IN THE HIGH COURT OF NEW ZEALAND
ROTORUA REGISTRY

CIV 2009-463-000378

BETWEEN	PIONEER PROPERTY TRUST LIMITED Plaintiff
AND	NGAWINI CHE NORTHCROFT AND STEVEN DANIEL NORTHCROFT Defendants

CIV 2009-463-000383

AND BETWEEN	PIONEER PROPERTY TRUST LIMITED Plaintiff
AND	HAROLD WAYNE VANDY AND SYLVIA ANN VANDY AS TRUSTEES OF VANDY FAMILY TRUST Defendants

Hearing: 25 and 26 November 2009

Appearances: S Kai Fong and P Kai Fong for the Plaintiff
D Dugdale and G Dennett for the Defendants in CIV 383
J Olphert for the Defendants in CIV 378 and 385
F Wood for the Defendants in CIV 384, 392, 427 and 479

Judgment: 4 December 2009

JUDGMENT OF
ASOCIATE JUDGE CHRISTIANSEN

This judgment was delivered by me on
04.12.09 at 1:30pm, pursuant to
Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar
Date……

CIV 2009-463-384

BETWEEN	**PIONEER PROPERTY TRUST LIMITED** Plaintiff
AND	**LEA HELENA LIGHT AND JASON MARK LIGHT** Defendants

CIV 2009-463-385

BETWEEN	**PIONEER PROPERTY TRUST LIMITED** Plaintiff
AND	**BRADLEY JOHN PORTLAND AND MICHELLE MARY PORTLAND** Defendants

CIV 2009-463-392

BETWEEN	**PIONEER PROPERTY TRUST LIMITED** Plaintiff
AND	**GRAHAM LLOYD DOUGLAS AND BRONWYN ROCHELLE SMITH** Defendants

CIV 2009-463-427

BETWEEN	**PIONEER PROPERTY TRUST LIMITED** Plaintiff
AND	**SHAUN CHRISTOPHER NUNN AND TANYA LOUISE NUNN** Defendants

Solicitors/Counsel:
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CIV 2009-463-479

BETWEEN	**PIONEER PROPERTY TRUST LIMITED** Plaintiff
AND	**DAVID IRVING NELSON AND LYNETTE ANNE NELSON** Defendants

[1] The defendants in each of the seven proceedings have been separately sued to recover what is claimed to be due in terms of an agreement for purchase from the plaintiff (PPT) of a lot in stage three of the PPT's subdivision at Ngongataha, Rotorua. In each case the defendants have purported to cancel their agreements for purchase. Although the reasons and circumstances of each vary in material particulars, they are at one concerning issues arising from the registration on 6 April 2009 of a Consent Notice against the title to the subdivision lot they had agreed to buy. They are at one over a claim that the Consent Notice materially/substantially altered the bargain they entered into. The Consent Notice changed the terms of the Rotorua District Council's (RDC) Notice of Decision which was attached to each defendant's agreement for sale and purchase.

[2] The defendants' claim there was a significant/material change which gave rise to a right to cancel. As well, separately each defendant submits representations were made to them individually which are of sufficient substance to persuade this Court not to grant the equitable relief of specific performance that PPT seeks upon its summary judgment application. Each claims they entered into their agreement for purchase because of representations by PPT's real estate agent or other agent about when title would be available. Each claims that notwithstanding the assertions of PPT's Mr Kenny to the contrary, that PPT must have known prior to the agreements for sale and purchase about those soil issues which lead to the change of the consent which occurred by the Consent Notice.

[3] Therefore, it is on these two fronts i.e. materiality of bargain caused by the Consent Notice, and due to claims of misrepresentation that the defendants have opposed the summary judgment claim for specific performance.

[4] In all material respects the respective defendants' agreements for sale and purchase are identical. Those agreements contain clauses which, as you would expect, inhibit the ability of a purchaser to challenge their agreement. Notwithstanding, there is no issue but that in certain circumstances section 7 of the Contractual Remedies Act 1979 enables the Court to consider and rule upon a purchaser's allegations of misrepresentation. Overarching these matters is the

function of the Court on a summary judgment application to determine whether an arguable defence is available to the defendants. As well an application seeking specific performance invites the Court to exercise its equitable jurisdiction. That involves issues of bona fide and the like.

