

O N A P P E A L

FROM THE COURT OF APPEAL OF NEW ZEALAND

B E T W E E N :DONN ALEXANDER DICKENS and
MURIEL MAY DICKENSAppellants

- and -

KEITH JAMES NEYLON and
JEAN AGNES NEYLONRespondents

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CASE FOR THE APPELLANTS

RECORDHISTORY

1. This appeal is brought from a judgment of the Court of Appeal of New Zealand (1977) 1 N.Z.L.R. pp. 58-81 (595) dated 6 April 1977 allowing the Respondents' appeal from a judgment (unreported) of the Supreme Court of New Zealand dated 3 September 1976.

2. The issues in this appeal arise from the following circumstances.

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3. By an agreement for sale and purchase dated 24 December 1975 the Appellants (hereinafter called "the vendors") agreed to sell to the Respondents (hereinafter called "the purchasers") their farm property containing a little over 1930 acres and situated near Lake Hauroko in Southland. Possession of the said property was to be given and taken on 27 February 1976.

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4. Clause 11 of the agreement called upon the purchasers to deliver to the vendors a declaration for the purposes of the Land Settlement Promotion and Land Acquisition Act 1952. The same clause called upon the vendors then to apply to the Administrative Division of the Supreme Court for its consent under that Act to the transaction of sale and purchase. The same clause acknowledged that each party to the transaction would do all such acts and things as might be necessary or expedient for the purpose of endeavouring to

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obtain such consent.

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5. Clause 13 of the said agreement stipulated that where any such consent should not be granted by 26 January 1976 or such later date as the parties agreed on or should be refused or should be granted subject to conditions then the agreement should be void. Clause 14 of the said agreement provided that if it became void under clause 13 the purchasers were entitled to a refund of their deposit but should have no other claim against the vendors.

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6. Such consent was given on 12 February 1976 and the order of the Court was sealed on 2 March 1976. Subsequently the vendors refused to complete the transaction and the purchasers brought the present action against them claiming specific performance of the agreement. It was argued by the purchasers in both the Courts below that the vendors could not rely on clauses 11 and 13 of the agreement as by their conduct they had waived compliance with the said clauses.

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7. The purchasers, perhaps due to the legal vacation in Southland, did not deliver to the vendors the required declaration under the Land Settlement Promotion and Land Acquisition Act 1952 in terms of clause 11 of the agreement. The said declaration was actually made by the purchasers on 28 January 1976. The Solicitor to the purchasers on a date which was probably 22 or 23 January 1976 telephoned the solicitor to the vendors and asked him to file their application for consent with advice to the Court that the purchasers' declaration would be filed as soon as it was available. On 23 January 1976 the vendors by their solicitor filed the application for consent but such consent was not obtained by 26 January 1976 as clause 13 of the agreement required. The purchasers submitted in both the Courts below that the act of the vendors in filing the application for consent was consistent only with an unequivocal waiver of the requirement that such consent be obtained so soon after the application was filed.

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8. In the Supreme Court of New Zealand Roper J. declined this submission, holding that the vendors had no alternative but to comply with the request that the application be filed without the declaration of the purchaser, and holding that he saw no reason why the vendors' solicitor should have accompanied his compliance with the request from the purchasers "with some form of caution". In the Court of Appeal of New Zealand, Their Honours reversed this decision and allowed the purchasers' appeal. Richmond P. held that the evidence established a waiver by mutual agreement.

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Woodhouse J. held that a common law waiver had been established and that there was no need for the party acting in terms of the indulgence to show detriment. Cooke J. held that a waiver by the Vendors had been shown and further held that detriment to the purchasers could be shown on the evidence. He said "on these views it is unnecessary to decide whether the arrangement on 23 January amounted to an oral variation of the contract or whether detriment is essential for waiver; but I am not to be taken as dissenting from the President's opinion on the first point or Woodhouse J.'s opinion on the second".

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9. The purchasers brought their case in the Court of Appeal on the following arguments:

(a) That the conduct of the parties was governed by a special practice in the Southland district whereby solicitors do not take notice of time limits for the obtaining of consent under the Land Settlement Promotion Act unless time is made of the essence in relation to those provisions.

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(b) That clause 13 of the Agreement, whereby the consent must be obtained by 26 January 1976, did not apply to consent under the Land and Settlement Promotion Act in terms of clause 11, but only to the consent of the Land Settlement Board under clause 12 (which clause relates to any land which is held under lease or licence under the Provisions of the Land Act 1948).

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(c) That the vendors had waived their right to determine the contract as a result of the conduct of their solicitor as set out in paragraph 7 hereof.

10. The Supreme Court rejected argument (a) above, but argument (b) was not advanced to it. The Court of Appeal rejected both arguments (a) and (b). It is submitted by the vendors as Appellants that argument (a) should not be upheld because Roper J. at first instance was not prepared to hold as a fact that the proof of any such general practice in Southland had been established. Further, the Appellants submit that a customary local usage cannot prevail if it is inconsistent with the strict terms of the agreement. The Appellants also submit that there can be no requirement that time be made of the essence when a specific date is stipulated in an agreement.

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11. Argument (b) above should not be upheld for the reason that clause 13 in its terms contains

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no reference to restrict its influence to clause 12 and not to clause 11. Clauses 11 and 12 provide that the contract is subject to any necessary consent under two different statutes, and it is submitted that it would be artificial if the later clause 13 imposed a time limit in respect of one consent only, for the contractual intention that the parties know where they are at a definite time would still be frustrated.

