IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2009-404-004911

BETWEEN	BOS INTERNATIONAL (AUSTRALIA) LIMITED (ABN 06601250) Plaintiff
AND	COLIN DOUGLAS GRIFFITHS First Defendant
AND	PATRICIA JEAN GRIFFITHS Second Defendant

Hearing: 1 December 2009

Appearances: J McBride and M Goodger for the Plaintiff
S Kai Fong for the Defendants

Judgment: 21 December 2009 at 2:00 p.m.

JUDGMENT OF WOODHOUSE J

This judgment was delivered by me on 21 December2009 at 2:00 p.m. pursuant to r 11.5 of the High Court Rules 1985.

Registrar/Deputy Registrar

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Solicitors:
Mr J McBride / Mr M Goodger, Bell Gully, Solicitors, Auckland
Ms S Kai Fong, McKechnie Quirke & Lewis, Solicitors, Rotorua

[1] The plaintiff (BOS) has applied for a summary judgment order for specific performance by the defendants of their obligations as purchaser under an agreement for sale and purchase of a residential unit.

[2] The defendants (the Griffiths) gave notice of cancellation of the agreement. They advance six positive grounds for resisting an order for specific performance, the first three of which were the reasons for the cancellation notice. These are:

a) The Griffiths were induced to enter into the agreement by misrepresentations by or on behalf of the vendor.

b) The unit as built is substantially different from and of lesser quality than the unit as represented and as contracted to be built.

c) Under the Fair Trading Act 1986, ss 9 and 14, there was misleading or deceptive conduct or false representations.

d) The Griffiths do not have the financial means to comply with an order for specific performance.

e) There are collateral contracts sufficient to justify refusing the application for summary judgment.

f) There are issues as to the sum payable under the contract.

[3] The broad response for the plaintiff is:

a) Provisions of the agreement for sale and purchase mean that the Griffiths' contentions in paragraph [2] a), b) and c) cannot be relied on or have no application.

b) The argument of inability to complete through lack of funds is founded on an affidavit filed significantly out of time and deficient in particularity such that the contentions should be dismissed.

c) The collateral contract arguments, at best, raise issues of quantum only.

d) The quantum issues do not justify refusal of an order.

The evidence for the parties and summary judgment principles

[4] The evidence for BOS is quite different in kind from the evidence for the Griffiths. BOS is a financier suing as assignee from the original vendor to the Griffiths. BOS acknowledges that the Griffiths have raised a large number of objections based on alleged pre-contract representations and breach of provisions of the contract. BOS does not for its summary judgment application seek to contest the contentions on the merits. BOS in large part simply relies on a number of contractual provisions said to exclude the arguments advanced by the Griffiths.

[5] Because of these markedly different approaches, it is unnecessary to consider refinements of the principles applying to summary judgment applications. It is sufficient to set out relevant parts of the leading judgment of the Court of Appeal in *Pemberton v Chappell*[1].

> The general object of the rules about summary judgments is clear. It is to enable a plaintiff to obtain judgment where there is really no defence to the claim made and so put an end to the spectacle of a worthless defence being raised and pursued for the purposes of delay. …
>
> If a defence is not evident on the plaintiff's pleading I am of opinion that if the defendant wishes to resist summary judgment he must file an affidavit raising an issue of fact or law and give reasonable particulars of the matters which he claims ought to be put in issue. In this way a fair and just balance will be struck between a plaintiff's right to have his case proceed to judgment without tendentious delay and a defendant's right to put forward a real defence.
>
> 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. …
>
> Where the only arguable defence is a question of law which is clear-cut and does not require findings on disputed facts or the ascertainment of further

[1] [1987] 1 NZLR 1 at 2-4

> facts the Court should normally decide it on the application for summary judgment, just as it will do so on an application to strike out a claim or defence before trial on the ground that it raises no cause of action or no defence: … Where the defence raises questions of fact upon which the outcome of the case may turn it will not often be right to enter summary judgment. There may however be cases in which the Court can be confident — that is to say, satisfied — that the defendant's statements as to matters of fact are baseless.

[6] In respect of the defendants' contentions contained in the principal affidavit of Mr Griffiths, there is no present argument for BOS that the matters of fact he puts forward are baseless. As I have said, BOS has not engaged in any real contest as to the reliability or credibility of the contentions of fact.

[7] For BOS, some emphasis was placed on its need, as a financier, for contractual certainty. I do not consider that this factor has any relevance independent of what may be drawn from the provisions in the agreement for sale and purchase.

Facts

[8] The narration of facts that follows is a narration of facts which are presently uncontested. This summary is, of course, not intended to amount to determinative findings of fact.

[9] In 2003 a company controlled by the Griffiths, Waiteika Investments Limited, purchased two units in a property at Mt Maunganui known as the Outrigger. The Outrigger was on Marine Parade, the main beachfront road in Mt Maunganui.

[10] There was a group of 10 owners of units and a manager. In 2006 the owners decided to sell as a group. Mr Griffiths said:

> We were not happy with the management/letting agreements and were effectively unable to sell except as a group.

At this time the Griffiths owned and operated a lavender farm and café near Katikati in the Bay of Plenty.

[11] The decision of the Outrigger owners to sell led to a meeting Mr Griffiths attended with a property developer, Edward Poh, in June 2006. Mr Poh had a proposal to purchase all the Outrigger units and the land on which they were built, demolish the building and "then build a new complex of luxury apartments in their place". The proposed apartment building was called Vivaldi Breeze.