[5] With the consent of all counsel it was agreed PPT's separate claims should be heard together.

Background

[6] These proceedings relate to sections sold in stage three of PPT's Oakland subdivision. The defendants' agreements were entered into between February 2007 and early 2008.

[7] Stages one and two titles were issued and sections were sold and settled without any issues. PPT says it was advised of potential sub-soil issues in early 2008 by MTEC, the engineers instructed by them. PPT then instructed Tonkin & Taylor (T&T) to carry out an investigative report to determine the extent of the problem and to advise of any remedial action required. As a result of T&T's findings and in conjunction with the Rotorua District Council (RDC) a Geotechnical Completion Report (the completion report) was completed in March 2009. As a result of that report, the Consent Notice was issued and registered against each certificate of title. It states that unless not required by the completion report, all foundations shall be subject to a Specific Engineering Design (SED) by a suitably qualified engineer. Since, RDC has confirmed that building consents can be issued for stage three lots and the report confirms that a dwelling may be constructed on each lot.

[8] On 6 April 2009 the Consent Notice accompanied an application for issue of titles. At the same time a number of easements were registered. Titles to stage three sections issued on 30 April 2009. The issue of titles bore the date of 6 April 2009 being the date upon which they were lodged for issue. On the same date (30 April 2009) the defendants through their respective solicitors were given notice that title

had issued. Contemporaneously advice of the settlement date 14 May 2009 was given.

[9] On 1 May 2009 the Northcrofts gave notice of cancellation. The Lights and the Portlands followed on 7 May 2009, and the Nunns on 11 May 2009.

[10] Each of those defendants were served with a settlement notice on 18 May 2009. So too were Mr and Mrs Vandy who three days later served notice of cancellation. The circumstances affecting Mr and Mrs Nelson and Mr Douglas and Ms Smith varied slightly. On 14 May 2009 and in response to their request for it, the Nelsons received a copy of the T&T Report. In their case a notice was given requiring settlement by 29 June 2009. On 3 July 2009 a settlement notice issued and on 6 July 2009 the Nelsons delivered a Notice of Cancellation.

[11] In the case of Douglas/Smith they, on 18 May 2009 agreed to purchase a different lot (lot 50) in substitution for that which they had agreed to buy (lot 35). On 21 May 2009 Douglas/Smith confirmed an intention to settle as soon as possible. But, on 11 June 2009 they delivered a Notice of Cancellation.

[12] In each case cancellation has not been accepted by PPT because it does not believe there is an entitlement to cancel. PPT asserts that it was at all material times ready, willing and able to settle by conveying to the defendants' title to the lot that they had entered into an agreement to buy.

[13] For PPT it is submitted that the agreements for sale and purchase contemplated that it may take as long as two years for title to issue because the right to cancel due to no issue of title could not occur within two years of the date upon which the agreements for sale and purchase were entered into.

[14] Stages one and two of the subdivision development sold out quickly. Market conditions were buoyant. Purchaser demand was high. The situation changed in the period in which the stage three lots were offered for sale. The auction process that had proved successful earlier was much less successful with stage three. Stage one sections were put on the market in October 2005. November 2006 the stage one

earthworks completion report was submitted to the RDC. In the same month the stage two sections were put on the market.

[15] In May 2007 stage one titles issued. In August 2007 the stage two earthworks completion report was provided. In the same month the stage three subdivision consent approval from the RDC was provided. In November 2007 stage two titles issued and the sections were placed on the market for sale.

[16] In March 2009 the T&T geotechnical completion report was provided.

[17] I have already provided details of the events including notification of the issue of title and the requirements for settlement that followed closely thereafter.

Defences raised

Vandy

a) The conditions pursuant to which RDC consented to the subdivision which the Vandys contracted to buy were varied, at the request or with the concurrence of PPT but without notice to the Vandys, in such a way as to adversely affect the land being sold;

b) Before they purchased there was a representation by an engineer (Mr Pitman) from MTEC that the lot was ready to be built on "right then as it was";

c) There was false or misleading conduct under s 14 of the Fair Trading Act 1986.

