IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

CIV 2008-419-1175

BETWEEN	FEATHERSTONE PARK DEVELOPMENTS LIMITED Plaintiff
AND	ROBERTSON HOMES LIMITED Defendant
AND	KELLY BRADLEY Counterclaim Defendant

CIV 2008-419-1174

AND BETWEEN	FEATHERSTONE PARK DEVELOPMENTS LIMITED Plaintiff
AND	WENDY DIAMOND Defendant
AND	KELLY BRADLEY Counterclaim Defendant

Hearing: 19-20 February 2009

Appearances: M D Talbot for the plaintiff/counterclaim defendant
G L Wilkin and V Whitfield for defendants

Judgment: 18 May 2009

JUDGMENT OF ALLAN J

In accordance with r 11.5 I direct that the Registrar endorse this judgment with the delivery time of 4.00 pm on Monday 18 May 2009

Solicitors/Counsel
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G Wilkin, Victoria St, Hamilton
V Whitfield, 5 Hill St, Hamilton

[1] The plaintiff is the developer of a residential subdivision, known as the St Petersburg Estate, situated on the northern outskirts of Hamilton. The defendants each purchased a section in the subdivision. Title to the defendants' sections having become available, they were called upon by the plaintiff to settle on 17 June 2008. But the defendants and a number of other purchasers had become dissatisfied with the overall standard of the subdivision and with what they claimed was the failure of the plaintiff to adhere to a number of representations made prior to the execution of the relevant agreements for sale and purchase.

[2] By letter dated 13 June 2008, the solicitors acting for six purchasers (including each of the defendants) gave notice to the plaintiff cancelling the agreement. The letter reserved the position of two further purchasers.

[3] Ensuing correspondence and negotiations proved inconclusive. At one point, Mr Bradley (managing director of the plaintiff) agreed to meet the defendants, but he did not adhere to the meeting arrangements. Ultimately, the plaintiff issued separate proceedings against each of the defendants and now seeks in those proceedings an order for specific performance by way of summary judgment. In each case, the defendant has filed a counterclaim again the plaintiff and Ms Kelly Bradley, who was a sales agent employed by the plaintiff. The proceedings raise virtually identical issues and were argued together. It is convenient to deliver a single judgment.

Summary judgment principles

[4] The principles applying to an application for summary judgment have been long established: see *Pemberton v Chappell* [1987] 1 NZLR 1; *Grant v New Zealand Motor Corporation Ltd* [1989] 1 NZLR 8; and *Westpac Banking Corporation v MM Kembla New Zealand Ltd* [2001] 2 NZLR 298.

[5] The plaintiff must satisfy the Court that the defendants have no fairly arguable defence to the claims brought against them. In other words, the plaintiff must show that there is no real question to be tried.

[6] In general, it is not possible to determine genuinely disputed issues of fact on affidavit evidence alone, and summary judgment will be inappropriate where the ultimate determination turns on issues that can be resolved only after a hearing of all of the evidence. But questions of law may be determined on an application for summary judgment, even where complex issues arise.

The issues

[7] In these present cases, Mr Talbot contends for the plaintiff that the defendants have not identified any reason for the Court to withhold the exercise of a discretion to make an order for specific performance.

[8] Ms Whitfield, who argued the case for the defendants, says, however, that there are numerous issues that can be resolved only in the context of a full hearing after the trial Judge has heard oral evidence.

The issues

[9] The defendants raise five issues in opposition to the application for summary judgment, each of which Ms Whitfield argues is sufficient to justify the refusal of the application. The defendants' claims are that:

a) The plaintiff and Ms Bradley engaged in misleading and/or deceptive conduct in breach of ss 9 and 14 of the Fair Trading Act 1986, entitling the defendants to seek an order declaring their respective contracts void;

b) The plaintiff and Ms Bradley made a number of pre-contractual misrepresentations to the defendants, entitling each of them to cancel their contract pursuant to s 7 of the Contractual Remedies Act 1979;

c) The plaintiff breached certain terms of its contract with each of the defendants, entitling them to cancel pursuant to s 7;

d) The plaintiff is in breach of a condition of the contract implied by s 225(1) of the Resource Management Act 1991 that the survey plan as agreed between the parties would be deposited, the defendants alleging that the plan as deposited is materially different from that agreed with the plaintiff;

e) The plaintiff has breached the Securities Act 1978 by offering securities to the public without a registered prospectus, in consequence of which the respective contracts are invalid and of no effect.

[10] Each of these contentions is discussed in turn.

Fair Trading Act 1986

[11] Sections 9 and 14 of the Fair Trading Act provide respectively:

> **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,—
>
> (a) make a false or misleading representation that a person has any sponsorship, approval, endorsement, or affiliation; or
>
> (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.
>
> (2) No person shall use physical force, harassment, or coercion in connection with the sale or grant or possible sale or grant of an interest in land, or the payment for an interest in land.
>
> (3) In this section interest, in relation to land, means a legal or equitable estate or interest in the land; and includes—

(a) A right of occupancy of the land, or of a building or part of a building erected on the land, arising by virtue of the holding of shares, or by virtue of a contract to purchase shares, in a company that owns the land or building; or

(b) A right, power, or privilege, over, or in connection with, the land.

[12] The defendants claim that a number of misleading and/or deceptive representations were made to them during the period leading up to the execution of their respective agreements for sale and purchase. These representations were in each case that:

a) the St Petersburg Estate was Hamilton's most exclusive address;

b) St Petersburg represented "romantic countryside living with city sophistication at your doorstep";

c) the sections would have a maximised reserve outlook;

d) there would be streamside walkways throughout the estate;

e) there would be a new café located on the estate;

f) beautiful architectural designed bridges would be located throughout the estate;

g) there would be a lake with a jetty;

h) there would be extensive planting;

i) large areas would be designated as reserves;

j) there was a large playground reserve;

k) St Petersburg was exclusive and that there would be no thoroughfare to other subdivisions;

l) a tennis court was to be constructed on the playground reserve, which would be owned by all residents.