[12] Negotiations with Mr Poh continued through 2006 to the beginning of 2007. Mr Griffiths said he had a number of meetings with Mr Poh and his marketing manager and had regular telephone discussions. Mr Griffiths said:

> [Edward Poh] assured us the development would be of absolute top quality, luxurious, the "best in the Mount", and "top of the range". We relied upon this advice which was reiterated on several occasions by Edward. We were prepared to look at a purchase of an investment property. We didn't intend to live there. Therefore the luxury aspect was extremely important to us with a purpose of on-selling as there is always a market for top-of-the-line properties on Marine Parade.
>
> …
>
> [In about November 2006] I drove Edward Poh around Mt Maunganui pointing out new developments where they all had an emphasis on glass and balconies to take account of maximum sunshine, the sea views and also possible views of Mt Maunganui. These are all absolutely desirable attributes for a beachfront property at the Mount. We were led to believe in our various discussions with Edward that these features would be included in the development.

[13] Further representations or commitments said to have been made by Mr Poh include, in summary, the following:

a) Mr Griffiths said that he and his wife were influenced by a marketing brochure, with plans and specifications in that brochure being incorporated into the formal agreement for sale and purchase. He said:

> We relied upon this material and the specifications in the agreement that were represented to us to make the Vivaldi Breeze a luxury complex. We would not have entered into the agreement if we knew that the final apartment and complex was not built to that standard and specification and relied on promises from Edward that he would deliver on his vision for the sight.

b) Before the agreement was entered into Mr Griffiths and Mr Poh's marketing manager used a cherry picker to ascertain "the heights and views from the various floor levels and balconies" of the proposed Vivaldi Breeze building. The cherry picker was provided at Mr Poh's expense. Mr Griffiths said:

> I used a tape measure to ascertain the first and second floor levels. The first floor [where unit 9 would be] was approximately level with the balcony at 47 Marine Parade. We had also been in the original Outrigger Unit 1, and ascertained that a balcony in the new apartment was necessary on the north side as this would give us all day sun and outdoor living and a view of Marine Parade instead of being restricted to the morning sun only on the front balcony. These were major influencing factors in our decision to purchase.

c) For the Vivaldi Breeze project to proceed, all Outrigger unit owners would either have to leave in part of the sale price of their units on mortgage, or purchase units in Vivaldi Breeze, and ideally do both.

d) An Outrigger owner purchasing an apartment in Vivaldi Breeze would pay 10% less than the "current market price (to be determined by a qualified valuer)". Mr Griffiths contends that, on this basis, the purchase price of the apartment he and Mrs Griffiths agreed to buy in Vivaldi Breeze should have been $1.75 million as against the contract price of $1.845 million. The calculation by Mr Griffiths was based on a valuation referred to at [18] below.

e) Mr Poh said that if Mr and Mrs Griffiths bought an apartment in Vivaldi Breeze he would buy it back within two years from the date of completion if the Griffiths had not sold it for the price they paid for it.

f) Mr Poh said that if Mr and Mrs Griffiths had to borrow to settle the purchase of an apartment in Vivaldi Breeze he would pay the interest on the money borrowed pending resale and that if the Griffiths resold at a loss he would reimburse them.

[14] On 13 February 2007 the Griffiths entered into an agreement with Vivaldi Enterprises Limited to purchase unit 9 in Vivaldi Breeze (the Vivaldi agreement). There does not appear to be any direct evidence as to the relationship between Vivaldi Enterprises and Mr Poh, but there is sufficient evidence, for present purposes, to draw the inference that Vivaldi Enterprises is the vehicle used by Mr Poh for the purpose of sales of units. An inference may also be drawn, from the evidence as it presently stands, that the representations and assurances said to have been made and given by Mr Poh were made and given on behalf of Vivaldi Enterprises.

[15] The purchase price was $1.845 million. The stipulated deposit was $92,250. Forming part of the agreement are drawings of the Vivaldi Breeze apartments showing plans of each floor, elevations, sections and three pages headed "outline specification". The clauses relied on by BOS in resisting the Griffiths' contentions are set out below when considering the various arguments.

[16] By written agreement dated 15 February 2007 the Griffiths' company, Waiteika Investments Limited, agreed to sell its two Outrigger units to Vivaldi Enterprises. The purchase price was $900,000 with a deposit of $36,000 (the Outrigger agreement).

[17] Clauses 19 and 20 of the Outrigger agreement provide, so far as material:

> 19 **Vendor Mortgage**
>
> 19.1 The Vendor has agreed that it shall provide a registered third mortgage over the property being purchased by the Purchaser at settlement on the terms set out below:
>
> | | |
> |---|---|
> | Principal Sum | $180,000.00 (subject to special condition 21) [The reference to "special condition 21" appears to be an error, with the correct clause being 20.1] |
> | Terms | 16 months from the settlement date |
> | Interest Rate | 8% per annum |
> | Guarantor | Edward Choo Chye Poh |
>
> The parties acknowledge that following redevelopment of the property, the mortgage shall convert to a registered third mortgage in shares over all the newly completed units with all other vendors leaving in secured vendor finance.