Portland, Northcroft, Douglas/Smith, Nunn, Nelson and Light

a) There was misrepresentation:

i) As to the date when titles would issue;

ii) That it was a quality subdivision with strong covenants to protect quality and standard of houses, which subject to compliance with such covenants, the lots would be suitable for the construction of a residential dwelling of the defendant's choosing upon the issue of title;

iii) The subdivision would proceed in accordance with the requirements of the variation to the approved subdivision consent issued by RDC on 22 August 2007.

b) There is an underlying problem with the subsoil which:

i) Restricts the type of house that can be constructed;

ii) Imposes additional requirements on the defendants to first obtain an engineering report and implement specific engineering requirements on any dwelling they construct on the site together with the additional cost that that would entail;

iii) Adversely impacts on the defendant's ability to obtain insurance and finance for the construction of the dwelling;

iv) Adversely affects the value of the section;

v) Requires construction of a debri interception fence for bund and the back-filling of silt ponds;

vi) Affects high ground water levels which could affect damp proofing of dwellings, utility of garden areas and strength of road pavement.

vii) Was known or ought to have been known to PPT prior the signing of the agreement and PPT failed to disclose the problem. The defendants would not have entered into the agreement if the problem had been disclosed.

c) The lots represent a loss of bargain as:

i) The Consent Notice imposed constraints which were not part of the original agreement;

ii) Restrictions affect the saleability of the sections.

Douglas/Smith, Nunn, Nelson and Light

[18] The defendants assert that special condition 2.4 of the agreement (by which the purchaser acknowledged that sections 225(2)(a) and (b) of the Resource Management Act 1991 do not apply and resort to which is waived except permitting cancellation of a contract if title has not issued within two years of the date of the agreement), is unlawful and contrary to public policy and of itself entitling cancellation of the contract.

Contractual terms

[19] The agreements prescribe the payment of a 10% deposit. They were unconditional and by them PPT agreed to give possession and a transfer in registrable form.

[20] Special conditions of sale provided:

a) Settlement date to be the 10th working day following the date upon which notice was given that a search copy of the title was available;

b) That the vendor had approval of the RDC to the subdivision in accordance with the scheme plan attached to the agreement;

c) By clause 2.4 the purchaser acknowledges that sections 225(2)(a) and (b) of the Resource Management Act 1991 do not apply;

d) By clause 2.6 PPT reserves a right to grant or receive the benefit of any easements, rights, leases, or licences, building loan restrictions or other

encumbrances, consent notices rights or obligations which may be required in order to satisfy any conditions of any consent given by any authority with jurisdiction over the land, or which in the sole discretion of the vendor are deemed to be necessary or desirable in respect of the vendor's subdivision and development of the land of which the property forms a part…;

e) PPT intends to establish the subdivision of which the property forms part as a modern and well designed subdivision… these covenants will ensure that only quality homes are built, which will subsequently protect the interests and investments of all purchasers… as follows: (including)

- Only to erect a new residential home;
- Not to erect a subsidiary dwelling;
- To erect a dwelling house of at least 125m^2;
- To keep any temporary dwelling, caravan, trade vehicle or other equipment at least within 5 metres of any boundary of the lot;
- Not to permit the erection of any temporary building or structure within the lot;
- To complete any building within a specified period;
- Not to allow removal of the soil, of any rubbish or permit the storage or accumulation of anything upon the property;
- To roof with approved materials;
- To build using approved materials;

(together, the "strong covenants").

Approach to Judgment

[21] I propose to deal with the defence issues raised under the headings:

a) Misrepresentations;

b) A change in the conditions of consent to the subdivision due to 'underlying problems'.

[22] I will then follow with my assessment of PPT's case in response, by reference to facts and also to the agreements for sale and purchase.

Misrepresentations

As to when title would be available

[23] Mr and Mrs Vandy inspected the subdivision on 6 October 2007 and made enquiries of the real estate agent and were then referred to an engineer Mr Pitman of MTEC Consultants, PPT's engineering consultants at the time. They say they were told the section was ready to be built on.

