IN THE HIGH COURT OF NEW ZEALAND
DUNEDIN REGISTRY

I TE KŌTI MATUA O AOTEAROA
ŌTEPOTI ROHE

CIV-2020-412-082
[2023] NZHC 468

BETWEEN	KATHRYN RAE McKINLAY and ALAN WAYNE REID Plaintiffs
AND	ROSS NEIL WHITBURN and VALERIE ELIZABETH WHITBURN Defendants

Hearing: 22 February 2023

Appearances: J W Cowan for Plaintiffs (by VMR)
T J Shiels KC for Defendants (by VMR)

Judgment: 10 March 2023

JUDGMENT OF ASSOCIATE JUDGE LESTER

---

[1] On 28 May 2015, the defendants, Ross and Valerie Whitburn (**the Whitburns**), purchased 438 Portobello Road, Dunedin (**the property**) from Kathryn McKinlay and Alan Reid (**the vendors**), settlement to take place only eight days after, on 5 June 2015. The contract was on the Ninth Edition of the ADLS Agreement for Sale and Purchase of Real Estate (**the 2015 contract**).

[2] As at least part of the building on the land had been built by the vendors, cl 6.2(5) of the 2015 contract created a warranty that building work had received an appropriate permit, resource consent or building consent and that to the vendors knowledge, the work had been completed in compliance with those permits or consents and that where appropriate a Code Compliance Certificate was issued for the works.

[3] Further term of sale, cl 18 of the 2015 contract provided:

> 18.0 This Agreement is subject to and conditional upon the Vendor obtaining a Code Compliance Certificate for the improvements and an Electrical Certificate of Compliance for all improvements and providing copies of same to the Purchaser as a condition of settlement.

[4] Given the short time between the date of the 2015 contract and settlement, the vendors must have been confident they could satisfy cl 6.2(5) of the 2015 contract. As I will describe below that confidence proved to be badly misplaced.

Settlement does not occur

[5] The Code Compliance Certificate and the Electrical Certificate of Compliance required by cl 18 of the 2015 contract were not available at settlement. A flood event at the property in June 2015 brought to the Whitburns' attention that there were a number of potential issues with building work at the property that would bring cl 6.2(5) into play. In circumstances that are disputed, the Whitburns took possession of the property but did not settle.

[6] The parties attended mediation and entered into a settlement agreement dated 19 December 2016 (**the settlement agreement**).

[7] The key provisions of the settlement agreement are as follows:

> 1. Subject to the provisions which follow, the Parties confirm the Agreement for Sale and purchase dated 27 May 2015.
>
> 2. The Vendors will obtain a Code Compliance Certificate for all improvements to the property other than the crib wall and the barbecue wall.
>
> 3. In relation to the crib wall the Vendors will obtain a Building Consent for repair work to the wall at the point where it changes direction and will also obtain a Code Compliance Certificate for this work.
>
> 4. The Vendor will obtain a Certificate of Acceptance for the balance of the newly constructed crib wall and the barbecue wall.

(I note the correct date of the 2015 contract is 28 May 2015 – nothing turns on the discrepancy)

[8] I refer in this judgment to the documents the vendors were required to obtain under the settlement agreement as the compliance documents.

[9] The settlement agreement recorded that settlement would occur within five working days of notice being given to the Whitburns that the compliance documents had issued.

[10] The settlement agreement also provided that the Whitburns would pay the vendors $700 per week for rent from 31 August (the agreement does not specify the year) to the date of settlement. The property remained at the vendors risk until settlement. The settlement agreement concluded by recording that: “In all other respects the Parties confirm the terms of the Agreement for Sale and Purchase.”.

[11] These proceedings were issued in September 2020 by the vendors following disagreement between the parties as to what work required Code Compliance Certificates and in respect of other work, was required to permit the issue of the compliance documents.

[12] The vendors say the 2015 contract remains conditional, relying on cl 18 of the 2015 contract as set out at para [3] above. While the vendors do not claim to have cancelled the 2015 contract pursuant to cl 18, it follows from their pleading and the fact they have not obtained all the compliance documents that they consider they have that right.

[13] In their proceedings the vendors sought an order that the Whitburns pay the agreed rental; the Whitburns having taken the view they only had to pay rental at settlement. Unfortunately, the settlement agreement is silent as to when rental was to be paid.

[14] In response to the proceeding by the vendors, the Whitburns counterclaimed and applied for summary judgment seeking specific performance of the 2015 contract.

Is special condition 18 still relevant?