…

20. **Purchase of Unit in Redevelopment of Property**

20.1 The Vendor and the Purchaser have agreed that that [sic] the Vendor or its nominee, C & P Griffiths, will purchase Unit 9 in the redevelopment of the Property at a purchase price of $1,845,000.00 in accordance with the terms and conditions of an Agreement for Sale & Purchase of Unit 9 executed contemporaneously with this agreement. The Purchaser has agreed that it will contemporaneously on settlement of this agreement pay the sum of $92,250.00 into the trust account of Knight Coldicutt McMahon Butterworth to be held by way of deposit for the purchase of Unit 9, such amount to be credited towards the Principal Sum of $180,000.00 referred to in clause 19.1 above with the balance of the Principal Sum being reduced to $87,750.00 accordingly.

[18] On 15 June 2007 a registered valuer provided a valuation of Vivaldi Breeze. This included a "current market value" for unit 9 of $1.945 million. The valuation was provided to a finance company on instructions from Vivaldi Enterprises. The Vivaldi Breeze building had not at that date been built. The valuation was based on "plans, specifications, costings, and various other information relating to the proposed development" provided to the valuer. There is no other valuation evidence.

[19] By deed dated 28 June 2007 Vivaldi Enterprises nominated Poh Trustee Limited as purchaser of the Outrigger units and as vendor of the Vivaldi Breeze apartments. By that date Vivaldi Enterprises had entered into agreements to buy all the Outrigger titles and to sell 13 apartments in Vivaldi Breeze.

[20] In July 2007, soon after the nomination of Poh Trustee, there was correspondence between the Griffiths' solicitors and the solicitors for Vivaldi Enterprises and Poh Trustee relating to the Griffiths' purchase of unit 9. The Griffiths' solicitors, amongst other things, sought confirmation that the deposit payable by the Griffiths of $92,250 under the Vivaldi agreement had been paid by the means specified in clause 20.1 of the Outrigger agreement. The solicitors for Vivaldi Enterprises and Poh Trustee advised that the deposit had not been paid as "there were insufficient funds" because of the nature of the financing of the development. The solicitors continued:

> Your client is protected by the second mortgage which is at full face value for your client's debt, until this position is rectified which should be when

> the development funding draws down in the next three months … of course there is no issue in terms of your client not having paid the deposit under the agreement, as this is for our client to do.

[21] On 1 May 2009 Poh Trustee's solicitors gave notice to the Griffiths' solicitors that settlement of the Vivaldi agreement was required to take place on 8 May 2009 in terms of the agreement. By letter of 5 May 2009 Poh Trustee's solicitors sent the Griffiths' solicitors a settlement statement requiring payment of the total purchase price, with adjustments for rates and body corporate levies. The statement records that no deposit had been paid.

[22] Settlement did not take place on 8 May 2009, and has not taken place since. On 18 May 2009 Poh Trustee's solicitors sent the Griffiths' solicitors a "settlement notice in terms of clause 12 of the agreement".

[23] On 2 June 2009 the Griffiths' solicitors wrote to Poh Trustee's solicitors about the Vivaldi agreement and Vivaldi Breeze. It commences:

> Our clients Mr and Mrs Griffiths have serious concerns regarding the entire development as well as their unit. From their perspective there has been a significant and fundamental change from the original design concept for the advertised "luxury apartments" complex.
>
> Prior to entering into the Agreement for Sale and Purchase ("the Agreement") the development was represented to our clients as "the Mount's best", the latest in style and fashion with Italian marble and "top of the range" fit out. Those are just some of the comments in the advertising brochures and materials and representations made to our client.
>
> The concept from our clients' point of view has changed from a developer driven and architecturally designed project to a design and build off the plan construction with subsequent erosion of quality and compromise to reduce costs. What has resulted is no longer the quality product promised and represented to our clients by Edward Poh and written representations contained in marketing material and also reconfirmed in the terms and conditions of the Agreement that were presented to our clients prior to entering into the Agreement. Such representations induced our clients to enter into the Agreement.
>
> It is our clients' contention that the vendor has misrepresented the development to our clients and breached the Agreement and following is a list of some of the factors which have given rise to our clients' concerns:

[24] Over the following four and a half pages the solicitors itemised a large number of alleged deficiencies in the development and other concerns. The

complaints were carefully explained, with descriptions of what the Griffiths say was represented to them or contained in the agreement, or both, contrasted with what was in fact produced. The alleged misrepresentations and breaches of contract relate to matters referred to above at [11]-[13] and a good deal more. I am satisfied that this detail provides a reasonably arguable foundation for the contentions summarised at the beginning of the letter and at its end. I do not consider it necessary to set this out in detail.

[25] The letter concluded as follows:

> All of the above changes have had an effect in downgrading the apartment from the "luxury apartment" concept represented to our clients and emphasised in the marketing material plans and specifications to an apartment which can only be described as ordinary in the best of lights. The fact is there are significant and visible changes which were never discussed with our clients, and our clients have lost all confidence in the completed product. Our clients suspect that there will also be other non visible material and design changes which have in fact been implemented solely to reduce costs and quality. To that end our clients reserve the right to add to the list above as other matters come to light.
>
> Our clients had hoped to be in a position to on-sell the apartment on completion but as a result of the material and significant changes our clients believe that the value of the apartments has been seriously affected and the end product is not what our clients contracted for. Each of the matters listed above constitute in our opinion a separate breach of contract and misrepresentation by the vendor and when taken as a whole substantially reduce the benefit of the contract to our client purchaser.
>
> The total effect of these matters is so significant that our clients hereby cancel the Agreement. We note no deposit was paid as confirmed by your two faxes dated 12 July 2007 and your settlement statement. Instead the full vendor finance of $180,000.00 from Waiteika Investments Ltd still remains secured by the third mortgage to that company.
>
> This notice of cancellation is given pursuant to s.7 of the Contractual Remedies Act 1979 and our client reserves any other rights they may have against your client at law or in equity or howsoever arising and without limitation under the Fair Trading Act 1986.