[24] The Northcrofts state that when on 13 December 2007 they entered into their agreement to purchase, they had been told that title would be available in May 2008. They then sold their current property in the expectation of being able to build as soon as title became available.

[25] The Portlands completed their agreement in January 2008. At the time they were advised that title would be available in about June 2008. They then sold their home in Rotorua in February 2008.

[26] Mr and Mrs Nunn claimed they were advised by the real estate agent that title would be released in March 2008. On that basis they sold their property unconditionally in January 2008.

[27] Mr Douglas and Ms Smith purchased in December 2007. They say they were told at the time that title would be available within six months. This was important to Mr Douglas who intended building the new house himself.

[28] Mr and Mrs Light were advised that title would issue within three months of their signing up in January 2008. They had previously purchased lot 10 in stage one and title became available within six months.

[29] Mr and Mrs Nelson bought early in 2008 in reliance upon an assurance that title would be forthcoming shortly. They sold their house in Auckland at that time and moved to Rotorua.

[30] All defendants state that had they contemplated title would not issue until March/April 2009 then they would not have entered into the agreements, but purchased elsewhere.

That it is a quality subdivision with strong covenants

[31] Particular concerns are identified by reference to actions by another landowner affecting one or more of the defendants. These are not properly matters in issue with PPT. In general however some of the defendants are concerned they may not be able to rely upon those covenants in view of the economic downturn and the sell off by PPT of lots at prices which, at first sight, appeared significantly less than the defendants' paid for theirs. Also they refer to the possibility that the obligations imposed by the new Consent Notice including the requirement to get an SED, may restrict the size and dimensions of the house and/or building materials that could be used. So too it is anticipated that landscaping, fencing and levelling requirements may change significantly. The general thrust of the defence is that the defendants may be unable to build the type of house they expected to build but not until they settle on the section and attempt to build will they know what they can build.

Underlying problems and the issue of the Consent Notice

[32] The defendants claim that PPT knew earlier, than its Mr Kenny has declared, of the subsoil issue – and that it was known of before most or all of the defendants purchased their lots. They claim there is a taint surrounding PPT's actions which do not entitle them to the equitable relief of specific performance.

[33] It has earlier been mentioned that MTEC were PPT's engineers throughout. What is known is that a preliminary site investigation undertaken in October 2004 by MTEC determined the existence of silt in some areas affected by the subdivision.

[34] Then in August 2007 a report by Coffey Geotechnics NZ Limited (Coffey Report) raised concerns about the settlement characteristics of the organic soils beneath. That report was not obtained by PPT but apparently by the purchaser of one of the subdivision lots in Stage two.

[35] PPT through Mr Kenny denies it was on notice about the subsoil problems following the 2004 investigation by MTEC, or in connection with the Coffey Report in August 2007. Mr Kenny says he only became aware of subsoil soft ground issues early in 2008 and that those had not been foreseen. At that time he engaged the services of T&T. In March 2009 T&T produced two reports; an assessment report and a completion report – the latter to which I have previously referred. It was the latter that provided the conditions of consent for the issue of building permits that were incorporated in the Consent Notice that was then registered upon the titles of all subdivision lots.

[36] It is in the outcome of the T&T report that most concern is expressed. Attached to the agreements for sale and purchase was notice of RDC's approval of subdivision on certain conditions. Then in early March 2009, in circumstances Mr Dugdale describes as with the "concurrence of the vendor but without notice to the purchasers, the earlier conditions were replaced by a new set". Clearly all defendants including the Douglas/Smith and the Nelsons cancelled after the Consent Notice was registered against their titles.

[37] T&T's report identifies engineering issues. It indicated that associated engineering works would require an SED. T&T gave an indication of the estimate of

costs that would arise in that result. An estimate of $2,500 was given for design costs and $10,000 for associated development costs. Although PPT offered to meet these costs to the maximum of those suggested sums, the defendants cancelled nonetheless. The defendants' concerns were not allayed by a report confirming that residential dwellings were able to be built upon each of the stage three lots.

[38] A number of the defendants have claimed they may experience difficulties in arranging insurance for the houses they had proposed to build. They are not content with PPT's argument that because these proceedings relate to sales of bare residential lots, that insurance is not a relevant requirement. As they put it unless insurance is available it is unlikely they will be able to borrow funds to finance the building works.