[13] For the purpose of the present applications only, the plaintiff does not argue that the oral representations claimed to have been made by Ms Bradley were not made and indeed, although she filed an affidavit, she did not deny the claims made by the defendants about her representations.

[14] The defendants rely both on what they say was said to them by Ms Bradley, and upon certain marketing material provided by the plaintiff.

[15] Mr Talbot raises two threshold arguments. The first is that the representations relied on relate to future conduct and that the mere non-fulfilment of a promise when the time for performance arrives does not of itself establish that a promisor did not intend to perform it when it was made: see *Global Sportsmen Pty Ltd v Mirror Newspapers Ltd* (1984) 55 ALR 25 at [18]; *Thompson v Mastertouch TV Service Pty Ltd [No 3]* [1977] FLR 270 at 278; and *Albany Timber Distributors Ltd v Tan* HC AK CIV 2006-404-1336 11 May 2007.

[16] In response, Ms Whitfield argues that there is evidence to suggest that the plaintiff did not, at the time of the relevant promises, intend to carry them through, and further, that the representations were implied representations of fact and not of future intention. The distinction is important. I will return to it later.

[17] Mr Talbot's second point relates to the provisions of the agreements for sale and purchase, which are materially identical. Clauses 9.3, 9.7 and 15.5 of the agreements respectively provide as follows:

> 9.3 **Objections or Requisitions**: The purchase will not be entitled to make any objection or requisition or claim for compensation by reason of any alteration or variation to the Scheme Plan or Subdivision Plan as may become necessary by the direction of the Territorial Authority or by the practical exigencies of subdivision. The Vendor reserves the right to at any time alter or vary the Scheme Plan or Subdivision Plan (including, but not in limitation, the addition, alteration, variation or cancellation of any proposed easement shown on any such plan) in such manner as the Vendor in its sole and absolute discretion considers appropriate having regard to the circumstances, provided that the Purchaser will be entitled to a

reduction to the Purchase Price if any alteration to the area of the Lot materially diminishes the value of the Lot.

If the parties cannot agree on such reduction then the amount of the same will be determined by a registered valuer who will be agreed by the parties, or if they cannot agree on one, appointed by the President for the time being of the New Zealand Institute of Valuers. If any variation to the Purchase Price has not been determined by the Settlement Date then settlement will proceed on that date subject to an amount fairly representing the Purchase Price reduction sought by the Purchaser being retained by the Vendor's Solicitors as stakeholder for both parties until such variation has been determined.

For the avoidance of doubt, the Purchaser acknowledges that a reduction in the land area of the Lot by 5% or less compared with that shown on the Scheme Plan, on the part of the Vendor will not constitute a reduction that materially diminishes the value of the Lot and that the purchase price may be increased pro rata to the increase in area of the Lot if the area of the Lot is increased by more than 5%.

…

9.7 **No Warranty:** The Vendor makes no warranty as to:

(a) when the Subdivision Plan will be Deposited at LINZ; or

(b) when the Purchaser will be able to register a memorandum of transfer of the Lot to the Purchaser; or

(c) whether the final appearance of the Development or the Purchaser's Lot will be similar to any representation or advertisement provided to or viewed by the Purchaser;

to the effect that the Purchaser acknowledges that it has relied entirely on its own investigations and has not relied on any statement, representation or warranty made by the Vendor or the Vendor's agents.

…

15.5 **Representation:** the parties acknowledge that this agreement, and the annexures to this agreement, together with any approvals and consents in writing provided for in this agreement and given prior to the execution of this agreement, contain the entire agreement between the parties, notwithstanding any negotiations or discussions prior to the execution of this agreement, and notwithstanding anything contained in any brochure, 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, which is not set out in this agreement.

[18] Mr Talbot argues that the combined effect of these provisions is such as to preclude reliance by the defendants on the provisions in the Fair Trading Act. But it

is settled law that contractual provisions of this type are not capable of over-riding the Act: *Smythe v Bayleys Real Estate Ltd* (1993) 5 TCLR 454; and *Body Corporate 202254 v Taylor* [2008] NZCA 317 at [63].

[19] While the contractual provisions reproduced above are clearly of relevance in respect of other issues between the parties, I do not regard them as constituting a bar to the defendants' counterclaim insofar as they are based upon the provisions of the Fair Trading Act.

[20] I turn to the defendants' specific complaints.

[21] Each of them says that Ms Bradley, on behalf of the plaintiff, represented that the St Petersburg Estate would be an exclusive community, that the subdivision would not back onto any other subdivision, and that it would have a semi-rural outlook. The defendants also relied upon the plaintiff's marketing material and, in particular, upon a glossy brochure, which described the subdivision as "Hamilton's most exclusive address", and described the subdivision as constituting "romantic countryside living with city sophistication at your doorstep".

[22] As completed, the subdivision is not exclusive in the sense that it is self-contained; rather, there is a thoroughfare to a neighbouring subdivision, the Eton Estate. There is also a future connector road which the defendants believe will eventually be linked to State Highway 1. In that respect, it differs markedly from the scheme plan attached to the agreements for sale and purchase and the indicative plans shown on the advertising brochure.

[23] Each of the defendants says that the self-contained and exclusive character of the subdivision was a primary factor in their decision to purchase a section in St Petersburg.

