

IN THE PRIVY COUNCIL

No. 30 of 1977

O N A P P E A L

FROM THE COURT OF APPEAL OF NEW ZEALAND

BETWEEN

DONN ALEXANDER DICKENS and
MURIEL MAY DICKENS

Appellants

- and -

KEITH JAMES NEYLON and
JEAN AGNES NEYLON

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Respondents

CASE FOR RESPONDENTS

RECORD

1. This is an appeal from a judgment of the Court of Appeal of New Zealand (Richmond P., Woodhouse J., and Cooke J.) given on 6 April 1977, in which the Court unanimously allowed an appeal by the respondents against the judgment of the Supreme Court of New Zealand (Roper J.) in which the respondents as plaintiffs were declined a decree of specific performance of a written contract for the sale of farm land entered into between the parties. The Court of Appeal ordered and decreed that the appellants (then respondents) specifically perform the contract, and ordered the appellants (respondents) to pay the respondents' (appellants') costs in the Court of Appeal and Supreme Court. For convenience the appellants are hereafter called "the vendors", and the respondents "the purchasers".

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p.81

pp.81-82

RECORD

2. The facts were not disputed. At the close of the purchasers' case in the Supreme Court the vendors elected to call no evidence.
3. On Christmas Eve 1975 the vendors entered into an agreement in writing in a form settled on their behalf to sell the purchasers their farm property. The contract was witnessed by their then solicitor. Some eight days before the date for completion (27 February 1976) the vendors refused to proceed with the contract. Their stated reason at that time was that only one of them had personally signed the contract. (Evidence of Mr Q.M. Smith). (That was later raised by them as a formal defence but abandoned in the Supreme Court.) Up to that stage the vendors, far from showing dissatisfaction with the contract, had actively assisted the purchasers towards its completion.
4. The purchasers commenced their action for specific performance on 11 March 1976. It was not until the vendors filed their Statement of Defence to the purchasers' action on 8 April 1976, after a change of solicitor, that they asserted for the first time that the contract had failed because the consent of the Supreme Court (Administrative Division) had not been given by 26 January 1976. (Statement of Defence, paragraph 6.) That is the only one of their defences which succeeded in the Supreme Court; none of their other defences was relied upon by them in the Court of Appeal which held unanimously, on various grounds, that the particular defence mentioned could not avail the vendors.
5. This is therefore a case of vendors voluntarily entering into a contract to sell their property, actively helping the purchasers at various stages and in various ways towards the completion of the purchase, and at

Ex.D; p.33

p.17, lines
28-30

p.2

p.3

p.5, line 35

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almost the last moment before the date for completion repenting of their bargain and seeking to avoid it on a ground that could not possibly be sustained and which was not finally relied on. When the purchasers made it clear by issuing their action that they proposed to hold the vendors to their bargain, a highly technical defence was introduced for the first time which the Court of Appeal held, in the circumstances, to lack any merit. It may be inferred that by this further appeal the vendors hoped to wear down the purchasers so that they would be persuaded to abandon their contractual rights. It can hardly be suggested on the facts that the vendors are likely to gain financially if their appeal were to succeed so as to justify the expense of a further appeal; nor can it be suggested that a point of law of substantial general importance is involved.

6. It will be helpful to set out the facts in their chronological order.
7. The contract was entered into on 24 December 1975 (Friday). It is important to appreciate that the purchasers' solicitors' offices were closed from 24 December 1975 to 20 January 1976 for the Christmas vacation. The purchasers' copy of the contract was not in fact received by the purchasers' solicitor until 20 January 1976.
8. The contract was conditional on the purchasers "arranging suitable finance to complete the purchase ... by the 9th day of February 1976" (clause 17). Possession was to be given and taken on 27 February 1976 (clause 3). By the relevant parts of clause 11, the purchasers undertook to deliver to the

p.16, line
29; p.19,
line 41

p.35

p.34

RECORD

vendors the purchasers' documents required

"for filing with an application to the Administrative Division of the Supreme Court and the Vendor shall within one month from date hereof ... make application to the Administrative Division of the Supreme Court for any necessary consent to this transaction" 10

and each party undertook

"to do all such acts or things as may be necessary or expedient for the purpose of endeavouring to obtain such consent or ensuring compliance with the provisions of the Land Settlement Promotion and Land Acquisition Act 1952 and any regulations for the time being thereunder." 20

p.34

By clause 13 of the contract the parties agreed that

"If any such consent where necessary shall not be granted by the 26th day of January 1976 or such later date as the parties agree on ... then this Agreement shall be void" (Emphasis added).