[15] Mr Cowan, counsel for the vendors, submitted that determining the inter-relationship of the settlement agreement and the 2015 contract would require testing the parties' evidence. He submitted there are material disputes as to the interpretation of the settlement agreement.

[16] In a summary judgment hearing the Court is able to determine what a contract means unless there are relevant contextual factual disputes. In my view, nothing in the evidence filed for the vendors would be admissible in relation to how the settlement agreement should be interpreted.

[17] The evidence of Mr Stuart McKinlay, sworn 20 May 2021, refers to the circumstances of the mediation and the settlement agreement. Mr Stuart McKinlay attended the mediation on behalf of the vendors. He refers to what, from *his perspective*, were the key issues but he does not say such were communicated at the mediation. He talks about what his *understanding* of the settlement agreement was but his subjective understanding of the settlement agreement is irrelevant to its interpretation by the Court.

[18] Accordingly, I do not accept there is anything in the evidence preventing me determining what the settlement agreement means and what its relationship to the 2015 contract is.

The role of cl 18

[19] I do not accept that in light of the vendors unqualified obligation to obtain the compliance documents, that special condition 18 of the 2015 contract can have been intended to permit the vendors to cancel the 2015 contract should they be unable to obtain them.

[20] If the vendors were correct, then the Whitburns who, by the time of the settlement agreement had already been in limbo for some 18 months in respect of the property, were committing to remain in limbo should the vendors not be able to obtain the compliance documents.

[21] If the vendors are correct, then on their interpretation of special condition 18, their obligation under the settlement agreement was limited to taking reasonable steps to obtain the compliance documents. However, the key provisions of the settlement agreement are that the vendors *will* obtain the compliance documents. On the vendors' case, the unqualified obligation in the settlement agreement set out at para [7] above, is to be read as the vendors will *take reasonable steps* to obtain the compliance documents. I do not accept this is a tenable interpretation of the settlement agreement.

[22] On the vendors' case, special condition 18 gave them the right to cancel the 2015 contract should they be unable to meet its requirements. Whether that is the correct interpretation of special condition 18, I need not decide, but assuming it is correct then cl 9.8(2) of the 2015 contract applied requiring the vendors to do all things reasonably necessary to enable the condition to be fulfilled by the date for completion.

[23] If the vendors' obligation in relation to the compliance documents under the settlement agreement was to be subject only to a reasonable endeavours obligation, then all the settlement agreement had to do was to define what compliance documents were required, define the new settlement date, and confirm the 2015 contract. There would have been no need to refer to the vendors' obligation to actually create an

obligation to obtain the compliance documents as on the vendors case, that obligation was already created by cl 6.2(5).

[24] As I have said, the obligations contained in the 2015 contract would not have been expressed in absolute terms if nonetheless it was intended the vendors were only obliged to take reasonable steps. The considerable delay in settlement by the time of the settlement agreement stands against the Whitburns agreeing to stand back and take the chance that the compliance documents would not be obtained. In any event, as I will discuss below in relation to the timing of settlement, even if I am incorrect in this view, the vendors needed to complete their obligations within a reasonable time and they failed to do so.

[25] Accordingly, I find special condition 18 was overtaken by the settlement agreement and the 2015 contract as modified by the settlement agreement is unconditional. The vendors' obligations to obtain the compliance documents is not qualified.

Frustration?

[26] Mr Cowan's submissions for the first hearing suggest that the 2015 contract may have been frustrated due to difficulties the vendors have encountered in obtaining the compliance documents.

[27] I do not accept any difficulties encountered by the vendors with the Consent Authority would amount to frustration.

[28] I have already noted that the vendors must have assumed at the time they signed the 2015 contract that obtaining the compliance documents would be straightforward.

[29] Hardship, or inconvenience or material loss will not found frustration.[1]

---

[1] Stephen Todd and Matthew Barber *Burrows, Finn and Todd on the Law of Contract in New Zealand* (7th edition, LexisNexis, Wellington, 2022) at 794.

[30] The latest evidence from the vendors is quite inconsistent with it proving impossible for them to obtain the compliance documents. Mr Cowan submitted that the building consent and Code Compliance Certificate for the crib wall and a Certificate of Acceptance for a further part of the crib wall and the barbecue wall had already been obtained.[2]

[31] As Mr Shiels KC, counsel for the Whitburns, noted, even if the vendors experienced difficulties dealing with the Consent Authority, they have the ability to apply to the Ministry of Business Innovation and Employment for a Determination under s 177 of the Building Act 2004. This process has already been utilised as a result of discussions when the Whitburns' application for summary judgment first came on for hearing.