[26] There is no evidence before me of any response to any of the Griffiths' complaints, other than the contentions of a BOS employee that provisions of the Vivaldi agreement preclude reliance by the Griffiths on the matters they complain about. In other words, no person engaged in any pre-contract negotiations or in the construction of Vivaldi Breeze has given any evidence challenging what the Griffiths say.

[27] The Griffiths have sought to supplement their contentions that Vivaldi Breeze was not constructed to the standard it should have been by putting in evidence promotional brochures issued after the original brochure which the Griffiths say influenced them in entering into the Vivaldi agreement. The Griffiths say that each of the new brochures shows a development of progressively lower standard than that which they say they were assured would be built and which they say Vivaldi Enterprises contracted to build.

[28] BOS sues as assignee of the interests of Vivaldi Enterprises and Poh Trustee in the Vivaldi agreement. No issue arises as to the validity of the assignment. And it was accepted for BOS that it takes as assignee subject to all obligations of the vendor and all rights of the Griffiths' as purchaser.

[29] I will now consider the relevant issues. It is convenient to approach the ultimate question as to whether BOS is entitled to summary judgment by considering the principal arguments advanced by Mr McBride on behalf of BOS.

The Griffiths were not and are not entitled to cancel

[30] Mr McBride submitted that each of the Griffiths' defences "faces a common and insurmountable hurdle". The effect of clause 4.7 of the Vivaldi agreement is that the Griffiths were not entitled to cancel. Clause 4.7 is as follows:

> NO WITHHOLDING OR OBJECTION
>
> 4.7 The Purchaser shall not:
>
> (a) withhold the balance of the Purchase Price (or any part of it) or demand any retention on Settlement Date by reason of any defect, shrinkage or fault in the Units, whether due to defective materials, workmanship or any other cause, or for any other reason or claim;
>
> (b) make any objection, requisition or claim for compensation because of any alteration to the Plans and Specifications or finishes which are made because of a requirement or direction of the Relevant Authority or because of the practical necessities of construction including (but not limited to) requirements of good building practice or the availability to materials, or to any alterations which in the sole opinion of an independent registered valuer appointed

by the Vendor have no material adverse effect on the value or use of the Units;

(c) object or procure any other party to object from a planning point of view or otherwise to any other part of the Development or any development by the Vendor on any neighbouring property. A provision to this effect may be included on the title of the Supplementary Record Sheet pursuant to the Act.

[31] There was an admirably succinct written submission in reliance on this clause, as follows:

> The first sub-clause is paramount. The purchaser is obliged to settle on the settlement date, without withholding or retention. It is not entitled, under any circumstance, to withhold payment in full.

[32] It was submitted that this approach is consistent with authority: *Lifestyle Group v Maxwell*[2]; *Tapp v Galway*[3]; and *Property Ventures Investments Limited v Regalwood Holdings Limited*[4]. BOS did not argue that the Griffiths' claims of misrepresentation and contractual breach are unsustainable as a matter of fact. BOS proceeded on the basis that the merit of those claims is irrelevant; the effect of clause 4.7 is that in no circumstances were the Griffiths entitled to cancel.

[33] In my opinion that argument is not sustainable as a matter of contractual interpretation and the cases relied on by Mr McBride do not hold otherwise.

[34] Mr McBride acknowledged that in some circumstances clause 4.7 would not prevent a purchaser from cancelling. This was a proper acknowledgement to make. But it means that Mr McBride's submission that the effect of clause 4.7 is that a purchaser cannot "under any circumstances" withhold payment in full is not correct.

[35] The cases relied on by Mr McBride are ones concerned with a question whether a purchaser wishing to settle, but claiming an entitlement to compensation for a breach of warranty, is entitled to settle by paying the contract sum reduced by the amount of compensation claimed. In the *Property Ventures* case the purchaser

[2] (2007) 8 NZCPR 648 (CA)
[3] (2007) 8 NZCPR 684 (HC)
[4] [2009] 1 NZLR 481 (CA)

failed to settle and the vendor gave notice of cancellation. The vendor then applied to remove the purchaser's caveat and forfeit the deposit. The vendor succeeded. The purchaser contended on appeal, amongst other things, that it was not obliged to settle the agreement without an abatement of the purchase price for breach of warranties. The Court of Appeal rejected that argument. The agreement for sale and purchase contained clause 6.5 as follows:

> 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 …

The Court of Appeal held that the effect of this clause was that, if a purchaser claimed there was a breach of warranty entitling the purchaser to compensation, the purchaser was nevertheless bound to settle in full and pursue its claim following settlement. In coming to that conclusion the Court approved the decision of Venning J in *Tapp v Galway* and followed its own decision in the *Lifestyle Group* case.

[36] Those cases have no application to the present case. The clause applied in *Property Ventures*, clause 6.5, is similar to clause 4.7 in the Vivaldi agreement. But, on this summary judgment application, it is at the least reasonably arguable that many of the Griffiths' complaints go well beyond the matters with which clause 4.7 is concerned. In addition, unlike the cases relied on by Mr McBride, this is not a case where the purchasers wished to settle, but wanted an abatement of the purchase price. This is a case where the purchasers considered they were entitled to avoid the contract altogether and gave notice of cancellation.