[39] Quite some evidence was advanced concerning the insurance/finance issue. PPT suggests this issue has arisen somewhat as an afterthought in order to bolster any other arguments supporting their claims to cancellation. PPT believes that the very reasons now offered in support of cancellation have varied significantly from those reasons initially offered to justify cancellation. At first blush this view would appear to be supported by reference to the reasons offered at the time of cancellation.

[40] In response to the defendants' claims that the saleability of their lots has suffered significantly, the defendants provided valuation evidence reporting not only the loss in value attributed to the economic downturn but also due to a "stigma" factor associated with the subsoil problems. PPT has countered with its own valuation. It has also filed a second affidavit from Mr Kenny indicating a significant number of lot sales recently. I will discuss the significance of those statistics later in this judgment.

PPT's reply

[41] It challenges claims of deceptive and misleading conduct. Mr Kenny deposed he did not become aware of any soil settlement risk problem until early 2008. He immediately acted by engaging the services of T&T. Therefore it is inappropriate to draw adverse inferences suggesting knowledge of the situation prior

to January 2008. Stage one had previously sold out as had Stage two and no issues arose regarding obtaining title. Moreover with the assistance of the T&T report, titles have issued and owners now know precisely of those conditions by which any building works must be under taken.

[42] It is mainly by reference to the terms of the contract that PPT answers the defendants' challenge.

[43] Clause 2.1 warranted that PPT had the approval of RDC to the subdivision in accordance with the scheme plan attached to the agreement. Unquestionably it did. Further it says that no evidence has been referred to by the defendants that there were representations that the subdivision would proceed precisely in accordance with the consent. Nor has there been evidence of any reliance upon that representation. Indeed the Court is aware that subdivision consents can and will change as development progresses. PPT's point is that the terms of the scheme plan was correct at the time the agreement was entered into by the defendants. Changes may and routinely do occur once civil engineering works are undertaken and the condition of the underlying land becomes apparent. One of the general conditions of the original consent provided:

> "That all engineering works required to be under taken to satisfy the conditions of this consent shall be carried out in accordance with the Rotorua Civil Engineering Standards (RCES) and the District Plan, to the satisfaction of the District Engineer."

[44] Further, as earlier noted clause 2.6 anticipates PPT was entitled to the benefit of changes to consent imposed by the RDC and for such to form part of their contract with purchasers.

[45] That clause clearly indicated that a purchaser took title subject to the vendor's rights expressed in that clause. Also in the final paragraph of this clause it is stated:

> "None of the matters referred to in the clause shall entitle the purchaser or any person claiming under him to damages or compensation or to make any objectionable requisition pursuant to clause 5.4 of the general conditions of sale."

[46] PPT's position is that when on 30 April 2009 it gave notice requiring settlement, it was at that time ready, willing and able to perform settlement and in particular it could give possession of land with the attendant title.

[47] Although some defendants received a discouraging response from some insurance companies when they enquired about house insurance, PPT claims those defendants did not give accurate information regarding the extent of any soil risk problem. In that outcome PPT's representatives contacted insurers and from one, Mr McCrae on behalf of AMI, it became clear that an earlier decision indicating non-insurability would be subject to review in a situation where there was a report from a geotechnical engineer which confirmed the property was considered adequate to build on.

[48] In response to a claim on behalf of some of the defendants that clause 2.4 of the agreement was unlawful and contrary to public policy. It is to be noted that section 225 (2)(a) and (b) of the Resource Management Act 1991 deemed that any agreement to sell the subdivision lot would be subject to conditions, inter alia:

a) Providing for a cooling down period by allowing a purchaser to cancel any agreement within 14 days of its making;

b) A sunset clause allowing a purchaser to cancel within two years after the grant of resource consent and one year after the date of the agreement, whichever is the later, if the vendor has not made reasonable progress in submitting a survey plan to the territorial authority.

[49] Clause 2.4 contained an acknowledgment by the purchaser that these provisions of the Resource Management Act 1991 did not apply. Instead the right of cancellation was limited to circumstances where the vendor had not provided title within two years of the date of the agreement. PPT submits the provision is clear and binding. Therefore considerations of illegality and public policy do not apply. Besides no issue in relation to clause 2.4 was ever raised by lawyers acting for the defendants on their purchases.