[32] I find there is no arguable defence based on the 2015 contract having been frustrated.

Should settlement have occurred?

[33] It will be recalled that settlement was to take place five working days after notice was given to the Whitburns that the compliance documents had been obtained.

[34] No time was specified in the settlement agreement for the vendors to obtain the compliance documents. The effect of that omission was to leave no specific time specified in the 2015 contract for settlement.

[35] D W McMorland in *Sale of Land* provides:[3]

> Normally the contract will specify a settlement date, but if it does not it is implied by law that settlement is to take place within a reasonable time in the context of the facts of the case. The same applies if the contract specifies a date which has been abandoned by the parties, for example, if the time for the fulfilment of a condition is extended beyond the prescribed settlement date, unless it can be inferred that the settlement date is to be moved forward by a corresponding period. In each case, neither party is entitled to call for settlement until a reasonable time has elapsed, or, to look at it from the other side, until the delay in settling has become unreasonable.

---

2 There is a dispute as to whether at least one of the Certificates of Acceptance is so qualified as to, in effect, not be a true Certificate of Acceptance, but I need not determine that issue.

3 D W McMorland *Sale of Land*, (4th ed, Cathcart Trust, Auckland, 2022) at 11.03A.

[36] What is a 'reasonable' time is to be determined on the facts of each case but it is assessed as at the date of the settlement agreement and on an objective basis from both parties. Neither party here contemplated the possibility that the compliance documents would take what will soon be eight years from the original settlement date and over six years from the settlement agreement.

[37] Mr Cowan submitted that the settlement date was deferred by the settlement agreement until the vendors were able to obtain the compliance documents. As settlement was to occur within five working days of the compliance documents having been obtained and as they have not been obtained, Mr Cowan submitted the time for settlement had not arisen. Implicit in this submission is that the vendors were under no obligation to take steps to obtain the compliance documents within a reasonable time. The settlement agreement records that all communication with the Consent Authority over the issue of the compliance documents was to be undertaken by the vendors:[4]

> Contractual promises generally must be performed by a specific time, which may be expressed in the contractual document or implied in by the Court in the circumstances.

[38] This is not a case where the settlement date was left for future negotiation and agreement.[5] Implying a term that the vendors had to obtain the compliance documents within a reasonable time is the other side of the coin of the obligation that they had to settle within a reasonable time. The vendors made a contractual promise to obtain the compliance documents and they had to do so within a reasonable time.

[39] Mr Shiels relied on the obligation to settle within a reasonable time noted above and submitted that on any view of it, a *reasonable time* has come and gone particularly, when it is noted that the 2015 contract contemplated the vendors obtaining compliance documents within a matter of days. Mr Shiels emphasised that the parties are not quite eight years on from the 2015 contract and over six years since the mediation took place.

---

4 Todd and Barber, above n 1, at 18.2.2(a)(iii).
5 *Barrett v IBC International Ltd* [1995] 3 NZLR 170 CA.

[40] On any view of it, there has been more than a reasonable time to obtain the compliance documents.

[41] While Mr Cowan referred to there being disputes in relation to the requirements of the Consent Authority, he did not in fact submit that a reasonable time had not elapsed. The tenor of Mr Stuart McKinlay's May 2021 evidence is that the vendors thought the compliance documents could be obtained without great difficulty. Mr Stuart McKinlay's evidence is that the work to allow the issue of the compliance documents was completed but the compliance documents were not issued by the Consent Authority. Mr Stuart McKinlay suggests responsibility for the compliance documents not issuing lay with the Whitburns interfering in Mr Stuart McKinlay's attempts to resolve matters with the Consent Authority. He talks of the Whitburns inserting themselves in the Consent Authority's sign-off process. If that is correct then the vendors would have a claim against the Whitburns, however, a breach by the Whitburns of their agreement to leave dealing with the Consent Authority to the vendors does not relieve the vendors of their obligations to obtain the compliance documents.

[42] Disputes with the Whitburns as to what work was required to obtain the compliance documents is not a justification for the delay that has occurred. The vendors had to satisfy the requirements of the Consent Authority, not those of the Whitburns. If the Consent Authority was failing to make decisions or taking a stance the vendors thought was unreasonable, the vendors needed to challenge those decisions.