[37] There is a further point. By its terms, clause 4.7 is not a provision purporting to prevent a purchaser from cancelling. It would be surprising to find a clause purporting to preclude a right of cancellation in any circumstances, and the Vivaldi agreement does not seek to do so. Apart from my interpretation as to the effect of clause 4.7, clause 12.4 provides, under the heading "PURCHASER'S REMEDIES":

> If the Vendor does not comply with the terms of a Settlement Notice served by the Purchaser then the Purchaser may without prejudice to any other rights or remedies available to the Purchaser at law or in equity:
>
> (a) Sue the Vendor for specific performance; or

(b) Give notice in writing to the Vendor cancelling the agreement and …

Exclusion of pre-contract representations

[38] Mr McBride submitted that provisions of the Vivaldi agreement prevent the Griffiths from seeking to rely on pre-contract representations. The primary clauses relied on were clauses 15.5 and 15.6, as follows:

> DISCLAIMER/SOLE AGREEMENT
>
> 15.5 The brochures, website, CD Roms, plans and Unit Title Plan showing the concept of the Development, specifications and any unit entitlement assessments and any body corporate budget have all been prepared prior to commencement of construction of the Development. While every reasonable effort has been made to ensure the information and calculations correctly illustrate the Development and the Units, they can only be for guidance and no responsibility will be taken for any differences, errors or omissions which may become apparent upon completion of the Development and after "as built" plans, specifications and calculations are finalised.
>
> 15.6 The parties acknowledge that this agreement, and the schedules and attachments to this agreement, contain the entire agreement between the parties, notwithstanding any negotiations or discussions prior to the execution of the agreement, and notwithstanding anything contained in any brochure, showroom, report or other document. The Purchaser acknowledges that it has not been induced to execute this agreement by any representation, verbal or otherwise, made by or on behalf of the Vendor or its agent, which is not set out in this agreement. In particular the Purchaser acknowledges and accepts:
>
> (a) that the Development is an evolving concept which the Vendor may complete in stages and which may not be completed in the exact same form as presented in the Unit Title Plan or Plans and Specifications. The Development (other than the Units) is subject to change at any time for whatever reason and without notice to the Purchaser. The Purchaser is not purchasing the Units in reliance upon any representations about completion of the Development or any part of it other than the Units; and
>
> (b) that any common facilities are at a concept stage only and the Vendor has the right to change and modify the location, use, operating rules and allow adjoining owners to use the same. The common area, equipment or facilities may also become commercially operated in which case may not be part of common property, but accessed and used by the Purchaser by easement or some other legal method.

[39] For the Griffiths, Ms Kai Fong submitted that s 4(1) of the Contractual Remedies Act 1979, when applied to the presently uncontested evidence of the Griffiths, means that the Court cannot at this stage conclude that the representations cannot be relied on. Section 4(1) is as follows:

> **4 Statements during negotiations for a contract**
>
> (1) If a contract, or any other document, contains a provision purporting to preclude a Court from inquiring into or determining the question—
>
> (a) Whether a statement, promise, or undertaking was made or given, either in words or by conduct, in connection with or in the course of negotiations leading to the making of the contract; or
>
> (b) Whether, if it was so made or given, it constituted a representation or a term of the contract; or
>
> (c) Whether, if it was a representation, it was relied on—
>
> the Court shall not, in any proceedings in relation to the contract, be precluded by that provision from inquiring into and determining any such question unless the Court considers that it is fair and reasonable that the provision should be conclusive between the parties, having regard to all the circumstances of the case, including the subject-matter and value of the transaction, the respective bargaining strengths of the parties, and the question whether any party was represented or advised by a solicitor at the time of the negotiations or at any other relevant time.

[40] Mr McBride submitted that the Griffiths cannot invoke s 4(1). This submission was based in considerable measure on a decision of Associate Judge Gendall in *Mayoral Drive Trustee Company Limited v Lal*[5]. In that case a vendor sought a summary judgment specific performance order against purchasers of an apartment. The purchasers sought to resist the application on the grounds that there were pre-contract misrepresentations entitling them to avoid the contract. There was a clause in the agreement for sale and purchase excluding reliance on pre-contract representations. The application for summary judgment was successful.

[41] Mr McBride pointed to what he submitted were factual similarities between the *Mayoral Drive* case and the present case which mean that in this case the sole

[5] HC AK, CIV 2007-404-001902, 26 October 2007

agreement provision should bind the parties, notwithstanding s 4(1) of the Contractual Remedies Act. The sole agreement provisions are, in material respects, almost identical. In the *Mayoral Drive* case the purchasers were legally represented, as were the Griffiths. In the *Mayoral Drive* case the transaction was commercial for both parties, and it was submitted that such is the case for the Griffiths. And there were said to be some similarities in the complaints relating to representations, in particular promised sea views and alterations to the initial plans and specifications.

[42] From this Mr McBride submitted "that the principles applied in *Mayoral Drive Trustee Company Limited* should be applied in the present case". To a considerable extent this amounts to a submission that there are principles of law which in this case preclude the enquiry by the Court which is expressly provided for in s 4(1), or which must lead to the conclusion that, on enquiry undertaken at this summary judgment stage, clause 15.6 should prevail.