Considerations and reasons for judgment

[50] I do not think the defendants' submission concerning clause 2.4 of the agreement, as it affects section 225 of the Resource Management Act, assists the defendants. Apparently there is no authority at all in support of the submission advanced. I would be surprised if the parties could not agree to contract out of the provisions of the Resource Management Act except where clearly any such agreement was expressly overridden. Moreover there is no evidence to suggest any party would have contracted out within 14 days of signing the agreement and none has cancelled claiming they would have done so before the registration of the Consent Notice.

[51] Claims relating to the lack of insurability have emerged in the aftermath of cancellation for the purpose, one would suspect, to justify cancellation. Certainly it was not a factor significant in the decision at all to cancel. That said, the equivocal nature of Mr McCrae's representation on behalf of AMI may give cause for concern. It does not provide any certainty about the availability of insurance cover.

[52] The issue of saleability arises as an aspect of the defendants' claim of a change in the materiality of their bargain in the outcome of the registration of the Consent Notice. PPT challenges the defendants' valuation evidence claiming it does not adequately account for the drop in the market since the agreements were signed. But I think to some extent PPT's own evidence from Mr Kenny in his second affidavit does not necessarily do PPT's case much good. Though recent evidence indicates a number of sales, each of these appears to involve building-package purchasers. The prices are at a level commensurate with the reductions indicated by the defendants' valuation evidence. Also, the terms of purchase are clearly more favourable now than they were nearly three years ago. Some sections do not have to be paid for until the property has been on sold.

[53] The evidence of misrepresentation, although a feature of each defendant's case, is I think equivocal. The agreements for sale and purchase clearly allowed for up to two years for the title to be produced. The real estate agent deposed that she could only advise when the vendor anticipated title would be available further, and

some defendants acknowledge they were handed written promotional material which supported the indication given by the real estate agent.

[54] A number of defendants stressed how important it was for them to receive title at an early stage and that because of this they sold the properties they then had. However and significantly none of those defendants, or indeed any of them has offered the unavailability of title as a reason for their taking the step of cancellation.

[55] Most importantly for this case is the description of issues under the heading of "underlying problems". It concerns of course the discovery of significant soil issues, the actions of PPT in early 2008 to instruct T&T to undertake an investigation report, and the affect of the issue of the Consent Notice. In that assessment the Court should not of course forget it is dealing with the exercise of the its equitable jurisdiction.

[56] Mr Kenny's affidavit describes his becoming aware of the problems in the following manner:

> "Late March/early April I found out there was an issue with an underground layer of silt in some areas of the subdivision… I instructed [T&T] Limited who are recognised experts in this field, to provide specific engineering advice about some soft ground issues under the subdivision where it had been found that there was a layer of silt under some of the lots and at varying depths.
>
> The [T&T] advice… took nine months to complete and was peer reviewed by three lots of engineers… it was extremely thorough and I estimate the cost to be around $500,000 for the report and survey not including any extra work the plaintiff has had to carryout.
>
> …As a result of that [T&T] report, the Rotorua District Council issued a consent notice which related to the geotechnical restraints on individual lots and the notice was registered against the title."

[57] Mr Kenny advised regarding his enquiries to obtain an estimate of additional costs likely to be involved as a result of the geotechnical restraints. He records that his offer on 10 June 2009 to meet some of those was refused. He believes that the purchasers have not got anything less than they bargained for or anything substantially different.

[58] Mr Kenny's assurances that he was not any earlier aware of soil issues do not satisfy Mr Dugdale on behalf of the Vandys. He says there is nothing from Mr Kenny amounting to an unequivocal statement as to the state of his knowledge of soft ground issues on 7 October 2007 i.e. at the time of the Coffey Report. As Mr Dugdale submits, if Mr Kenny did know of problems on or about 7 October 2007 then there has been a nondisclosure amounting to false and misleading conduct. He further submits that even if Mr Kenny did not know of the soil problems until after 7 October 2007, PPT's initial attempts to enforce a contract without a candid disclosure of the problems, should disqualify PPT from obtaining the equitable remedy that it seeks. Mr Olphert, for the Northcrofts and Portlands, goes further and suggests that the plaintiff has been aware of silt problems since MTEC's report in 2004. Other evidence suggests that the presence in 2004 of silt does not necessarily identify the presence of a problem.