[24] Mr Talbot argues that the defendants are not able to show that the plaintiff did not, at the time representations were made, honestly hold the belief that the subdivision would be completed in accordance with those representations and that, accordingly, the defendants cannot succeed on this point.

[25] Moreover, Mr Peter Bradley, the managing director of the plaintiff, says in evidence that the change to the road layout and, in particular, the connection to a neighbouring estate was a requirement of the local authority. He says:

> 5.12 With respect to the roads connecting St Petersburg, at the time that the subdivision was planned, St Petersburg was over a kilometre away from the closest residential area. Since that time, various other subdivisions and developments have forced HCC to rethink their planning strategies for that area.
>
> 5.13 As a result, HCC have required us to provide connections to St Petersburg's neighbouring subdivisions. I personally took every possible action, to avoid linking up with the neighbouring subdivision – to no avail. The final say is with the HCC who refused to grant a s224C certificate if we did not comply with their requirements. While I understand the purchaser's concerns, this matter was beyond Featherstone's control. I again note that this is exactly the type of contingency that all developers need to protect themselves against by including a clause such as clause 9.3 in the ASP.

[26] That explanation appears to be inconsistent with the amended subdivision resource consent released by the Hamilton City Council on 11 March 2008. There, the Council refers to the original condition 11, which was imposed to ensure that there was no access from the St Petersburg Estate to the adjoining Eton Estate. The Council records in its amended consent of 11 March 2008 the following:

> I. Original condition 11 was imposed to ensure that road access from River Road via St Petersburg Drive, to the adjoining development 'Eton Estate', was controlled and restricted. The Consent Holder has now obtained written approval from the developer of 'Eton Estate' to allow for road traffic to traverse in an unrestricted manner. This condition imposing a segregation strip is, thus, no longer relevant or necessary.

[27] The terms of the Council's consent strongly suggest that the decision to connect the subdivision to the neighbouring development was that of the plaintiff, and not of the Council. The letter, therefore, casts doubt upon the accuracy of Mr Bradley's evidence. On this point, it is not simply sufficient for the Court to hold that the defendants have failed to prove that the plaintiff did not, at the time of the representation, intend to give effect to it. There appears to be a credible argument that the plaintiff did not, at the time the representation as to exclusivity was made, intend the subdivision to be exclusive in the sense understood by the defendants.

The precise factual position would need to be explored at trial if summary judgment is refused.

[28] I note in passing that the defendants rely in part upon the evidence of a Mr Paine, another disgruntled purchaser. He swore an affidavit which includes hearsay evidence of his discussions with Council officers to the effect that the decision to connect the St Petersburg Estate to the Eton Estate by road was the decision of the plaintiff, and not that of the Council. However, given the hearsay character of that evidence, I set it to one side.

[29] The next complaint relates to the extent of reserve areas. The marketing brochure incorporated a scheme plan of the subdivision showing 84 sections and substantial provision for reserve areas. The same scheme plan was annexed to the agreements for sale and purchase. Those agreements are dated 29 August 2005 and 16 August 2005 respectively. But a scheme plan dated 21 September 2005 is quite different. It shows a total of 94 sections and a much smaller reserve area. The 10 additional sections have been created in part by the reduction in reserve area size and in part by a reduction in the size of some of the initial lots. For example, the section purchased by Robertson Homes Limited has been reduced from 913^{m2} to 870^{m2}.

[30] Mr Bradley's evidence on this point is that the early section layouts were provisional and lacking in accuracy. The later scheme plan was the product of more accurate measuring and planning.

[31] Ms Whitfield submits that Mr Bradley's evidence on this point cannot be taken at face value, in that the reduction in reserve area is achieved not by a correction of inaccuracies, but by the provision of additional lots and reductions in size of existing lots. Moreover, as she points out, it is likely that the plaintiff was aware of the changes at the time of execution of the agreements for sale and purchase, given that a later scheme plan incorporating the changes is dated only a few weeks after the agreements were executed.

[32] The defendants say that the significant lot sizes of all of the lots in the subdivision, and the generous provision made for reserves, formed part of their reasons for their eventual choice of subdivision.

[33] It is, in my view, arguable that the plaintiff knew at the time of the execution of the agreement that the scheme plan attached to the agreements did not accurately or fairly depict what the plaintiff intended at the time of execution of the agreements. But that is a matter of fact which would require resolution after a full trial.

[34] The next complaint concerns an alleged representation about the inclusion of a lake with a jetty in the subdivision. The defendants' expectations about this first arose by reason of the plaintiff's coloured brochure. It depicts a lake of considerable size (perhaps 100m x 30m at its widest point) incorporating a wooden jetty. Mr Robertson says that Ms Bradley confirmed that a large lake and jetty would be incorporated into the subdivision. Ms Diamond gives virtually identical evidence. Each presumed that plans were already in place for the creation of the lake.

[35] On the reverse of the advertising brochure there is a detailed plan of the subdivision. The lake is clearly marked (it appears to form part of a stream running through the estate) and the location of the proposed jetty is identified. Ms Diamond says that where the lake is supposed to be, there is simply an "ugly gully". Mrs Robertson says that the area "looks dreadful". Photographs tend to bear out those descriptions.

[36] Mr Bradley points that the scheme plan simply refers to a "wetland", although he accepts that the advertising material depicts what appears to be a lake. The term "wetland" is not used in the advertising brochure.

[37] Mr Bradley says that the plaintiff never intended to provide a lake. Yet the brochure and the representations made by Ms Bradley would lead potential purchasers to assume that the plaintiff did intend to create a lake. No doubt such a prominent feature would serve as a significant selling point in a subdivision which was heavily promoted as being Hamilton's most exclusive address. Again it is, in my view, fairly arguable that the representation is actionably misleading.