p.34

9. The one month allowed for filing the necessary application papers expired on 24 January 1976 (a Saturday): see Land Settlement Promotion and Land Acquisition Act 1952, s.25(1)(a). After that the contract would be unlawful and have no effect: *ibid.*, s.25(4). The purchasers' solicitors' office opened on 20 January 1976 (Tuesday) after the Christmas vacation. The purchasers lived at Haast (a remote township some considerable distance from Invercargill). 30 40

p.16, line 29

p.16, line 31

RECORD

- There was no possibility of their being able to complete the purchasers' declaration so that it could be filed by 23 January 1976. (It is common ground that the Court Registry is not open during the weekend, so 23 January was the last effective date for complying with s.25 of the Act). In those circumstances the purchasers' solicitor (Mr Q.M. Smith) telephoned the vendors' solicitor (Mr W.G. Broughton) on or about 23 January 1976 (Friday) and it was mutually arranged that the vendors would file the application for consent without the purchasers' declaration, which, it was agreed, would be filed at a later date when it became available. The vendors' solicitor filed the application on 23 January 1976 (Friday) and wrote a covering letter to the Court confirming that the purchasers' declaration had been sent to Haast for completion and would be filed in support of the application later (Exhibit B).
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- p.16, line 31
- p.16, line 12, 40; p.18, line 48 - p.19, line 5; Exhibit "B" p.23
- p.23
- p.18, line 29 - p.19 line 5
- p.34

RECORD

vendors were not obliged to file an application unless and until the purchasers had delivered to them the purchasers' declaration which is an essential part of the documentation in support of an application.

12. The situation was, therefore, that the vendors were advised one working day before the statutory time for filing an application expired that the purchasers' declaration would not be available until after that time had expired. In those circumstances, at the purchasers' request, knowing that the contract would become illegal and void by s.25 of the Act if the application were not filed on 23 January, and knowing also that the Administrative Division's consent could not possibly be given by 26 January 1976, and knowing that the filing of the vendors' application would prevent the contract becoming void by operation of law, the vendors voluntarily elected to keep the contract alive by filing the application without the purchasers' declaration, and by accepting that such declaration would be filed after 26 January 1976. 10 20
13. Had the vendors' solicitor not agreed to file the vendors' application, then the contract would have been void pursuant to s.25 of the Act and nothing done by the parties could have revived it. They would have had to start afresh and enter into a new contract. The filing by the vendors of the application effectively prevented that situation from arising. 30
14. The inferences properly to be drawn from these facts are : 40
- (a) That the parties by their solicitors agreed, in terms of clause 13 of the contract, that the

time within which it had been provided that the Court's consent was to be granted should be extended to a reasonable time after 26 January; and/or

- 10 (b) That the parties agreed to variation of the contract, to the effect that if the Court's consent was not granted by 26 January 1976, the contract would not be void, but would continue in full force and effect; and/or
- 20 (c) That the vendors represented to the purchasers that the provision in clause 13 as to the time limit for obtaining the Court's consent was not being treated by them as absolute and need not be strictly complied with, and the purchasers acted on such representation to their detriment; and/or
- (d) Whether or not the provision as to the time limit remained absolute, the vendors waived strict compliance with that provision; and/or
- 30 (e) The vendors, knowing that the purchasers were in breach of clause 13 in that it had become impossible to obtain the Court's consent by the specified time, by their actions on 23 January elected not to rescind the contract but instead to affirm it;
- 40 (f) In any event, and however the matter is looked at, in all the circumstances the vendors cannot be heard to say that the contract became void because the Court's consent was not obtained by 26 January 1976.