[59] T&T's report referred to the Coffey report. It is not clear how T&T came by that report. PPT said it did not learn of the Coffey Report until it received the T&T report. The Coffey report clearly identifies concerns regarding the settlement characteristics of the organic soils and that further evaluation of the suitability of the particular site investigated should be undertaken. Investigations undertaken by T&T revealed the presence of deposits similar to those identified in the Coffey report.

[60] The defendants are suspicious. They said it is almost inconceivable that PPT did not know of these issues prior to some of the defendants entering into agreements. Mr Wood for the defendants he represents submits this brings into question the claim of PPT that, until receipt of the T&T report, subsoil soft grounding issues had not been foreseen.

[61] In her affidavit Mrs Northcroft stated that as soon as the contents of the Coffey report were known, the RDC put a hold on further building consents for the subdivision. There has been no evidence provided to counter the suggestion. It raises the issue of how and when contents of the Coffey report were disclosed.

[62] Mr Wood submits that as a matter of logic the problems with the subsoil must have existed on the land prior to its development by PPT, or as a consequence of its

development there were acts or omissions by the developer which contributed to the problems with the subsoil. In the former case he submits there is clearly a potential claim against the original engineer, MTEC, for failing to detail or disclose the underlying problems with the soil, and in the latter case by a claim of negligence in relation to acts or admissions. Mr Wood notes that PPT has deposed that it has put MTEC on notice for possible claims. Obviously the defendants are not privy to the information which may support the legal basis of such a claim. All defendants' counsel are at one in submitting that the information contained in the earlier MTEC and Coffey report strongly suggests PPT had knowledge of issues prior to most of the agreements being entered into. Importantly for my consideration is the submission that the Court does not have any evidence concerning what prompted PPT to instruct T&T when it did in February and March 2009.

[63] This Court is not unfamiliar with issues of the kind raised by the defendants in these proceedings. Usually those challenges fail particularly upon claims of oral representations or that their bargain was much less than they thought it would be. Clear provisions of a written contract usually favour a vendor in that outcome. But, here it is different. This case is not just about a vendor fulfilling its obligation to provide title within the time specified in the contract. It is about underlying problems related to soil issues. It is not just about purchasers buying their piece of land – not when soil issues may affect the integrity of the bargain. The bare land is bought in order for a house to be built upon. In New Zealand that house is a source of long term investment. A concern is the knowledge PPT may have had regarding soil issues at or about the time the defendants' contracts were entered into. If there is knowledge then there is a basis upon which claims of misrepresentation and deceptive and misleading conduct can better be assessed. The availability of the discovery process may assist that.

[64] Regardless of that conclusion there is the question about whether or not the Consent Notice has delivered a product which is materially different from that which the parties contracted to buy, even though conceivably what was delivered by the Consent Notice was within the terms of the original agreement for sale and purchase.

[65] Mr Kenny's offer to pay a contribution for the engineering costs arising in the outcome of the Consent Notice does not necessarily cover the total of costs that may be involved. Other estimates suggests the costs could be much greater. Also Mr Kenny's offer is to be contrasted with an earlier indication he gave that all those additional costs concerned would be met by PPT.

[66] In the round and for the various reasons I have indicated, it seems to me claims of materiality cannot be adequately assessed on the basis of the available affidavit evidence. For similar reasons I believe that PPT's claims that some of the defendants have affirmed their contracts ought likewise be left for consideration at trial.

[67] It is not appropriate to make orders for specific performance upon PPT's summary judgment application.

Result

[68] The summary judgment applications are dismissed.

[69] Costs are reserved to be fixed in the outcome of a trial.

[70] All proceedings shall be adjourned to a telephone conference to be arranged by the Registrar in late February or March 2010. Before that conference counsel shall file memoranda regarding issues to be dealt with at that time.

Associate Judge Christiansen