[38] The next complaint refers to the statement in the brochure to the effect that there would be "beautiful architectural bridges throughout". Each of the defendants understood that there would be three bridges across the waterway passing through the subdivision and were told by Ms Bradley that they would be made of schist. Ultimately, however, there is only one bridge. It is not made of schist and has not been designed by an architect. Moreover, the defendants complain it is dominated by an ugly safety barrier.

[39] Mr Bradley says that it became clear as the construction plans were developed that two minor bridges would not be required and that the single bridge has been designed by a civil engineering company as required by the Council.

[40] Ms Whitfield argues that the plaintiff had no adequate factual foundation for its representation as to the inclusion of multiple bridges and, therefore, the representation was not supported by the requisite belief: *Gunton v Aviation Classics Ltd* [2004] 3 NZLR 836. Again, I think that this point is arguable on the part of the defendants, although it is not, in my view, of the same significance as the issues previously discussed.

[41] The next point relates to the absence of streamside walkways. The advertising brochure specifies "streamside walkways throughout estate". The plan on the reverse of the brochure clearly depicts a walkway passing throughout the estate alongside the stream, connected to a further walkway linking the stream to the playground reserve.

[42] The defendants say that they were told by Ms Bradley that walkways would be provided throughout and that they would evolve as the subdivision was developed. They now say, and this is confirmed by Mr Bradley, that the plaintiff does not propose to construct walkways itself; rather, the Hamilton City Council intends, as a long-term project, to create walkways in various parts of the city. However, there are no indications that such walkways, if and when constructed, would accord with the scheme plan.

[43] Again, it is, in my view, fairly arguable by the defendants that the plaintiff never intended to provide walkways and that the representation to that effect in the brochure, along with Ms Bradley's representations, were misleading.

[44] The next point relates to a proposal for a café on the estate. The advertising brochure indicates "new café located on the estate". The depiction of the lake and jetty to which I have earlier referred incorporates the café which is shown as an attractive building, partially built over the lake and with provision for indoor/outdoor dining. Ms Bradley confirmed to each of the defendants that a café would be provided.

[45] For his part, Mr Bradley says that the reference to the café was simply intended as an opportunity for someone related to the project to develop a business, and that lot 65, the most suitable piece of land, was tentatively set aside for that purpose. He says that if no one else takes up the option, he will develop the business himself once physical residential development of the area is advanced. Mr Bradley's evidence on the point is somewhat vague. It appears that little, if anything, has yet been done to advance plans for a café.

[46] It is, in my view, arguable that the representations regarding the café were misleading and deceptive when made.

[47] Finally, the defendants contend that there has been misleading and/or deceptive conduct with respect to a proposed playground reserve and tennis court.

[48] The scheme plan appearing in the advertising brochure and annexed to the respective agreements for sale and purchase identifies a playground reserve abutting lots 53 and 54 and the south-western stormwater wetland reserve.

[49] Mr Robertson says that Ms Bradley identified the playground reserve area when driving the Robertsons around the subdivision prior to the execution of their agreement. He says that Ms Bradley indicated that the playground reserve would include a tennis court and that the reserve would be a communal facility for all residents to own, use and enjoy.

[50] Ms Diamond says that Ms Bradley likewise pointed out the playground reserve to her on the brochure and said that the reserve would be owned by all of the residents and that there would be a society created to look after the playground and other reserve areas.

[51] The reserve was identified in the scheme plan and in the application to the Hamilton City Council for subdivisional consent as Lot 90. In the consent dated 29 September 2005, the Council directed that Lot 90 be held in common with all other lots. But in a later consent dated 11 March 2008, that condition was amended. It provided that if a residential dwelling or any other type of land use was established on Lot 90, then all applicable financial contributions and levies would be payable.

[52] Each of the agreements provides for the establishment of the St Petersburg Society. It requires the defendants to become members of the society and obliges them to comply with the society's rules. The constitution of the society forms part of the agreements and defines the expression "community facilities" as:

> … all land, equipment, facilities and amenities owned, leased, licensed or which is subject to an easement or interest in favour of the Society or otherwise held or operated by the Society (as the Society may determine) from time to time. In particular, but not in limitation the Community Facilities includes a recreation (sic).

[53] The definition is incomplete. Presumably, it was intended to refer to "a recreation area" or "a recreation lot". The plain intention was that the society would become the owner of recreation facilities and that, as members of the society, lot owners would be required to maintain recreational facilities by the payment of levies, while at the same time having a role in the management of those facilities. But the society has not been established and the plaintiff has taken no step to transfer the recreational reserve.

[54] Mr Talbot submits that the lots purchased by the defendants carried no entitlement to a share in the recreational lot and that the plaintiff has no obligation to transfer Lot 90 to the society or to the purchasers generally. He argues the plaintiff is under no legal obligation to provide any recreational lot at all. It may or may not do so.

[55] Mr Bradley says in his evidence that Lot 90 "has been set aside for the playground reserve", but he is silent as to ownership and as to the existence of any fixed intention to transfer the lot out of the ownership of the plaintiff in the future.

[56] Given the reference in the scheme plan to the recreational lot, and to Ms Bradley's representations as to the ownership and enjoyment of the recreational reserve, the defendants have, in my opinion, raised a credible argument as to the availability of relief under the Fair Trading Act in respect of the manner in which the plaintiff has dealt with Lot 90.

[57] In order to succeed at trial, of course, the defendants would need to establish that they can satisfy the three-stage test set out in *AMP Finance Ltd v Heaven* (1997) 8 TCLR 144, namely that:

a) The relevant conduct was capable of being misleading;

b) The defendants were, in fact, misled by that conduct; and

c) It was reasonable for them to have been so misled.

