IN THE HIGH COURT OF NEW ZEALAND
PALMERSTON NORTH REGISTRY

CIV 2009-454-172

BETWEEN	SHETLAND FARMS LIMITED Plaintiff
AND	PLATEAU FARMS LIMITED First Defendant
AND	FERRY VIEW FARMS LIMITED Second Defendant
AND	F R CRAFAR, AJ CRAFAR AND EJ CRAFAR Third Defendants

Hearing: 11 May 2009

Appearances: T.P. Cleary - Counsel for Plaintiff
A.N. Isac - Counsel for Defendant

Judgment: 21 May 2009 at 11.00 am

JUDGMENT OF ASSOCIATE JUDGE D.I. GENDALL

This judgment was delivered by Associate Judge Gendall on 21 May 2009 at 11.00 a.m. pursuant to r 11.5 of the High Court Rules.

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Introduction

[1] This is an application for summary judgment seeking an order for specific performance on the part of the purchaser of an agreement for sale and purchase. The first defendant is sued as original purchaser, the second defendant as nominated purchaser and the third defendants as personal guarantors.

[2] The application is opposed by the defendants.

Background Facts

[3] Under the Agreement for Sale and Purchase in question, an Agreement dated 10 April 2008 (the "Agreement"), the plaintiff agreed to sell to the first defendant the major part of the plaintiff's dairy farm at Bulls for an agreed price of $23,150,000 (plus GST if any). This comprised approximately 378 hectares being land and buildings contained in Certificates of Title WN29C/164, 335989, WN37A/247, WN530/289 (less 7.8 hectares) and WNF3/1375 (the "Agreement Land"). Although as I have noted the Agreement Land was the predominant part of the plaintiff's dairy farm, the Agreement did not cover the entire operating farm area. In particular, it excluded first a 7.8 hectare block (the "7.8 Hectare Block") which formed part of Certificate of Title WN530/289, and, secondly a 1.356 hectare area contained in Certificate of Title WN530/288, on which was situated the farm homestead (the "House Section"). The 7.8 Hectare Block is located immediately to the north of the House Section.

[4] To effect part of these arrangements, pursuant to clause 25.0 of the Agreement, the plaintiff agreed to subdivide the 7.8 Hectare Block from Certificate of Title WN530/289 as follows:

> "The parties acknowledge and agree that excluded from this Agreement is an area of land of approximately 7.8 hectares subject to survey, being the area shown as Lot 2 on the plan annexed hereto and being presently part of the land in Certificate of Title WN530/289. The vendor shall at the vendor's cost proceed with all due diligence to complete the subdivision of this land from the land in Certificate of Title WN530/289 …"

[5] Of the total price to be paid for the Agreement Land of $23,150,000 plus GST, a deposit of $500,000.00 plus GST was paid initially. The parties agreed, pursuant to clause 24.0 of the Agreement, that a further $18.65 million plus GST was to be paid for the major part of the farm containing 325.3896 hectares for which the separate Certificates of Title WN29C/164, 335989, WN37A/247, and WNF3/1375 had been issued, on the possession date being 12 May 2008. Possession of the entire Agreement Land was to be given on that date. The balance of the purchase price remaining being $4 million plus GST was to be paid on "the final settlement date", defined as the "fifth (5) working day following the date on which the vendor has given notice that a search copy … of the title for the balance of the land presently contained in Certificate of Title WN530/289 is obtainable". The vendor was also to pay interest at 8% p.a. on the $4 million balance purchase price from the possession date until the final settlement date. Set out in full, clause 24.0 provided as follows:

> "24.0 The parties agree that the balance of the purchase price will be paid or satisfied as follows:
>
> (a) $18.65 million plus GST thereon being full and final settlement for 325.3896 ha contained in Certificates of Title WN29C/164, 335989, WN37A/247, and WNF3/1375 on the possession date.
>
> (b) As to the balance of $4 million plus GST thereon on the fifth (5) working day following the date on which the vendor has given notice that a search copy, as defined in Section 172A of the Land Transfer Act, of the title for the balance of the land presently contained in Certificate of Title WN530/289 is obtainable ("the final settlement date"). On the final settlement date the purchaser shall also pay to the vendor interest at 8% p.a. on the balance purchase price from the possession date until the final settlement date. Upon payment of the balance purchase price and interest as set out above the vendor shall transfer to the purchaser title to the balance land free of any mortgages or charges but subject to the encumbrances referred to in the Schedule of Land. If the vendor is required to account to the Inland Revenue Department for GST on the balance purchase price prior to the final settlement date, then in such case the purchaser shall pay the GST to the vendor five (5) days prior to the date the vendor has to account to the Inland Revenue Department."

The parties thus agreed under this clause 24.0(b) to have the 7.8 Hectare Block subdivided from Certificate of Title WN530/289, leaving the remainder of the land in that title ("the Residual Land") to be transferred to the purchaser under a new separate title on the "final settlement date".

[6] Pursuant to clause 36.0 of the Agreement, the third defendants agreed to personally guarantee payment of the purchase price and performance of all the purchaser's obligations under the Agreement. The third defendants are directors of the first and second defendants. Mr. Frank Robert Crafar, the first-named third defendant, signed the Agreement on behalf of the other third defendants pursuant to an Enduring Power of Attorney.

[7] On 7 May 2008, the first defendant advised the plaintiff that it had nominated the second defendant into the Agreement as purchaser. Several days later, possession date under the Agreement being 12 May 2008 arrived. On that date, the second defendant took possession of the Agreement Land and became the registered proprietor of the land in Certificate of Titles WN29C/164, 335989, WN37A/247 and WNF3/1375. In turn, pursuant to clause 24.0(a) of the Agreement, the plaintiff received payment of $18.65 million plus GST. But, as I understand the position, when subsequently the plaintiff took steps to action the subdivision provided for in clause 25.0 of the Agreement, the Rangitikei District Council indicated that the 7.8 Hectare Block could not be the subject of a separate issued title.

[8] So, it seems the parties then agreed to enter into a second agreement. By this Agreement for Sale and Purchase which was dated 7 July 2008 (the "Second Agreement"), the second defendant agreed to purchase the remainder of the farm from the plaintiff. This constituted the House Section (Certificate of Title WN530/288 containing 1.356 hectares and the homestead) and the 7.8 Hectare Block. Clause 19.0 of the Second Agreement provided however:

> "19.0 The vendor undertakes with all due diligence to have the scheme plan of subdivision attached hereto approved by the Rangitikei District Council and will forthwith lodge for deposit in the Wellington Land Titles Office a plan of subdivision to obtain one amalgamated title for the two parcels of land described on the face of this Agreement. The parties acknowledge that the Rangitikei District Council will not permit

> a separate title to issue for the 7.8 hectare parcel of land being subdivided from CT WN530/289."

[9] The scheme plan of subdivision attached provided for an amalgamation of proposed Lot 1 on the plan, "the Residual Land" (which comprised approximately 53.13 hectares of the total 60.9274 hectares presently contained in Certificate of Title WN 530/289) with Certificate of Title WN 37A/247. Consequently, in addition to an amalgamation between the House Section and the 7.8 Hectare Block, this remaining 53.13 hectares contained in Certificate of Title WN530/289 (being the "Residual Land") was to be amalgamated with the land contained in Certificate of Title WN37A/247, which had been transferred to the second defendant on 12 May 2008. The result of this was that first, the Residual Land would need to be transferred to the second defendant as the owner of Certificate of Title WN 37A/247 before issue of title to the amalgamated land would be possible, and secondly the Residual Land would not be covered by its own separate Title as originally envisaged in clause 25.0 of the Agreement.

[10] Returning to the Agreement, it includes under its "General Terms of Sale" a clause at 3.16 entitled "New Title Provision". This provides for a deferment of settlement where the transfer of the property in question is to be registered against a new title yet to be issued and a search copy of that title is not obtainable by the fifth working day prior to the named settlement date. In this situation and of particular relevance in the present case is paragraph 3.16(2), which provides:

> "(2) This subclause shall not apply where it is necessary to register the transfer of the property to enable a plan to deposit and title to the property to issue."