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15. As a further relevant circumstance, the uncontroverted evidence was that in the Southland area a provision in a contract for the sale and purchase of rural land rendering the contract "void" if the consent of the Supreme Court is not granted by a specified date is not regarded by solicitors dealing with such contracts as a provision which must be strictly complied with, nor the date so fixed a date which must be strictly adhered to. That customary local interpretation of such a provision must therefore be regarded as expressing the parties' true contractual intention at the time when the vendors' solicitor agreed to file the application for consent and agreed that the purchasers' supporting declaration might be filed later. Accordingly, until one of the parties thereafter gave notice making time for compliance with such provision (which would thereafter be understood as prescribing a reasonable time following the filing of the application for consent) of the essence, and until the date specified in such notice was not complied with, such provision could not operate so as to relieve the parties or either of them from performance of the contract. 10
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16. The whole of the remainder of the evidence is consistent with and confirms that view of the matter. The purchasers' declaration was duly filed. In early January Mr Neylon, one of the purchasers, visited the farm with his manager and spoke to Mr Dickens, one of the vendors. Mr Dickens showed Mr Neylon round the property and was very helpful, "he couldn't do enough for us". That was quite inconsistent with any sincerity in the vendors' later assertion that the contract was not binding on them because only one of them had personally signed it. 40

p.14, line 30 -
p.15, line 46

p.17, line 6

p.9, line 38 -
p.10, line 1

Mr Neylon paid a further visit in February with a Marginal Land Boards Committee, and again Mr Dickens' attitude was quite inconsistent with the contract having failed. In fact he took all steps consistent with assisting Mr Neylon in his obtaining Marginal Land Board finance for the acquisition and operation of the farm.

RECORD

p.10,
lines 2-7

10 17. On 5 February 1976 the purchasers' solicitor formally notified the vendors' solicitor that finance had been arranged and that the contract had become unconditional (Exhibit G). There was no response on the vendors' part but the vendors' silence at that stage is not equivocal: the vendors must have known that the purchasers were selling their own farm to enable them to complete the purchase of the vendors' farm, and their silence at that point can be interpreted only as an acceptance by them that the contract remained in full force and effect.

p.40

18. On 16 February 1976 the purchasers' solicitor forwarded a memorandum of transfer and other documents to the vendors' solicitors and asked for a settlement statement. (Exhibit F). Again the vendors remained silent, thus indicating their acceptance that the contract remained in force.

p.39

19. On 18 February 1976 a Mr Halstead, a representative of the land agent which had procured the contract, which firm was also a stock and station agent, telephoned Mr Dickens to arrange the vendors' stock clearing sale on 26 February 1976 (the date of settlement pursuant to the contract being the next day). Again Mr Dickens said nothing to indicate that the contract was not still on foot.

p.21, line
30 - p.22
line 5

20. At some time shortly before 23 February 1976 the vendors' solicitor

p.17, lines
20-30

RECORD

telephoned the purchasers' solicitor and advised that the vendors would not proceed with the contract. The only stated reason which was given was that Mrs Dickens had not signed the agreement personally. It is clear that there was never any substance in that ground for declining to proceed; but again the fact that that ground was stated demonstrates that the vendors' view at that time was that the contract had not failed because of non-compliance with clause 13. The vendors' solicitor later wrote on 23 February 1976 confirming that the vendors would not proceed. (Exhibit H).

pp.40-41

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p.10, lines
10-41

21. In the meantime the purchasers had sold their own farm, and were ready to settle with the vendors.

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p.42

p.18, lines
16-20

22. The purchasers' solicitor made a formal demand for settlement on 26 February 1976 (Exhibit J) and tendered the purchase price on 27 February 1976.

23. On 11 March 1976 the purchasers issued their writ, and on 8 April 1976, after a change of solicitor, the vendors filed their Statement of Defence, alleging for the first time failure of the condition in clause 13.

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24. In summary, therefore: the contract provided by clause 13 that it would become void if the Court's consent were not obtained by 26 January 1976. The vendors, at the purchasers' request voluntarily agreed to file the application for consent, and did so, and agreed to the purchasers' supporting declaration being filed on or after 26 January 1976, knowing that on the strict terms of the contract the contract would become void if the Court's consent were not obtained by 26 January 1976 and knowing that it

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was impossible for the Court's consent to be obtained by that date. The vendors thereafter conducted themselves in a manner inconsistent with any view that they were treating the contract as void in terms of clause 13, and when the vendors finally sought to repudiate the contract they did so without any reliance on clause 13 and on a different ground which was patently incapable of being sustained and which they did not attempt to sustain at the trial.

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25. The only inference to be drawn from all the circumstances is that the vendors accepted that clause 13 in its existing form need not be complied with and accepted that the contract remained binding on them in spite of the fact that the Court's consent could not be and was not obtained by 26 January 1976.