[58] Mr Talbot devoted considerable time and effort to an argument addressing this test and submits that neither defendant satisfies it. In particular, he argues that:

a) The defendants' pleadings are inadequate in respect of the claim that the plaintiff did not intend to honour the alleged promises at the time they were made and as to the absence of a sufficient factual foundation to support the making of the promises;

b) There was no evidence that the time for performance of most of the alleged promises has arrived or passed. In other words, he says, it remains open for the plaintiff to comply with them;

c) It is necessary to bear in mind the fact that there was a commercial aspect to each of these purchases in that the Robertsons were experienced builders, who had entered into similar agreements in the

past, and Ms Diamond had purchased the property primarily as an investment and for on-sale;

d) The defendants' claims against the plaintiff are excluded by the fact that the agreements expressly empowered the plaintiff to exercise its discretion to change the scheme plan, excluded all warranties and provided that the agreements would constitute the entire agreement between the parties.

[59] In my view, the defendants' pleadings are sufficient to support their summary judgment defence. The remaining matters raised by Mr Talbot must await trial. There is a credible argument that the defendants meet the *Heaven* test.

[60] I conclude that, taken in their totality, the claims made by the defendants under the Act raise a credible argument for relief. Section 43 confers on the Court power to make a wide range of orders. Remedies under the Act are discretionary. There is valuation evidence which suggests that the defendants' sections are worth 10-15% less as a result of the apparent failure of the plaintiff to fulfil the alleged representations.

[61] Although the apparent losses, on the evidence available, are relatively limited, I agree with Ms Whitfield that once it is determined that there is an arguable case under the Act, then the extent of liability, if any, and the selection of an appropriate remedy, are matters to be determined at trial. In those circumstances, specific performance is not appropriate at the summary judgment stage.

The Contractual Remedies Act 1986

[62] As an alternative argument, Ms Whitfield says that the defendants have raised an arguable case for relief under the Contractual Remedies Act 1986. Section 7 of that Act entitles a party to cancel a contract if:

(a) That party has been induced to enter into the contract by a misrepresentation, whether innocent or fraudulent, made by or on behalf of another party to the contract; and

(b) The effect of the misrepresentation is to substantially reduce the benefit of the contract to the cancelling party.

[63] Given my conclusions in respect of the claims made under the Fair Trading Act, it is necessary to devote only brief attention to this and other arguments.

[64] As under the Fair Trading Act, an actionable misrepresentation will be as to an existing fact or some past event. The state of mind of the maker of a representation is an existing fact: see *Ware v Johnson* [1984] 2 NZLR 518 at 537; and *New Zealand Motor Bodies Ltd v Emslie* [1985] 2 NZLR 569 at 593.

[65] Counsel are agreed that the relevant analysis under the Contractual Remedies Act is essentially the same as that under the Fair Trading Act.

[66] Mr Talbot submits that any claim under the Contractual Remedies Act is precluded by virtue of clauses 9.3, 9.7 and 15.5 of the agreements set out earlier in this judgment.

[67] Section 4 of the Act provides:

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.

(2) If a contract, or any other document, contains a provision purporting to preclude a Court from inquiring into or determining the question whether, in respect of any statement, promise, or undertaking made or given by any person, that person had the actual or ostensible authority of a party to make or give it, the Court shall not, in any proceedings in relation to the contract, be precluded by that provision from inquiring into and determining that question.

(3) Notwithstanding anything in section 56 or section 60(2) of the Sale of Goods Act 1908, this section shall apply to contracts for the sale of goods.

(4) In any proceedings properly before a Disputes Tribunal, this section shall not limit the powers of the Tribunal under section 18(7) of the Disputes Tribunals Act 1988.

[68] The applicable principles have been discussed on numerous occasions: see *Brownlie v Shotover Mining Ltd* CA181/87 21 February 1992; *Snodgrass v Hammington* (1995) 10 PRNZ 672; and *Mayoral Drive Trustee Company Ltd v Lal* HC AK CIV 2007-404-1902 26 October 2007.

[69] In *Brownlie*, the Court of Appeal emphasised the importance in a commercial context of declining to go behind a "no reliance" clause in the absence of fraud. That approach has recently been followed in the *Mayoral Drive* case. In each of those instances, the Court was satisfied that the contract was essentially commercial in character and that the parties had separate legal advice.

[70] On the other hand, in *Snodgrass*, the Court considered that it should enquire into pre-contractual representations where the contract was for the sale and purchase of a residential property and the parties did not have the benefit of legal advice before signing the agreement.

[71] Here there are factors which, at the summary judgment level, suggest that it is at least arguable that s 4 should be applied in favour of the defendants:

a) For the Robertsons, although it was by no means their first purchase, the section was intended to be the site of a future family home;

b) There is no evidence that Ms Diamond was experienced in the sale and purchase of land;

c) In each case, as the defendants have pointed out in their evidence, the purchase was made not solely on the basis of the purchase price, but because the subdivision was promoted as offering the highest available quality of environment and facilities in the Hamilton region;

d) Neither defendant had the benefit of legal advice before the agreement was executed;

e) The parties were not of equal commercial strength. The plaintiff is an experienced property developer. Sections were at the time selling quickly and for peak prices;

f) The agreement for sale and purchase was not a common form document. Mr Bradley says that it was prepared especially for this particular subdivision; together with its annexures and schedules, it runs to some 62 pages.

[72] In my opinion, it is arguable that the facts of this case are such as to permit the Court to enquire into the claimed representations, notwithstanding the provisions of the agreement.

[73] Mr Talbot also relies upon s 5 of the Act, which he contends confers primacy on cl 9.3 of the agreement and which, he claims, precludes any claim by the defendants in respect of the alleged misrepresentations. I disagree. Section 5 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.