Both parties accept that sub-paragraph (2) of paragraph 3.16 is clearly applicable to this case, and that this paragraph 3.16 therefore cannot determine the settlement date in this particular case.

[11] In a letter dated 27 August 2008, the plaintiff's solicitor advised the second defendant that, due to the amalgamation condition, the Residual Land would need to be transferred in conjunction with the deposit of the new subdivision plan and not as originally intended in terms of clause 24.0 (b) of the Agreement. As I have noted,

that subdivision plan required amalgamation of the Residual Land with Certificate of Title WN37A/247, and amalgamation of the House Section with the 7.8 Hectare Block.

[12] Then, on 5 September 2008, the plaintiff's solicitor advised the second defendant that the subdivision plan in question had been approved as to survey and that the ss 223 and 224 certificates had issued. On 24 September 2008, he suggested a settlement date of 3 October 2008 and proposed to hold the $4 million plus GST proceeds of sale in his firm's trust account until title for the amalgamated land had issued. The second defendant did not accept this settlement date, and on 26 September 2008 proposed settlement within 12 months instead. The plaintiff's subsequent offer to extend settlement to 10 October 2008 was also rejected. In a Settlement Notice dated 13 October 2008, the plaintiff sought payment of the outstanding purchase price within 12 working days of service. The second defendant asserted that the Settlement Notice was invalid. It is interesting to note in passing at this point that the interest rate for late settlement under the Agreement is 14%.

Summary Judgment

[13] The Court's power to grant summary judgment is set out in r 12.2 of the High Court Rules, which states:

> "………
>
> (1) The court may give judgment against a defendant if the plaintiff satisfies the court that the defendant has no defence to any cause of action in the statement of claim or to a particular cause of action."

[14] Clearly, the onus is on the plaintiff to satisfy this Court that the defendants have no defence to the claim. In the leading case of *Pemberton v Chappell* [1987] 1 NZLR 1 at 3, Somers J described the test as follows:

> "At the end of the day Rule 136 requires that the plaintiff "satisfies the Court that a defendant has no defence". In this context the words "no defence" have reference to the absence of any real question to be tried. That notion has been expressed in a variety of ways, as for example no bona fide defence, no reasonable ground of defence, no fairly arguable defence. … On this the plaintiff is to satisfy the Court; he has the persuasive burden. Satisfaction here indicates that the Court is confident, sure, convinced, is persuaded to the point of belief, is left without any real doubt or uncertainty.

> …
>
> Where the defence raises questions of fact upon which the outcome of the case may turn it will not often be right to enter summary judgment. There may however be cases in which the Court can be confident – that is to say, satisfied – that the defendant's statements as to matters of fact are baseless.

[15] However, in situations where there appears to be no defence to the plaintiff's case on the face of it, the defendant will have an evidential burden to raise a defence. This was also explained by Somers J in *Pemberton v Chappell* (at 3):

> "If a defence is not evident on the plaintiff's pleading, I am of the opinion that if the defendant wishes to resist summary judgment, he must file an affidavit raising an issue of fact or law and give reasonable particulars of the matters which he claims ought to be put in issue. In this way a fair and just balance will be struck between a plaintiff's right to have his case proceed to judgment without tendentious delay and a defendant's right to put forward a real defence."

[16] The Court on a summary judgment application will not normally "attempt to resolve any conflicts in evidence contained in affidavits or to assess the credibility or plausibility of averments in them": *Attorney-General v Rakiura Holdings Ltd* (1986) 1 PRNZ 12, 14. Nor will the Court determine real issues of credibility because the determination of such issues requires examination and cross-examination of witnesses not possible under the summary judgment procedure: *Busch v Dive & Marine Tours Ltd* HC AK CP1587/86 19 February 1987; McGechan on Procedure at HR12.2.03.

