Ventures Investments Ltd v Regalwood Holdings Ltd.*

Evidence obligations upon the plaintiff

[50] The rules as to summary judgment make specific provision as to the affidavit which must be filed by or on behalf of the plaintiff. Rule 12.4(5)(b) requires that the affidavit verify the allegations in the statement of claim. The person making the affidavit must depose to the belief that the defendant has no defence to the allegations and must set out the grounds of that belief.

[51] I have referred above (at [18] and [25]) to matters of defence which were not referred to by Mr Fowler in his affidavit. Those include:

(a) A telephone discussion between Mr Carr and Mr Fowler a month after titles issued in which Mr Carr refused to settle due to the unfinished work on the lagoon area and the unfinished entry way to the lagoon.

(b) A letter of cancellation received from Mr Robertson's solicitor a week before the proceeding was issued.

[52] Where a potential defendant has presented to the potential plaintiff details of its issues or grounds of defence, the provisions of r 12.4(5)(b) mean that the plaintiff cannot simply disregard those issues. A blanket statement of belief that the defendant has no grounds, in circumstances where issues of substance have been raised, does not meet the requirements of r 12.4(5)(b) because it does not set out the grounds of that belief.

[53] Of that situation, the Court of Appeal said this in *Canning v Lucas Industries N.Z. Limited* CA24/89, 22 March 1990, at p 6:

> The initial failure to disclose the defences put forward in the letters to its solicitors would ordinarily deserve peremptory dismissal of its application, but that failure has been remedied by the material now produced, so that we are able to assess the merits of the sole defence relied on in the appeal and we think it is in the interests of both parties that we deal with it.

[54] This passage was referred to by Master Venning in *Scales Trading Limited v Far Eastern Manufacturing and Commerce Corporation* HC Christchurch CP41/97

11 September 1997 at p 24. After citing the Court of Appeal judgment, the Master observed:

> Certainly a plaintiff has an obligation to inform the Court of any likely defence that may be available to the defendant on an application for summary judgment where the plaintiff is aware of such defence if, for instance, it has been raised in previous correspondence between the parties or is apparent from the plaintiff's own records.

[55] The Master concluded on the facts of the case before him that the matters not drawn to the Court's attention were not in a category of a clear defence raised in solicitors' correspondence.

[56] In my view, the failure of Mr Fowler to deal with the state of the lagoon development in his evidence is close to, if not, the reverse situation of that encountered by the Master in the *Scales Trading Limited* case. On the uncontradicted evidence before the Court Mr Fowler knew precisely what at the least the Carrs' concerns were. The Carrs had explained their concerns in the face of pressure by Mr Fowler to settle. The refusal to settle was because of the state of the site.

[57] Given the clear view enunciated by the Court of Appeal in *Canning v Lucas Industries N.Z. Limited*, as to the peremptory dismissal of applications, the circumstances of this application may well have warranted peremptory dismissal. However, the issue was not the subject of submissions by either counsel. Having regard to my conclusions on other grounds it is unnecessary that I decide the application on this basis. I therefore refrain from doing so.

Result

[58] The application for summary judgment must fail by reason of the defendants each having an arguable defence based on misrepresentation, in a situation where the terms of the contract as relied upon by the plaintiff at least arguably do not exclude rights of cancellation for the type of misrepresentation alleged by the defendants.

Orders

[59] I dismiss the summary judgment application as against the first and third defendants.

[60] In accordance with the approach in *NZI Bank Ltd v Philpott* [1990] 2 NZLR 403 (CA) I reserve the costs of the application.

Timetabling

[61] The defendants' statements of defence are required to be filed within ten working days: r 12.13.

[62] The Court is otherwise required to give such directions as to the future conduct of the proceeding as may be appropriate: r 12.12(1). Having regard to the timing of the defence, I adjourn this proceeding for a first case management conference at *11am 4 February 2010*, by telephone. I direct that counsel are to treat that conference as a first case management conference and are to file no later than two working days before the conference preferably a joint memorandum dealing with all matters for consideration under Schedule 5, High Court Rules.

Solicitors:
William McKenzie, Rangiora
Christopher Morrell, Christchurch.