[74] Clause 9.3 of the agreement provides a remedy only for a reduction in the size of a lot. It provides no remedy in respect of any other matter, including any claimed misrepresentation. The defendants make no specific claim in respect of the diminution in the size of their own lots. Accordingly, cl 9.3 does not prevent the

Court from proceeding to a determination of the question of whether the agreement was validly cancelled for misrepresentation.

[75] The defendants, through their solicitors, purported to cancel the agreements by letter dated 13 June 2008. They did so in reliance on s 7(4)(b)(i) of the Contractual Remedies Act. Ms Whitfield submits that the effect of the misrepresentations was to reduce substantially the benefits of the agreements to them.

[76] In *Jolly v Palmer* [1985] 1 NZLR 658, at 662, Hardie Boys J said that in respect of a claim that a contract has been validly cancelled:

> Each case must be considered on its own facts, and an individual determination made having regard to the nature of the contract and of its subject-matter and to all the circumstances of the case. In a house purchase, recognition must be given to the fact that values, and hence benefits, are not capable of precise assessment and are likely to be affected by a range of extraneous factors both objective and subjective.

[77] There the Court regarded a reduction in value of 11 per cent as insufficiently substantial to qualify for cancellation, but in that case there appeared to have been a subsequent affirmation by the purchaser. Further, the Judge found that the defendants had cancelled not so much by reason of a misrepresentation as to the Government valuation, but because they were unable to obtain mortgage finance. Whether any reduction in value may be substantial enough to qualify for cancellation will be a question for the trial Judge.

[78] In the present case, there is valuation evidence that suggests that the Robertsons' section would have been worth $275,000 had the subdivision been completed in accordance with the marketing material, but that it is currently worth only $245,000. In the case of Ms Diamond the comparable figures are $226,000 and $200,000. But Ms Whitfield submits the loss to the defendants is not solely financial. She refers by way of example to the evidence of Ms Diamond who says:

> The subdivision that has been completed does not even compare to what we were promised. There are none of the promised features, no café, no lake, no playground reserve/tennis court, no streamside walkways, no planting. It is not "exclusive" and has none of the appeal that attracted us in the first place. Quite simply – it is not what we purchased.

[79] Ms Whitfield submits that:

> St Petersburg was sold as something better than the rest – this was the marketing strategy. What has been provided is inferior to other subdivisions and does not match the marketing material and statements made – which was all the purchasers had to rely upon when making their decision to buy.

[80] Mr Talbot submits that, essentially, these defendants were purchasing a large section in a quality subdivision, and although the nature of the surroundings may be important, the key factor is the quality and the size of the section itself. He argues that other factors will not have any significant impact on the ultimate value of a piece of real estate with a substantial good quality home on it.

[81] There is some force in that submission, but in my opinion, the defendants have at least an arguable case that the cancellations of 13 June 2008 were valid. I think that the assessment required by s 7 of the Contactual Remedies Act ought to be conducted at the trial.

Breach of contract

[82] The statements of defence to the plaintiff's claim assert two distinct classes of breach of contract. The first group is based on the representations made to the defendants about the quality of the subdivision and its facilities.

[83] Ms Whitfield submits that there exists between the parties a collateral contract of the type identified in *Couchman v Hill* [1947] KB 554 and *AM Bisley & Co Ltd v Thompson* [1982] 2 NZLR 696. In each of those cases, collateral oral assurances were upheld despite exclusion clauses purporting to limit a defendant's liability.

[84] The representations relied upon are those discussed earlier in this judgment. Given my overall conclusions, it is unnecessary to give further consideration to this aspect of the defendants' case, which will be for ultimate determination at trial.

[85] The second aspect of the defendants' claims against the plaintiff for breach of contract concerns cl 4.1 of the agreements, which provides:

> **4.1 Development:** The Vendor will proceed with completion of the Development and complete the Works in a proper and workmanlike manner and, subject always to the provisions of this Agreement, substantially in accordance with the Resource Consents and the Scheme Plan.

[86] Nothing in the agreements purports to exclude the plaintiff's liability for breaches of this clause.

[87] For summary judgment purposes, the defendants rely upon the evidence of a Mr Jellyman, a witness with over 35 years involvement in the construction industry, including experience as a structural inspector.

[88] The plaintiff has chosen not to meet Mr Jellyman's evidence. Instead, both Mr Bradley, in his evidence, and Mr Talbot, in argument, invite the Court to disregard Mr Jellyman's evidence on the ground that he lacks sufficient expertise.

[89] I am not prepared to do that. I am perfectly satisfied that Mr Jellyman has sufficient qualifications and experience to qualify him as an expert in respect of the matters upon which he has given evidence, namely the construction of footpaths, the quality of bridge design and construction, drains, the quality of chip seal roading, retaining walls, geotec cloth in the planting area, and patched roading.

[90] The defendants say that the plaintiff's work in many areas of the subdivision falls well below the high standards claimed by it in its promotional material and that the plaintiff is in breach of cl 4.1. Mr Jellyman's evidence tends to bear out the defendants' claim.

[91] Mr Talbot complains that Mr Jellyman's evidence does not identify any formal standards or the manner in which they have been breached; nor does he refer to the relevant provisions of the building code or by-laws; nor does he provide any supporting data. For example, Mr Talbot submits, a retaining wall of which Mr Jellyman is critical has been "signed off by the Hamilton City Council".

[92] It is unnecessary to do any more than to set out these competing contentions. Whether, if the defendants' claims are made out, they are sufficient to justify cancellation can only be determined at trial.