[17] Having said this a Judge will not be bound:

> "[t]o accept uncritically, as raising a dispute of fact which calls for further investigation, every statement on an affidavit, however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself it may be:" *Eng Mee Young v Letchumanan* [1980] AC 331 at 341. (See also McGechan on Procedure at HR12.2.08.)

[18] *Bilbie Dymock Corporation Ltd v Patel* (1987) 1 PRNZ 84 is authority for the proposition that the Judge is entitled to take a robust approach to cases involving summary judgment, and to dismiss defences which do not stand up to scrutiny. The Court commented at 85-86:

> "… the need for judicial caution has to be balanced, when considering a summary judgment application, with the appropriateness of a robust and realistic judicial

> attitude when that is called for by the particular facts of the case. In the end it can only be a matter of judgment on the particular facts."

[19] The ultimate issue is as stated by McGechan on Procedure at HR12.2.06:

> "The Court must be satisfied there is no defence. In *Towers v R & W Hellaby Ltd* (1987) 3 NZCLC 100,064, Thorp J said that the critical question will generally be whether the Court is satisfied that the plaintiff's case is unanswerable and the Court will not reach that conclusion if it can see an arguable defence."

Plaintiff's Submissions

[20] The plaintiff claims that the first and/or second defendants have failed to complete final settlement under the Agreement as purchaser and are therefore in breach of the Agreement. It is further alleged that the third defendants are jointly and severally liable based on their personal guarantee pursuant to clause 36.0 of the Agreement. On that basis, the plaintiff seeks an order for specific performance of the Agreement, and in particular completion of the final settlement and payment of the outstanding $4 million plus GST.

[21] The plaintiff submits that, by entering into the Second Agreement, the parties varied the terms of clause 24.0 (b) of the Agreement. This variation is said to have been effected by clause 19.0 of the Second Agreement, which rendered performance of clause 24.0 (b) impossible. The plaintiff argues that the defendants cannot continue to rely on clause 24.0 (b) as the basis for settlement because, at clause 19.0 of the Second Agreement, the parties agreed to pursue a subdivision where the Residual Land was to be amalgamated with the land in the second defendant's adjoining land being WN37A/247. Hence there would not be a separate "title for the balance of the land presently contained in Certificate of Title WN530/289" as contemplated by clause 24.0 (b).

[22] The plaintiff further submits that, if settlement under the Agreement was varied as a result of clause 19.0 of the Second Agreement, that settlement became contingent on the approved scheme plan of subdivision being deposited in the Wellington Land Titles Office and on the subsequent approval by the Registrar-General of Land. It is argued that the parties agreed that settlement under the Agreement would occur once these steps were completed because the settlement date would otherwise be indefinite.

[23] In essence, the plaintiff contends therefore that the defendants' insistence on settlement in terms of clause 24.0 (b) of the Agreement disregards the contractual variation that the parties entered into by virtue of the Second Agreement.

Defendants' Submissions

[24] As I have noted, the first, second and third defendants oppose the plaintiff's application for summary judgment. Their principal contention is that there was no legal requirement in the Agreement to complete settlement of the balance of $4 million plus GST on or by 10 October 2008. Instead, clause 24.0 (b) provides for settlement of the remaining subdivided land to be completed within 5 days after the issue of the new Certificate of Title.

[25] The defendants submit that clause 24.0 (b) is the operative clause governing settlement despite the fact that the Second Agreement provided that the Residual Land was to be conveyed through an amalgamation with the land contained in the second defendant's Certificate of Title WN37A/247. It is submitted that the words "title for the balance of the land" in clause 24.0 (b) must be understood as referring to a title issued through the process of amalgamation as well as subdivision, and that the word "title" is not limited to a *separate* title for the Residual Land.

[26] A further ground of opposition advanced by the defendants is the suggested lack of additional consideration by the plaintiff in return for such a variation. The underlying argument seems to be that it would not be reasonable to expect the defendants to bear the risk that title might not issue. It is further submitted that, if any clause was varied as a result of the change from subdivision to amalgamation, it would be clause 25.0, and not clause 24.0.