MAIN SUBMISSIONS

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12. The Appellants submit that argument (c) above should not be upheld, and the decision of the Court of Appeal should be set aside, on the following grounds:

(A) The condition requiring fulfilment in the agreement i.e. the obtaining of the consent of the Court, is a condition precedent and can only be waived before the date for its performance.

(B) The act of waiver, or that of promissory estoppel, must involve an unambiguous representation arising as the result of a positive and intentional act done by the Representor with knowledge of all the material circumstances. Here the exchange between the witnesses Smith and Broughton cannot be said to be free from ambiguity.

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(C) The exchange between those witnesses referred specifically only to the filing of the substantive application for consent, and no reference to when that consent might be granted was made. It is submitted that the solicitor to the vendors was making no representation relevant to clause 11 of the agreement.

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(D) In general terms, waiver should be construed strictly, and the Court should be slow to spell a representation, other than a positive act, out of conduct explicable on other grounds.

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ARGUMENT

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13. It is submitted that, as was held by Roper J., the vendors' solicitor need not have issued any form of caution to the purchasers' solicitor as to the proximity of the crucial date. He was told that the purchasers declaration was still not available and asked whether he would lodge the application for consent on the part of the vendors. Even if it was not "necessary" (in terms of section

11 - see paragraph 4 above) that the vendors should accede to the purchasers' request to file the application, it was surely "expedient" that they should do so. To the extent that the purchasers' declaration had not been produced within the fourteen days stipulated under clause 11 of the agreement, it is conceded that the vendors' solicitor was waiving the production of that declaration in the necessary time. This however, it is submitted, is the limit of any waiver granted by the vendors.

14. It is submitted with respect that the reasoning of Cooke J. in the Court of Appeal should not be adopted. His Honour held that the purchasers were so seriously in default at the time the solicitors spoke that there was no longer any possibility of obtaining consent by 26 January. He held that the vendors were entitled to rescind on that day, but instead they agreed to file the application for consent while knowing of the purchasers' breach under clause 11 which had already occurred. It is submitted that while this is correct, it takes no account of the fact that the vendors were not obliged to reach any decision as to rescission before 26 January, when the compliance with the condition would fail. It is submitted that there was no obligation on the vendors to signal to the purchasers what decision on this they might make by 26 January, or even that they were contemplating or were likely to contemplate making any such decision.

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15. The letter from the solicitor to the vendors to the Registrar of the Court (exhibit 4) made no representation as to when consent should be obtained, and conveyed no more than the information given him by the solicitor to the purchasers. It should be noted that that letter did not go to the solicitor to the purchasers and would not have been seen by them or anyone on their behalf until long after the time for consent under clause 11 and expired. It is submitted that the vendors were asked for a specific indulgence and this they granted. It is submitted that there is no case to claim that "they must have meant" that a larger indulgence would follow. If waiver of specific contractual obligations is to be construed out of what it is thought solicitors may have thought, when carrying out a specific action, as to matters beyond that action; then the concept of waiver is eroded and made imprecise.

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16. It is submitted that in all matters of land law, contractual terms as included in any document are of prime importance. While such terms can certainly be abrogated by waiver, or by

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promissory estoppel, or by other variation, the Courts should insist on clear evidence that such abrogation has taken place. The exchange in the present case took place between professional advisers, with knowledge of the specific terms of the contract between their clients, and it is submitted that in these circumstances one would expect to see a waiver established by a clear and unambiguous representation by the party waiving. On the contrary, the evidence of Mr Smith indicates that he did not expect the vendors' solicitor to raise the question of when the consent would be obtained because he (Smith) claimed to have some understanding that time would not be of the essence as a result of the Southland practice. This, it is submitted, is far from evidence that a specific waiver of the date was granted by the vendors, being rather evidence that the date did not matter and was not even in the witness's mind. 10

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17. In cross-examination the witness Smith said that he gave no "tacit consent to the date being put back". He said that he was more conscious of the statutory period of one month after the date of the contract within which the application has to be filed. There was ample opportunity for the witness to say that he was told, or given to believe, that the date of 26 January would not be insisted on, but such evidence he did not give. It is submitted that the real complaint of the purchasers at the original hearing, as exemplified by the evidence of Smith, was that the unspoken rule as to the Southland practice had been breached. This was not a ground on which the purchasers succeeded in either of the Courts below (and has already been dealt with herein - paragraph 10 herein) and as an allegation it is inconsistent with the allegation of waiver which the purchasers later raised by way of legal argument. 20

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18. The overwhelming probability from the evidence must be that the witness Smith made no reference to the date of 26 January because due to his understanding of the local practice it did not concern him at all. How then, it could be asked, can he claim that fulfilment of condition 11 by that date was waived by the conduct of the vendors' solicitor? It is submitted that the evidence led by the purchasers does not support their argument of waiver. 30

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19. It is finally submitted that the issue of waiver is usually determined by a finding as to the facts of words, writing or conduct on which the claim of waiver is based. In this case, the issue was clearly one of fact which was determined by the Judge who heard the witnesses. It is 50

submitted that the facts, as given in evidence by the purchasers themselves, support the decision which was reached by Roper J., and that they do not provide a base for any argument of legal waiver before that Judge or in any subsequent Court.

JOHN F. BURN

15 March 1978

IN THE PRIVY COUNCIL

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