Section 225 Resource Management Act 1991

[93] Section 225(1) of the Resource Management Act 1991 provides:

> **225 Agreement to sell land or building before deposit of plan**
>
> (1) Any agreement to sell any land or any building or part of any building that constitutes a subdivision and is made before the appropriate survey plan is approved under section 223, shall be deemed to be made subject to a condition that the survey plan will be deposited under the Land Transfer Act 1952 or in the Deeds Register Office, as the case may be; and no such agreement is illegal or void by reason that it was entered into before the survey plan was deposited.

[94] Ms Whitfield submits that the expression "survey plan" appearing in s 225(1) must mean the survey plan as agreed between the parties. She claims to draw support for that proposition from *WR Clough & Sons Ltd v Martin* [1978] 1 NZLR 313, where a local authority condition would have required the provision of a six metre wide service lane across the land being purchased. The Court of Appeal there held that the subdivision in the form approved by the Council was materially different from that to which the purchaser had initially agreed.

[95] Mr Talbot says that the effect of s 225 is effectively excluded by virtue by cl 9.3 of the agreements. Ms Whitfield argues that s 225 was inserted to protect purchasers of land that had not yet been subdivided and that, for public policy reasons, it should not be possible for developers to contract out of its provisions.

[96] The effect of s 225(1) was extensively discussed by the Supreme Court in *Steele v Serepisos* [2007] 1 NZLR 1, where at [22] Tipping J explained that the subsection:

> … did not, as its literal terms might suggest, create a statutory warranty by the vendors that they would deposit the plan, come what may. The purchaser rightly did not argue for that construction. The purpose of s 225(1) is essentially permissive, that is, it allows contracts to be entered into prior to the deposit of the plan but necessarily subject to its deposit. To construe the section as also creating a warranty by the vendor that the plan will be deposited would create a substantial imbalance of rights and obligations between the parties outside the statutory purpose.

[97] The subsection has been interpreted by the Courts so as to make it workable in practice. The vendor is to be treated as having agreed to take reasonable steps to secure a deposit of the relevant plan. But the vendor is not held to the obligation if it would not be reasonable to do so. Neither is the vendor to be held to the identical plan, because local authority requirements may give rise to necessary modification.

[98] The approach for which Ms Whitfield argues would render the subsection unworkable in practice. It would require vendors to procure the deposit of an initial scheme plan without any amendment whatever. The imposition of such an implied contractual duty would fly in the face of practical realities of the subdivision of land, and is also contrary to the observations of the Supreme Court in *Steele v Serepisos.*

[99] I do not regard this aspect of the defendants' argument as justifying the refusal of summary judgment.

Securities Act 1978

[100] Section 37 of the Securities Act 1978 provides:

> **37 Void irregular allotments**
>
> (1) No allotment of a security offered to the public for subscription shall be made unless at the time of the subscription for the security there was a registered prospectus relating to the security.
>
> (2) No allotment shall be made of an equity security or a participatory security or a unit in an unit trust offered to the public for subscription … unless the amount stated in the registered prospectus relating thereto as the minimum amount which, in the opinion of the directors of the issuer, must be raised by the issue of the securities in order to provide for the matters specified in regulations made under this Act, is subscribed, and that amount is paid to, and received by, the issuer within 4 months after the date of the registered prospectus; and, for the purposes of this subsection—
>
> (a) A sum shall be deemed to have been paid to, and received by, the issuer if a cheque for that sum is received in good faith by the issuer and the directors of the issuer have no reason to suspect that the cheque will not be paid:
>
> (b) The amount so stated in the registered prospectus shall be reckoned exclusively of any amount payable otherwise than in cash.

(2A) Subsection (2) does not apply if there is no minimum amount which, in the opinion of the directors of the issuer, must be raised by the issue of the securities in order to provide for the matters specified in regulations made under this Act.

(3) An allotment of a participatory security offered to the public for subscription must not be made unless, at the time of allotment, a written statement from the subscriber authorising the subscription for that particular security has been received by—

(a) the statutory supervisor; or

(b) a person appointed by the statutory supervisor to receive, on the statutory supervisor's behalf, that written statement or written statements of that class.

(4) Any allotment made in contravention of the provisions of this section shall be invalid and of no effect.

(5) Where subscriptions for securities are received by or on behalf of an issuer, but, by virtue of this section, the securities may not be allotted, or for any reason the securities are not allotted, the issuer shall ensure that—

(a) Repealed.

(b) The subscriptions, together with such interest (if any) as has been earned thereon, are repaid to the subscribers as soon as reasonably practicable.

(6) If any subscriptions to which this section applies are not so repaid within 2 months after the date on which the subscriptions were received by or on behalf of the issuer (or, in any case to which subsection (2) of this section applies, within 5 months after the date of the registered prospectus), the issuer and all the directors thereof shall be jointly and severally liable to repay the subscriptions, together with interest at a rate prescribed from time to time by regulations made under this Act from the date on which the subscriptions were received by or on behalf of the issuer:

Provided that a director shall not be so liable if he or she proves that the default in the repayment of the subscriptions was not due to any misconduct or negligence on his or her part.

(7) For the purposes of the Limitation Act 1950, any sum recoverable under subsection (5) or subsection (6) is not a penalty or forfeiture or sum by way of penalty or forfeiture.

[101] As earlier discussed, the agreements require the purchaser defendants to become members of the St Petersburg Society and to fulfil the obligations of a member of the society "as set out in the Constitution, including paying any levies". The obvious intention of the agreements and the constitution was that the society

would hold community facilities. Unfortunately, the definition of the term "community facilities" in the constitution is incomplete. But it is common ground that the society's purpose is to hold common property on behalf of all subdivision owners.