[27] The defendants argue that, even if the plaintiff's submission as to a variation is accepted, there is no evidence to support the claim that clause 24.0 was varied in relation to the settlement date. The parties had simply not turned their mind to the question of fixing a new settlement date. According to the defendants, there is no specified date for final settlement under the Agreement other than clause 24.0 (b), and clause 3.16(2) is silent as to when settlement is to take place. It is argued that the

question in issue is what the contract, if varied, actually provides, and that the fact that the plaintiff wishes to adopt a different machinery of settlement cannot be relevant. Hence, before the defendants are willing to pay the remaining purchase price, they contend the plaintiff must permit title to transfer through amalgamation. As long as the plaintiff refuses to deposit the subdivisional plan and obtain that title it is not ready, willing and able to settle.

[28] It is also suggested that the plaintiff declined the second defendant's suggestion to resolve the situation by obtaining and accepting a legal opinion on the issue from an independent third party. The solicitor for the plaintiff disputes that a formal request to resolve the dispute in this way was ever made, but says that in any event, the plaintiff would have refused any such proposal.

My Decision

[29] The issue in this case is whether it is reasonably arguable that final settlement under the Agreement is to occur either in accordance with clause 24.0 (b), that is only upon a new title being issued, despite the Second Agreement requiring an amalgamation of the Residual Land with the land in Certificate of Title WN37A/247, or on some other basis. Both parties accept that the Agreement subsists and final settlement is still to occur. The plaintiff says that it is ready, willing and able to settle, and that it simply awaits deposit of the outstanding purchase price on a retained stakeholder basis into its solicitor's trust account.

[30] The combined effect of the material contractual terms here can be summarised as follows:

- Clause 25.0 of the Agreement provides for subdivision by the plaintiff of the 7.8 Hectare Block from Certificate of Title WN530/289;
- Clause 24.0 of the Agreement provides that settlement for the Residual Land is to occur once title for the Residual Land is obtainable;
- Clause 19.0 of the Second Agreement provides that the Residual Land is to be amalgamated with land already owned by the defendants;
- As a result of that clause 19.0, the Residual Land is not to be the subject of its own separate title, and the Residual Land would need to

> be transferred to the second defendant before title to the amalgamated land could be issued.

[31] As outlined above, the plaintiff contends that clause 24.0 (b) was varied by the Second Agreement. The defendants oppose this submission on the basis that clause 24.0 (b) remains the operative clause governing settlement.

[32] The parties to a contract may agree to vary the terms of that contract. This agreement for variation must itself amount to a contract. The agreement must thus fulfil the requirements of a contract and be supported by consideration. In *NZ Amalgamated Engineering Printing and Manufacturing Union Inc v Air New Zealand Ltd* [2004] 1 ERNZ 614, the principle was expressed as follows (at 659):

> "A variation is a further contract between the same parties whereby they agree to make some change to their rights and obligations as previously expressed, whether by way of addition, subtraction or modification."

In light of the changes effected through clause 19.0, of the Second Agreement, I am satisfied that the Agreement was varied to the extent that it was inconsistent with the Second Agreement. The defendants' submission that the Second Agreement did not amount to a variation of clause 24.0 (b) is flawed in several ways.

[33] First, settlement could not now proceed in the way that clause 24.0 (b) envisioned, even if the plaintiff agreed to transfer the Residual Land before payment is made to allow title to the amalgamated land to be issued in the meantime. The clause clearly sets out that the issue of title is to occur first, the balance price is to be paid next and, finally, the Residual Land will be transferred. Because transfer is now necessary before issue of title to the amalgamated land is possible, the parties are unable to follow the process set out in clause 24.0 (b).