[43] There will be cases where, on a summary judgment application, a purchaser seeking to rely on s 4 of the Contractual Remedies Act will fail to advance sufficient evidence to persuade the Court that there are grounds for embarking on the s 4 inquiry, or that, following inquiry, it is arguable that the sole agreement provision should not prevail. Aspects of this led to the conclusion reached by the Judge in the *Mayoral Drive* case. But there are no principles of law which provide an automatic answer.

[44] At the summary judgment stage it is a threshold question dependent on evidence, not principle. What is required is sufficient evidence before the Court to lead to the conclusion that the Court cannot rule out the inquiry under s 4(1) and cannot rule out the possibility of a conclusion that the sole agreement clause should not prevail. That is all that is required from the defendant if there is no evidential challenge from the applicant. Two cases cited by Ms Kai Fong amply illustrate this. One of those is another decision of Associate Judge Gendall, *Kinloch Golf Resort Limited (In Liquidation) v Knight and Ors*[6]. The other is a decision of Allan J, *Featherstone Park Developments Ltd v Robertson Homes Ltd*[7].

[6] HC NAP, CIV 2008-441-670, 3 July 2009
[7] HC HAM, CIV 2008-419-1175, 18 May 2009

[45] Section 4(1) requires the Court to have regard to all the circumstances of the case. If it is established, for example, that both parties were engaged solely for commercial reasons, that may be a factor weighing in favour of application of the exclusionary provision in the contract. This was noted as a material consideration to that effect by the Court of Appeal in *Brownlie v Shotover Mining Limited*[8]. *Brownlie* was applied by the Judge in the *Mayoral Drive* case and given some emphasis by Mr McBride in this case. However, the fact that there may be commercial objectives on both sides is not of itself determinative. What is more, even though there is evidence that the Griffiths purchased the Outrigger units as an investment, and may have regarded the proposed purchase in Vivaldi Breeze as being broadly similar in nature, the real impact of that cannot be assessed without putting it into the context of "all the circumstances of the case" as s 4 requires.

[46] In the same way, other circumstances relied on in one case in support of a conclusion that the sole agreement clause should prevail, cannot of themselves lead to the same conclusion in another case. Added caution is needed when, on a summary judgment application, the applicant seeks to rely on circumstances from other cases which were established at trial, and therefore with all relevant evidence adduced and subjected to cross-examination. In this case the Griffiths have presented a substantial body of evidence which, unlike the evidence for the purchasers in the *Mayoral Drive* case, certainly meets the necessary threshold of indicating that the Griffiths' s 4(1) contentions are fairly arguable.

No right of cancellation for misrepresentation or breach of a term of the contract

[47] Mr McBride submitted that, even if there were misrepresentations which can be relied on, or a relevant breach of contractual terms, the evidence for the Griffiths did not establish an arguable case that this would justify cancellation in terms of s 7 of the Contractual Remedies Act 1979. Mr McBride dealt separately with the question of entitlement to cancel for misrepresentation and entitlement to cancel for breach of a term of the contract. It is convenient to deal with both matters under one heading.

[8] CA187/87, 21 February 1992

[48] Relevant provisions of s 7 of the Contract Remedies Act 1979 are:

> **7 Cancellation of contract**
>
> (1) Except as otherwise expressly provided in this Act, this section shall have effect in place of the rules of the common law and of equity governing the circumstances in which a party to a contract may rescind it, or treat it as discharged, for misrepresentation or repudiation or breach.
>
> …
>
> (3) Subject to this Act, but without prejudice to subsection (2) of this section, a party to a contract may cancel it if—
>
> (a) He has been induced to enter into it by a misrepresentation, whether innocent or fraudulent, made by or on behalf of another party to that contract; or
>
> (b) A term in the contract is broken by another party to that contract; or
>
> (c) It is clear that a term in the contract will be broken by another party to that contract.
>
> (4) Where subsection (3)(a) or subsection (3)(b) or subsection (3)(c) of this section applies, a party may exercise the right to cancel if, and only if,—
>
> (a) The parties have expressly or impliedly agreed that the truth of the representation or, as the case may require, the performance of the term is essential to him; or
>
> (b) The effect of the misrepresentation or breach is, or, in the case of an anticipated breach, will be,—
>
> (i) Substantially to reduce the benefit of the contract to the cancelling party; or
>
> (ii) Substantially to increase the burden of the cancelling party under the contract; or
>
> (iii) In relation to the cancelling party, to make the benefit or burden of the contract substantially different from that represented or contracted for.
>
> …

[49] Mr McBride submitted that the pre-condition of essentiality in s 7(4)(a) had not been and could not be established. This was on the basis that clause 4.4 of the Vivaldi agreement means that the matters relied on by the Griffiths for cancellation had been impliedly agreed by them not to be essential.