[43] I find that a reasonable time for the vendors to complete their obligations under the settlement agreement has elapsed and they are therefore in breach of their obligations to obtain *all* the compliance documents recorded in the settlement agreement.

[44] It follows that the vendors cannot rely on their own wrong to say that the date for settlement has not yet been reached. Even if cl 18 of the 2015 contract had remained relevant, having concluded a reasonable time to obtain the compliance documents has passed, the vendors could not cancel the 2015 contract under cl 18 as

their doing so would mean they would benefit from their own wrong. This is the other side of the coin from whether the time for settlement has been and gone. However, I am unable to say when settlement should have in fact occurred as fixing a date would require evidence as to when a *reasonable time* for the completion of the vendors' obligations came to an end.

[45] However, that issue is not presently material. Given I have held that whatever a reasonable time was, it has passed, I am satisfied the Whitburns have established the vendors are in breach of the 2015 contract as modified by the settlement agreement. The breach being that the vendors failed within a reasonable time to meet the obligations on them under the settlement agreement to obtain the necessary compliance documents. The Whitburns are, at least, entitled to judgment for liability in respect of the vendors' breach of the 2015 contract as modified by the settlement agreement. I enter judgment for liability accordingly.

[46] That conclusion, however, does not mean that the Whitburns are entitled to the specific performance orders they seek.

The orders sought by the Whitburns

[47] The orders sought are as follows:

(1) A declaration that the counterclaim plaintiffs are entitled to have the agreement for sale and purchase dated 28 May 2015 in respect of the property known as 438 Portobello Road, Dunedin as modified by the settlement agreement dated 19 December 2016, specifically performed with compensation or damages for the difference between the value of the property as conveyed and the value of the property with full compliance with clause 6.2(5) of the agreement for sale and purchase.

(2) An order that, on the counterclaim plaintiffs paying to the Registrar of the High Court at Dunedin the sum of $1,553.500, the counterclaim defendants do transfer to the counterclaim plaintiffs the fee simple

estate in Lot 1, DP 1138, being all the land comprised and described in Computer Freehold Register OT 2C/1273 (Otago).

[48] Issues remain between the parties as to whether further consents were needed relating to the alteration of a water course on the property. There is also the point already referred to, as to whether a Certificate of Compliance is overly qualified so as mean it is not in fact a Certificate of Compliance.

[49] The Whitburns seek an order that there be an enquiry into the compensation or damage they are entitled to. Further, the Whitburns seek an order that an expert be appointed to report to the Court in relation to what works are necessary to enable the compliance documents to issue including, whether works carried out to date are to an appropriate standard.

Why the Whitburns want the sale proceeds held by the Registrar

[50] At the moment the Whitburns are in occupation of the property but are not its owners and as such do not see themselves free to have the works required on the property to obtain the compliance documents carried out. Nor do the vendors consider the Whitburns have the right to carry out work on the property. Without the remedial works actually being completed, the best the Whitburns are left with is obtaining estimates for its cost. Estimating what the remedial work will cost is problematic when the extent of the works required may not be fully evident until the work is underway. The Whitburns are concerned if they settle with an amount withheld to carry out the remedial works, that amount may prove insufficient.

[51] This is why the Whitburns ask for an order that they can settle on the basis they will pay the purchase price in full, including rent, with that amount to be paid to the Registrar of the Court to be held until the value of the compensation or damages to which they are entitled is quantified.

[52] Mr Shiels invoked the specific performance jurisdiction of the Court which allows the Court to order specific performance with abatement and/or compensation. However, that in reality is not what is being sought. What the Whitburns seek to achieve here is to obtain title, but to have the full purchase price (plus rent) available

as a fund against which they can have recourse once they have carried out the remedial works necessary to obtain the Compliance Documents.

[53] As I said to counsel during the hearing, this amounts to the Whitburns obtaining a pre-judgment charging order against the vendors.

[54] In substance, the Whitburns wish to settle and to then run a damages claim against the vendors for failing to obtain the necessary compliance documents. I do not consider the orders sought by the Whitburns are an appropriate use of the Court specific performance jurisdiction, as I have said, they amount to a pre-judgment charging order.

[55] The Whitburns do not wish to settle with an abatement pursuant to the provisions of the 2015 contract which entitle a purchaser to settle with a sum withheld for the vendors' failure to obtain the compliance documents. While I can understand the Whitburns' concerns about the uncertainty of quantifying their compensation or damages claim, what they are seeking is a fundamental departure from what the 2015 contract provides is to occur at settlement when the purchasers consider they may have a claim against the vendors. The 2015 contract does not entitle the Whitburns to security against the entire purchase price. The 2015 contract provides that the Whitburns can call for settlement after nominating a genuine pre-estimate of the loss they say they will suffer. The sum must be particularised and quantified to the extent reasonably possible at the time of their notice.