[34] Second, in my view it is clear that, by referring to "the title for the balance of the land presently contained in Certificate of Title WN530/289", clause 24.0 (b) is confined to the issue of a separate title only comprising the Residual Land, as provided for by clause 25. It would be wholly inconsistent to read the words "the title for the balance of the land" as referring to the title for the amalgamated land, of which the Residual Land will only form a part. Following amalgamation, there

simply will not be a single separate title to the Residual Land itself. Also, in my view it is arguable that the words cannot be understood as referring to a title issued through the process of amalgamation as well as subdivision. The whole purpose of clause 24.0 (b) was to fix a settlement date for the Residual Land once subdivision in accordance with clause 25.0 had taken place.

[35] As I see the position, there is also no good reason why the Second Agreement could not have varied both clauses 25.0 and 24.0, as opposed to only clause 25.0 as the defendants seem to suggest. The Agreement was varied insofar as it was inconsistent with the parties' subsequent decision to amalgamate the Residual Land with land already owned by the second defendant. It is irrelevant that such inconsistencies are to be found in more than one clause.

[36] The defendants' submission that there was insufficient or no consideration for a variation of the settlement process must also be dismissed. The variation formed part of the Second Agreement, which clearly provided for consideration to be given to the defendants.

[37] Because the parties' decision to amalgamate is inconsistent with the process of settlement as set out in clause 24.0 (b), I am of the view that clause 24.0 (b) was revoked by the Second Agreement. The issue that remains for consideration is whether, in addition to revoking clause 24.0 (b), the Second Agreement also contained an implied term providing for an alternate settlement date or process. The plaintiff submits that the variation of clause 24.0 (b) had to result in a new settlement process whereby settlement would occur once the Registrar-General of Land had approved the amalgamation. This approval is described as the "final legal step necessary to create a new amalgamated certificate of title". The defendants in turn insist that, even if clause 24.0 (b) was varied, settlement is still to follow the issue of title. It is argued that the plaintiff is seeking to imply terms which do not exist. In effect, the parties' positions therefore differ only insofar as the plaintiff seeks payment following the Registrar-General's approval and the defendants are unwilling to pay before title is finally issued. (I leave on one side here the second defendants' 26 September 2008 proposal for settlement to be deferred 12 months with vendor finance in the mean time).

[38] As I have already noted, in his letter dated 24 September 2008, the plaintiff's solicitor proposed to hold the full proceeds of sale undisbursed in his firm's trust account (presumably as a stakeholder) until the new amalgamated title had issued, and to undertake that immediately following receipt of the settlement funds all necessary documentation to deposit the plan would be lodged. While this suggested stakeholder mechanism seems to me under the circumstances here to be wholly reasonable, the question at issue is not merely one of reasonableness. Instead, I must ask myself whether the Second Agreement contained an implied term that settlement was to occur after the approval of the Registrar-General of Land, but before deposit of the plan and the issue of title, on the condition that the plaintiff's solicitor would hold the funds in a stakeholder's trust account until the new amalgamated title had issued. In accordance with *Devonport Borough Council v Robbins* [1979] 1 NZLR 1 (CA), this term would have to:

> "(1) be reasonable and equitable; and
> (2) be necessary to give business efficacy to the contract as no term will be implied if the contract is effective without it; and
> (3) be so obvious that "it goes without saying"; and
> (4) be capable of clear expression; and
> (5) not contradict any express term of the contract."

[39] While it is evident – in light of my earlier conclusion that clause 24.0 (b) was revoked – that an alternate term is necessary to give business efficacy to the contract, the content of this term still remains in dispute. It is therefore important to consider whether it is at least arguable that the Second Agreement contains an implied term providing for settlement to occur <u>after</u> transfer of the Residual Land to the second defendant.

[40] Having regard to common conveyancing practice, I do not think that this is arguable. The defendants' underlying concern with the plaintiff's approach seems to be that the risk associated with obtaining title would be shifted to the defendants if payment was to be made before title to the amalgamated land is issued. In my view, these concerns are unfounded if the funds are held in a stakeholder's trust account and only paid out to the plaintiff once title has issued. It is thus obvious that, had the parties turned their minds to the matter, they would have agreed on a settlement process whereby payment would have preceded or occurred simultaneously with, the

transfer of land and preceded the issue of title. Any other arrangement would have required the plaintiff to bear an unreasonable and very unusual risk.