[50] Clause 4.4 is contained in part 4 of the Vivaldi agreement, under the main heading "COMPLETION OF DEVELOPMENT". Clauses 4.2 and 4.3 are directly relevant to interpretation of clause 4.4. The three clauses are as follows:

> CONSTRUCTION
>
> 4.2 The Vendor shall complete in a proper and workmanlike manner the Units and the Building substantially in accordance with the Plans and Specifications and the Consent and in accordance with all statutory, regulatory bylaws and requirements of the Relevant Authorities. The Vendor will not be responsible for any delays in securing consents or permits in respect of the Development or as a result of weather conditions, strikes, lock-outs, accidents, unavailability of any material, finish, product or system referred to in the Plans and Specifications or any other matters beyond its reasonable control.
>
> REPLACEMENT MATERIALS
>
> 4.3 If any materials, finish, product or system set out in the Plans and Specifications are unprocurable or, owing to supply constraints, cannot be procured on reasonable terms or in a timely manner, or the use thereof is prohibited by any statute, regulation or by-law or the Vendor or its consultants believe a change is desirable to them, the Vendor shall substitute any materials which are of a value and quality as near as reasonably practicable to the specified materials.
>
> DESIGN CHANGES
>
> 4.4 The Purchaser acknowledges that the Purchaser has purchased the Property on the basis of the Plans and Specifications. The Purchaser shall not make any objection, requisition or claim for compensation because:
>
> (a) of any alteration to Plans and Specifications for the Development, by virtue of the Plans and Specifications being developed into the developed design for the Development, provided that such changes do not alter the shape and dimensions of the Unit in a material adverse manner. In particular but without limitation the Purchaser acknowledges that the Vendor may amalgamate or further subdivide the units shown on the Plans and Specifications.
>
> (b) the final dimensions of the Development and Units as constructed may differ from the Plans and Specifications and no claim for compensation shall be made by the Purchaser, unless in the sole opinion of an independent registered valuer appointed by the Vendor for this purpose, these changes in dimension have a material adverse effect on the value of the Units.
>
> (c) of the circumstances described in clauses 4.3, 7.6, 7.7 or 7.8 or other parts of this agreement.

[51] In relation to the pre-contract representations relied on by the Griffiths, it is not immediately apparent that clause 4.4 has any application to the question whether the parties impliedly agreed that the representations made by Mr Poh were essential to the Griffiths. Clause 4.4 is not concerned with pre-contract representations at all, except to the extent that it might be taken impliedly to seek to exclude any reliance on them, a matter expressly dealt with in clause 15.6. A provision impliedly excluding reliance on pre-contract representations does not address the question whether the parties have impliedly agreed that a representation would not otherwise be essential. The contrary inference might be drawn from the fact that the vendor has sought to exclude reliance on the representation.

[52] Clause 4.4 is not expressed to apply to cancellation at all. What it seeks to prevent is "any objection, requisition or claim for compensation" by the purchaser founded on the matters carefully defined in paragraphs (a), (b) and (c) of clause 4.4. The "objections" from the Griffiths, founded on representations and contractual provisions, go well beyond the matters set out in clause 4.4 and, in reliance on those matters, they have purported to cancel the agreement, not to make an "objection, requisition or claim for compensation".

[53] Clause 4.4 must be interpreted in its contractual context. The "design changes" provided for in clause 4.4 are of relatively limited scope. The scope is further substantially confined by clauses 4.2 and 4.3. And clauses 4.2 and 4.3 indicate that the Griffiths have a fairly arguable defence. Clause 4.2 required Vivaldi Enterprises to complete the development "in a proper and workmanlike manner … substantially in accordance with the Plans and Specifications". It is at the forefront of the Griffiths complaints, based on Mr Poh's representations and on the contract they signed, that this fundamental obligation has not been met. Qualifications of the obligation in clause 4.2 contained in other provisions, including clause 4.4, fall well short of establishing, as a matter of contractual interpretation, that the Griffiths could not succeed with their complaints at trial.

[54] Clause 4.3 is concerned with "materials, finish, product or system" contracted to be provided. There is a substantial body of uncontradicted evidence from Mr Griffiths to the effect that items of this nature do not comply with representations

and do not comply with the contract. Clause 4.3 permitted Vivaldi Enterprises, as vendor, to change the matters referred to in certain circumstances. There is at present no evidence that any of those circumstances are applicable.

[55] The alternative pre-condition to cancellation in reliance on misrepresentation or breach is in s 7(4)(b); in this case, principally, that the effect of the misrepresentation or breach will be substantially to reduce the benefit of the contract to the Griffiths.

[56] Mr McBride submitted that, notwithstanding the large number of complaints in the letter from the Griffiths' solicitor and in Mr Griffiths' evidence, there was an absence of material evidence demonstrating that the benefit of the contract would be substantially reduced. Mr McBride also pointed to the fact that there is no independent valuation evidence. The Griffiths' contentions are open to challenge and some, as the evidence presently stands, may be questionable. Aspects of this were discussed during the hearing. Similar observations may be made when assessing the present evidence in relation to other provisions in the Contractual Remedies Act. But I am not persuaded that at this stage it can be concluded that the effect of the matters the Griffiths complain about would not substantially reduce the benefit of the contract to them if they were required to complete it.

Fair Trading Act

[57] The Griffiths allege breach of ss 9 and 14 of the Fair Trading Act 1968. The relevant parts of these sections are as follows:

> **9 Misleading and deceptive conduct generally**
>
> No person shall, in trade, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.
>
> **14 False representations and other misleading conduct in relation to land**
>
> (1) No person shall, in trade, in connection with the sale or grant or possible sale or grant of an interest in land or with the promotion by any means of the sale or grant of an interest in land,—
>
> …

> (b) make a false or misleading representation concerning the nature of the interest in the land, the price payable for the land, the location of the land, the characteristics of the land, the use to which the land is capable of being put or may lawfully be put, or the existence or availability of facilities associated with the land.
>
> …

[58] Liability under ss 9 and 14, and the related provisions of the Fair Trading Act, cannot be excluded by contract: *Smythe v Bayleys Real Estate Limited*[9]; *Phyllis Gale Limited v Ellicott*[10]; *Body Corporate 202254 v Taylor*[11].