[56] Mr Shiels noted that cl 7.5 of the 2015 contract, which creates the right for a purchaser to call for settlement with an amount to be held by a stakeholder, does not prevent either party taking proceedings for specific performance. That is correct but fundamentally the Whitburns are not asking the Court to order specific performance of the 2015 contract as modified by the settlement agreement. Under the 2015 contract, on settlement it is the vendors who are entitled to the purchase price less, if they are in breach, a reasonably quantified sum for compensation held by a stakeholder. Here, the Whitburns want the entire sum plus rent held.

[57] Nor do I consider this is a case for the Court to appoint an expert. The parties will be free to agree to have issues between them determined by an independent expert if they wish but absent agreement, it seems inevitable there will be a conflict on the evidence that the Court will have to resolve.

[58] I considered whether the Whitburns were entitled to an order in terms of the relief they seek set out at para [47](1), that is, a declaration that they are entitled to have the 2015 contract specifically performed. I have concluded that they are not for the following reasons.

[59] The Whitburns seek to settle now with compensation or damages determined in the future. As to the availability of compensation, McMorland in *Sale of Land* notes:[6]

> In a claim by the purchaser for specific performance with compensation, it has been said that "Subject to considerations of hardship [the purchaser] may elect to take all he [or she] can get, and to have a proportionate abatement from the purchase money". The only argument the vendor can raise against a claim by the purchaser for specific performance is hardship as to the quantum of compensation. This argument goes to the exercise of the court's discretion.

[60] Here, the Whitburns seek that the whole purchase price plus the rent be held and be available as compensation. To order that the Whitburns are entitled to specific performance before the level of compensation is known would deprive the vendors of the ability to argue: "…hardship as to the quantum of compensation". Without knowing what the compensation may be, the Whitburns have not demonstrated that the vendors do not have an arguable defence. That the Whitburns ask for all of the funds to be held, is an indication they consider they may require that level of protection, that is, all of the purchase monies plus rent. Where the vendors may lose the entire purchase price plus rent, or a significant percentage of that sum, they have an arguable defence available based on hardship.

[61] That the compensation may equal or exceed the purchase price may not of itself be enough for the vendors to resist specific performance.[7] The point is, all of the

---

6 D W McMorland, above n 3 at 292.

7 At 294 referring to *Grant v Dawkins* [1973] 1 WLR 1406, [1973] 3 All ER 897.

circumstances will have to be before the Court before specific performance with what may be a significant level of compensation will be ordered.

[62] McMorland in *Sale of Land* notes:[8]

> Whether a purchaser may settle with payment of the full purchase price, while reserving the right to claim damages for any deficiency, is not clear. That is certainly not the way in which the law in this area has developed, but, given the rationalisation which is now underway of the particular rules of contract law applicable in certain areas, it may now ben an acceptable way to proceed if the purchaser so wishes. Normally, however, the purchaser wishes to pay only the lesser sum on settlement and any deduction is restricted to compensation recoverable either in equity or under an express clause of the agreement.

[63] Here, the Whitburns wish to go one step further and settle with the entire purchase price held and then claim compensation. At summary judgment, that is a step too far.

[64] What the Whitburns seek does not fit within the terms of their contractual rights, nor have they demonstrated that the vendors do not have a defence to their claim for specific performance. The onus is on the Whitburns to show the vendors do not have a defence, therefore, it was for the Whitburns to identify the level of compensation before it could be said no arguable hardship to the vendors would flow from specific performance.

[65] I consider the Whitburns are entitled to judgment for liability against the vendors for the vendors' failure to settle. What form relief for that finding of liability will take is another matter. Whether there will be an order for specific performance with compensation is a matter for trial.

Costs

[66] Counsel were not heard on costs. The Whitburns have had some success. If

---

8 D W McMorland, above n3 at 295.

costs are sought by the Whitburns then submissions of not more than five pages are to be filed *within five working days*. The vendors' response is to be filed *within a further five working days*.

_____

Associate Judge Lester

Solicitors:
Anderson Lloyd, Dunedin (for Plaintiffs)
O'Neill Devereux, Dunedin (for Defendants)

Copy to counsel:
T J Shiels QC, Barrister, Dunedin (for Defendants)