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26. The vendors called no evidence at the trial: the inference is that there was no evidence which could have been expected to help them.

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27. It is therefore immaterial whether this is technically a case of waiver, estoppel, variation of clause 13, or an agreement that time be extended in terms of clause 13. Whether the case falls into one or more of these legal categories the result is the same.

28. The purchasers rely generally on the reasons for judgment of the members of the Court of Appeal, which may be summarised for convenience as follows:

Richmond P.

pp.58-65

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(a) The word "void" in clause 23 of the contract means what it says. But it does not follow

p.62,
line 40

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that in practice a failure to obtain consent by the date specified will have the automatic effect of bringing the contract to an end. A party not in default may be precluded from setting up non-fulfilment of the condition as the result of an established election, waiver, or estoppel.

p.62, line 40 -
p.63, line 10

- (b) In the present case the actions of the vendors' solicitor can be explained only on the basis that he was treating time, under clause 13, as not being of the essence. By filing the vendors' application he was taking a step which he was not obliged to take; and by agreeing to the late filing of the purchasers' declaration he was allowing the purchasers to incur expense and trouble which was pointless unless time under clause 13 was being treated by the vendors as being at large. 10
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- (c) The evidence establishes a waiver by mutual agreement and a parol variation of the terms of clause 11 of the contract. It was a necessary incident of the parties' arrangements that time under clause 13 was not of the essence. 30
- (d) The vendors' repudiation was therefore unjustified and accordingly specific performance should be decreed.

p.63, lines
11-25

p.63, line 46 -
p.64, line 8

p.65, lines 1-5

pp.65-76

Woodhouse J.

- (a) When the vendors acceded to, and acted upon, the proposals put forward on the purchasers' behalf the contractual time-limit in clause 13 was consequentially, but quite deliberately, extended. 40

p.76, lines
32-37

- (b) The vendors therefore waived the strict requirement as to time and were not justified in their refusal to complete.

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p.76, lines
37-41

Cooke J.

pp.77-81

- 10 (a) "Void" in clause 13 means what it says. If the necessary consent is not granted by the required date, either party will prima facie be entitled to say that the contract has come to an end unless steps have been taken in accordance with the proviso to clause 13 to keep it alive. p.77, lines 19-30
- 20 (b) But by filing the vendors' application with knowledge that the delay in obtaining the purchasers' declaration meant that consent could not be obtained by the date specified in clause 13, the vendors elected not to rescind but instead to affirm the contract: the vendors were actively keeping the contract alive. It is not consistent with what was done on 23 January that the time specified in clause 13 was to remain of the essence. p.79, lines 1-30
- (c) The purchasers acted to their detriment in reliance on the vendors' actions. p.80, lines 1-23
- 30 (d) The vendors therefore either waived the condition as to time in clause 13 or the condition as to time was waived by agreement. p.80, lines 24-38
- (e) Possibly (but without deciding the point) there was an implied agreement between the parties on a later date for the purposes of compliance with clause 13. p.80, line 39 - p.81 line 7
- (f) In any event the vendors were not entitled to refuse to complete. p.80, lines 7-12

40 The respondents therefore respectfully submit that this Appeal should be dismissed with costs for the following among other

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- (i) The parties by their solicitors agreed, on 23 January 1976, in terms of clause 13 of the contract; that the time within which it had been provided that the Court's consent was to be granted should be extended to a reasonable time after 26 January;
- (ii) The parties by their solicitors agreed, on 23 January 1976, to a variation of the contract, to the effect that the contract would not be void if the Court's consent was not granted by 26 January 1976, but would continue in full force and effect; 10
- (iii) The vendors represented to the purchasers that the provision in clause 13 as to the time limit for obtaining the Court's consent was not being treated by them as absolute and need not be strictly complied with, and the purchasers acted on such representation to their detriment; 20
- (iv) Whether or not the provision as to the time limit remained absolute, the vendors waived strict compliance with that provision;
- (v) The vendors, knowing that the purchasers were in breach of clause 13 in that it had become impossible to obtain the Court's consent by the specified time, by their actions on 23 January 1976 elected not to rescind the contract but instead to affirm the contract; 30
- (vi) In any event in all the circumstances the vendors are precluded from asserting that the contract became void because 40

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the Court's consent was not obtained
by 26 January 1976;

RECORD

- (vii) The unanimous decision of the Court
of Appeal was correct.

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