[59] The prohibition against contracting out of obligations under the Fair Trading Act does not prevent contractual provisions which might enable a Court to conclude, as a matter of fact, that a defendant has not engaged in misleading or deceptive conduct or made false representations. Similarly, an effectively drafted clause may properly enable the Court to conclude that a plaintiff relying on the Fair Trading Act has not, as a matter of fact, been misled or deceived[12].

[60] Mr McBride did not seek to argue, to any material extent, that any of the provisions in the Vivaldi agreement can be relied on to exclude possible liability for the vendor under the Fair Trading Act. His submissions, in response to the Griffiths' positive contentions, were to the same essential effect as those relating to pre-contract misrepresentation. My conclusions in that regard, against BOS, are applicable in respect of the Fair Trading Act issues.

Other possible defences

[61] The conclusions I have already reached are sufficient to dismiss the application for summary judgment, but it is appropriate briefly to consider other defences raised by the Griffiths.

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[9] (1993) 5 TCLR 454
[10] (1998) 6 NZBLC 102, 445
[11] [2009] 2 NZLR 17 (CA) at [63]
[12] See *Law of Contract in New Zealand* (Burrows, Finn and Todd, 3rd ed, 2007, at 7.5.7)

[62] One defence is, in substance, impossibility of performance. The Court will not order specific performance of what is impossible[13]. If a purchaser is unable to pay the purchase price, that may provide a defence under this heading. Hardship, from financial incapacity or for other reasons, may also be grounds for declining an order for specific performance.

[63] In my judgment the Griffiths have raised sufficient grounds, by way of evidence, to conclude that BOS has not satisfied the onus on it of demonstrating that there is no defence of impossibility or hardship. I have not overlooked Mr McBride's objection to the very late filing of an affidavit from Mr Griffiths which indicates that he and Mrs Griffiths do not have the financial resources to complete the agreement. There is also an affidavit for BOS, prepared and filed on very short notice through no fault of BOS, which does indicate that a good deal more may be required from the Griffiths before a Court could conclude that they do not have the financial resources. However, if the late affidavit is admitted, it does warrant further inquiry and justifies declining the application for summary judgment. I am not persuaded that the late affidavit should be ignored because it has been filed very late. There is evidence in the first affidavit from Mr Griffiths providing a foundation for this defence.

[64] There is also the evidence from Mr Griffiths that Mr Poh, impliedly on behalf of Vivaldi Enterprises, effectively undertook to fund the purchase. This allegation is not presently contradicted. If it is established, and if it was an undertaking from Mr Poh binding on Vivaldi Enterprises, this may have a bearing on the terms of any order for specific performance even if it does not provide a complete defence to the application for the order.

Quantum issues

[65] Two matters raised as defences do not in my judgment amount to a complete defence, but do go to quantum. One is the claim that the contract price is higher than the price agreed with Mr Poh. The presently uncontradicted evidence of Mr Griffiths

[13] See *Laws of New Zealand*, Specific Performance, para 114.

is sufficient to conclude that the Griffiths do have an argument available against BOS as assignee that the contract price is less than the stipulated sum of $1.845 million. The other quantum issue concerns the deposit. On the face of it the Griffiths are entitled to a credit for the deposit, contrary to the settlement statement referred to at [21] above. This issue will have to be determined if BOS challenges the Griffiths' contention. If the deposit is deemed to have been paid there will be a corresponding reduction in the amount owing to Waiteika Investments for the balance of the sale price of the Outrigger units. This balance apparently remains secured by third mortgage registered against the current titles. There are also likely to be quantum issues arising out of interest adjustments.

[66] Had I concluded that the Griffiths had no grounds for resisting the application for specific performance, it may have been appropriate to grant an order subject to determination of the relevant quantum issues. However, in view of my earlier conclusions it is unnecessary to consider this further.

Costs

[67] The Griffiths sought costs in the event the summary judgment application was dismissed. However, the general rule is to reserve costs when an application for summary judgment is dismissed. This is a general rule. In some cases it may be appropriate to award costs before the merits have been determined at trial[14]. However, I do not consider this to be a case where there should be an order. Costs will therefore be reserved.

Result

[68] The application for summary judgment is dismissed.

[69] Costs are reserved.

[14] See the commentary in McGechan at HR12.12.08.

[70] The proceeding is adjourned to the case management conference on 10 February 2010 already scheduled for the related proceedings in: CIV 2009-404-005143, High Court, Auckland, BOS International (Australia) Limited (ABN 06601250) v Raglan Acceptances Limited and Anor; CIV 2009-463-000564, High Court, Rotorua, BOS International (Australia) Limited (ABN 06601250) v Dana Limited and Anor; CIV 2009-470-000612, High Court, Tauranga, BOS International (Australia) Limited (ABN 06601250) v Mara Construction Limited and Anor; CIV 2009-470-000613, High Court, Tauranga, BOS International (Australia) Limited (ABN 06601250) v Oceanview (2007) Limited and Anor; and CIV 2009-470-000614, High Court, Tauranga, BOS International (Australia) Limited (ABN 06601250) v Outrigger (Vivaldi Breeze) Limited and Anor.

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Peter Woodhouse J