[41] It is widely accepted that settlement by payment of the purchase price under a Sale Agreement and provision of documents to enable transfer of title are interdependent and are thus to occur simultaneously. In *Sale of Land* (second edition) DW McMorland at para. 11.02 this is confirmed:

> "Unless the contract expressly provides to the contrary, the payment of the balance of the purchase price and the assurance of the property, i.e the delivery to the purchaser of the memorandum of transfer and means to obtain registration, are usually interdependent and contemporaneous."

[42] And, similarly in Blanchard's *Handbook on Agreements for Sale and Purchase of Land* (Fourth Edition) at 56 it is noted:

> "Unless there is a clear indication to the contrary, where the parties have nominated a date for payment or a settlement date is implied (i.e. settlement is to occur within a reasonable time from the date of the agreement) but nothing has been stated regarding the delivery of a transfer and title documents, the law will infer that payment of the balance of purchase money and delivery of the documents are intended by the parties to be simultaneously effected and thus interdependent."

On this the standard provisions of the general terms of sale in the Agreement at clause 3.7 confirm this process as the generally accepted arrangement for settlement.

[43] In my view therefore, it is reasonable to infer here that had the parties turned their minds to this issue when the Second Agreement was entered into and it altered arrangements under the Agreement, they would have agreed to settle "simultaneously" to the extent that that was possible once the plaintiff vendor was in a position to deposit the new plan.

[44] That said, the plaintiff here in my view, was right to expect payment to be made once approval by the Registrar General of Land had been obtained and it was ready to deposit the plan. A payment of the settlement monies to a party as stakeholder until title was available as the plaintiff suggested, was appropriate and unobjectionable.

[45] But, in case I may be wrong in my conclusion that a variation of the final settlement terms under the Agreement has occurred here, I turn now to consider one last alternative.

[46] This relates to the need for the Court to imply a term into a Sale and Purchase Agreement, such as the Agreement here, in order to fill a "gap" and to determine an issue that the parties had not turned their minds to. In essence what is required of a Court in this situation is to imply a term without which performance of the contract (the Agreement in this case) would be impossible. In my view, this is precisely the situation which prevails in the present case, if it does transpire here that the parties did not agree to a variation of the settlement terms in the Agreement.

[47] On this aspect, in *Chitty on Contracts: General Principles* (30 ed, Sweet & Maxwell) this category of implied terms is described in the following way at para. 13-0008:

> "13-0008 Incomplete Contract. There is yet another situation where a term may be implied. This is where the court is simply concerned to establish what the contract is, the parties not having themselves fully stated the terms."

[48] The learned authors then proceed to give examples of cases in which courts implied terms for the purposes of "completing" contracts. One of these examples is *Sim v Rotherham Metropolitan BC* [1987] Ch 216, where the Court implied an obligation on the part of teachers to cover for absent colleagues during non-teaching periods if requested to do so. The contract in that case was in general silent as to the extent of the teachers' obligations.

[49] In *Fletcher Challenge Energy Ltd v Electricity Corporation of New Zealand Ltd* [2002] 2 NZLR 433, the Court of Appeal was required to determine whether the contract in issue was sufficiently certain to enable the Court to give effect to the agreement by filling in the terms on which the parties had failed to agree. More relevantly, however, the Court also made some general observations concerning the Court's ability to save incomplete agreements:

> "[60] The intention of the parties, as discerned by the Court, to be bound or not to be bound should be paramount. If the Court is satisfied that the parties

> intended to be bound, it will strive to find a means of giving effect to that intention by filling the gap.
>
> …
>
> [63] … It will be a matter of fact and degree in each case whether the gap left by the parties is simply too wide to be filled. The Court can supplement, enlarge or clarify the express terms but it cannot properly engage in an exercise of effectively making the contract for the parties by imposing terms which they have not themselves agreed to and for which there are no reliable objective criteria.
>
> [64] Where the intention to contract is found to have existed, the Court may supply an omission by implying a term."