[102] Ms Whitfield argues that the plaintiff has failed to comply with the requirements of the Securities Act and that the agreements are, therefore, invalid and of no effect in terms of s 37(4) of the Act.

[103] The same argument was considered against a similar factual background in *Whisper Cove Limited v Wright* HC AK CIV 2007-404-7931 26 May 2008 where Lang J usefully analysed the issues in the following way:

> [26] This issue arises because of the requirement in the contracts that the purchaser must become a member of the Society. This requirement brings into play the provisions of the Securities Act 1978 ("the Act"), because such a requirement amounts to an offer to take up a "participatory security" in terms of that legislation. The Act applies to such memberships notwithstanding the fact that they are not investments in the conventional sense. The Society is established solely as a convenient medium through which the residents in a property development can hold, use and enjoy communal facilities. It also provides a convenient and equitable means of funding the maintenance of those facilities.
>
> [27] Ordinarily, therefore, the developer would be required to comply with the disclosure requirements of the Act. In particular, it would need to comply with the provisions of the Act relating to issuing of a prospectus and investment statement. It is common ground that neither Kawau Holdings nor Whisper Cove has complied with those requirements. Failure to comply with the disclosure requirements of the Act will render an allotment (in this case the contracts) invalid and of no effect: s 37(4) of the Act.
>
> [28] It is, however, open to the Securities Commission to grant exemptions from the requirements of the Act, on such terms and conditions as it thinks fit.
>
> [29] On 15 April 1999 the Securities Commission promulgated, by publication in *The Gazette*, the Securities Act (Residential Property Development) Exemption Notice 1999. That notice ("the 1999 Notice") repealed and replaced an earlier notice that had been gazetted in 1997. Both notices apply to participatory securities in the form of membership of an incorporated society that confers ownership rights and the right to use communal facilities in a residential development.
>
> [30] Clause 3 of the 1999 notice exempts the developer of a residential subdivision from the requirements of the Act. The exemption only applies, however, where the developer meets the conditions prescribed by clause 4 of the Notice. Whisper Cove contends that it has met all of those conditions.

As a result, it maintains that it is exempt from complying with the disclosure requirements of the Act. The defendants, however, contend that Whisper Cove has not met the conditions in clause 4 of the 1999 Notice. As a result, they maintain that each of the contracts is invalid and of no effect by virtue of s 37(4) of the Act.

Condition 4(d) – Transfer of communal facilities to Society

[31] The principal argument for the defendants in this context is that Whisper Cove has failed to comply with condition 4(d) of the 1999 Notice. That condition provides:

> 4. **Conditions** – The exemptions granted by clause 3 are subject to the conditions that -
>
> …
>
> (d) No settlement of a sale agreement is completed until, -
>
> (i) If the developer represents or agrees that communal facilities will be held by a society, the communal facilities are owned or leased by the society; and
>
> (ii) If land is included in the communal facilities, the society holds a certificate of title for an estate in fee simple, or a leasehold estate, under the Land Transfer Act 1952 or for a stratum estate under the Unit Titles Act 1972; and

[32] The Notice defines "communal facilities" as follows:

> "Communal facilities" –
>
> (a) Means the land within a development designated by a developer or the society for use by the owners or certain classes of owners of residential properties; and
>
> (b) Includes chattels, fixtures, and fittings used, or intended, adopted, or designed for use, in connection with the use of the land by those owners:

[33] In order to comply with condition 4(d), a developer must therefore ensure that certain land is transferred to the Society before it proceeds to complete the settlement of any sale agreement. The developer must transfer to the Society any land that the developer has represented or agreed will be designated for use by owners of the residential properties in the development.

[104] In that case, for summary judgment purposes, Lang J held that the allotments concerned were arguably invalid and of no effect, the developer being unable to bring itself within condition 4(d) of the Securities Act (Residential Property Development) Exemption Notice 1999.

[105] Mr Talbot submits that the securities legislation is not yet engaged in this case because the plaintiff has not decided whether or not the society will become the owner of Lot 90 (the recreational reserve), or indeed any other communal facilities. If and when a decision is taken to transfer any property to the society, the plaintiff will comply with the Act or apply to the Securities Commission for a specific exemption, he says.

[106] Mr Talbot also submits that, in any event, cl 4 of the exemption notice referred to in the judgment of Lang J has been complied with. But it is difficult to see how that can be so, given that no transfer has yet occurred.

[107] It must be said that the stance adopted by the plaintiff is somewhat disconcerting. No reason has been given for a deferral of the decision as to the ownership of Lot 90. One available inference is that the plaintiff does not wish to make a decision until the present litigation is over because to undertake a transfer now would be to run the risk of difficulty under the Securities Act. On the other hand, to make a definite decision not to transfer Lot 90 to the society at all gives teeth to the defendants' misrepresentation claims.

[108] In my opinion, it is simply not sufficient for Mr Bradley to say that he has not yet made up his mind as to the ultimate ownership of Lot 90. The defendants were given by Ms Bradley to understand that the society would own the lot.

[109] A party that is seeking specific performance is not, in my view, entitled to assert that it has yet to decide what the defendants are to receive in return for the purchase price. Summary judgment is inappropriate in these circumstances.

Ms Bradley's position

[110] It is contended on behalf of Ms Bradley that her role was limited and that she was a mere conduit of information. Accordingly, Mr Talbot submits, she should not be found to have been acting in trade in respect of any of the conduct alleged against her.

[111] In my view, that is a matter for trial. There is no application to strike out the counterclaim against her.

Result

[112] For the foregoing reasons, the plaintiff's applications for summary judgment are dismissed in respect of each defendant.

[113] At the request of counsel, costs are reserved.

[114] The Registrar is asked to refer these files to an Associate Judge for case management purposes.

C J Allan J