[50] In the present case there can be no doubt in my view that an intention to contract existed between the parties. The Agreement had been part performed with the major part of the purchase price having been paid and possession of the entire farm taken by the second defendant. In this situation and based upon the observations of the Court of Appeal in *Fletcher Challenge Energy Limited v Electricity Corporation of New Zealand Limited* it is clear that Courts should strive to give effect to contractual arrangements by "filling the gap" and implying a necessary term where the parties, as here, intended to be bound and there are reliable objective criteria which can be used to determine the content of that term.

[51] *Brookers Land Law in New Zealand* at para. 7.17.12(5) notes that clause 3.16 of the Agreement "does not apply where it is necessary to register a transfer for a plan to deposit." The learned authors go on to state, however, that:

> "Where this occurs, an express provision outlining how settlement is to occur should be inserted in the agreement. The situation occurs most commonly when an amalgamation condition under s. 220(2) Resource Management Act 1991 has been imposed.

[52] This is the situation which has occurred here. With clause 3.16 of the Agreement not applying in the present case, and there being no express provision outlining how final settlement under the Agreement was to occur in the changed circumstances prevailing in this case, there is no doubt in my mind that the Court can supply this omission by implying a term to cover settlement arrangements.

[53] I say this bearing in mind that the application before me is one for summary judgment upon which it is acknowledged that the onus is on the plaintiff to satisfy the Court that the defendants have no defence to the claim. Notwithstanding this, in my view, the present case is precisely the type of case envisaged in *Bilbie Dymock Corporation Ltd v Patel* where a robust approach is required. The defence advanced by the defendants here as I see it simply does not stand up to scrutiny and should be dismissed. Summary judgment is required in this case in order that a pragmatic resolution of this impasse between the parties is promptly reached.

Result

[54] And, having found both that the Second Agreement revoked clause 24.0 (b) and implied a process of settlement whereby transfer followed payment, and also that, in any event, and alternatively, the Court should imply a term for final settlement of the Agreement here for the purpose of filling any gap that might have arisen and "completing" the contract terms, I am satisfied that the plaintiff's application for summary judgment must succeed and an order for specific performance of the Agreement follow. Once approval by the Registrar-General of Land had been obtained, the plaintiff was ready, willing and able to settle, and the defendants, as they were invited to do, should have duly deposited the outstanding purchase price into the plaintiff's solicitors' trust account as stakeholder.

[55] As the plaintiff asserts in its Statement of Claim, from 10 October 2008 it had been in a position to complete final settlement under the Agreement, and it agreed to settlement occurring on that date.

[56] The plaintiff has satisfied the Court in terms of r 12.2 High Court Rules that it is entitled to an order for specific performance of the Agreement and it is accordingly granted summary judgment against each of the defendants in terms of its application.

[57] Orders are now made by way of summary judgment as follows:

(1) An order is made that each of the first, second and third defendants jointly and severally are to specifically perform all the remaining

requirements on them as Purchaser/s and Guarantors pursuant to the Agreement including completion of final settlement.

(2) Final settlement under that Agreement is to be made no later than 20 working days after the date of this judgment at which time the second defendant is to pay to the plaintiff's solicitor as stakeholder or to some other mutually agreed stakeholder the balance due under the Agreement including default interest thereon at 14% per annum from 10 October 2008 up to the date of settlement, and settlement is otherwise to proceed in the manner specified at para 2 of the 30 September 2008 letter from the plaintiff's solicitors to the defendants' solicitors.

(3) Leave is reserved to any party to apply further in the event of any difficulty in the implementation of these orders including any modification or variation of the settlement requirements or other provisions of the Agreement as may be required.

(4) As to costs, the plaintiff has succeeded in its summary judgment application and is entitled to costs in the usual way. Costs are awarded to the plaintiff against the first, second and third defendants on a category 2B basis together with disbursements as fixed by the Registrar.

'Associate Judge D.I. Gendall'