

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

Respondents

RECORD OF PROCEEDINGS

MACFARLANES,
Dowgate Hill House,
London EC4R 2DY

Agents for :

Nicoll, Sinclair, Cooney & Co.
Ashburton,
New Zealand.

ROSLING KING AYLETT & CO.
1 Pilgrim Street,
London EC4V 6AD

Agents for :

Macalister Bros.,
Invercargill,
New Zealand.

(1)

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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

Respondents

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RECORD OF PROCEEDINGS

No. 1

STATEMENT OF CLAIM

IN THE SUPREME COURT OF NEW ZEALAND
INVERCARGILL REGISTRY

No. 18/76

In the Supreme
Court of New
Zealand

No. 1

Statement of Claim

11 March 1976

BETWEEN KEITH JAMES NEYLON
of Haast, Pilot and
JEAN AGNES NEYLON
his wife

Plaintiffs

A N D DONN ALEXANDER DICKENS
of Tuatapere, Farmer
and MURIEL MAY
DICKENS his wife

Defendants

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In the Supreme
Court of New
Zealand

STATEMENT OF CLAIM

Thursday the 11th day of March 1976

No. 1

Statement of
Claim

11 March 1976

- continued

THE PLAINTIFFS BY THEIR SOLICITOR say:

1. THAT by Memorandum of Agreement dated the 24th day of December 1975 made between the Plaintiffs and the Defendants it was agreed that the Defendants would sell and the Plaintiffs would buy all that the freehold of that parcel of land containing 1986 acres 1 rood 32.4 perches more or less being Sections 6, 8, 9 and 13 Block XII Hauroko Survey District then held by the Defendants under a Deferred Payment Licence from Her Majesty The Queen together with certain chattels described in the said Agreement for the sum of \$112,000 and upon the terms therein set out. 10

2. THAT by letter dated the 23rd day of February 1976 the Defendants by their Solicitors notified the Plaintiffs that they would not complete the sale of the said land to the Plaintiffs and refused to execute a Memorandum of Transfer thereof in favour of the Plaintiffs. 20

3. THAT all covenants conditions and obligations imposed on the Plaintiffs by the said Agreement have been performed and fulfilled and all things necessary to entitle the Plaintiffs to have the said Agreement performed by the Defendants have happened and the Plaintiffs have been and still are ready and willing to accept a Transfer of the said land and otherwise to comply with the said Agreement but the Defendants have refused and still refuse to execute a Transfer and perform their obligations in terms of the said Agreement. 30

WHEREFORE THE PLAINTIFFS CLAIM:

(a) That the Defendants be ordered specifically to perform the said Agreement by executing in favour of the Plaintiffs a Transfer of the freehold of the said land in terms of 40

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the Agreement and to do all the acts necessary to put the Plaintiffs in full possession of the said land and chattels in terms of the said Agreement.

- (b) the costs of and incidental to this action.
- (c) Such further or other relief as to this Honourable Court may seem just.

In the Supreme Court of New Zealand

No. 1

Statement of Claim

- continued

11 March 1976

No. 2

STATEMENT OF DEFENCE

Statement of Defence

8 April 1976

10

Thursday the 8th day of April 1976

The Defendants by their Solicitor say:

1. THAT they admit the allegations contained in paragraph 1 of the Plaintiffs' Statement of Claim but they say that at all material times the said contract was subject to certain conditions as appear below which have not been fulfilled by the Plaintiffs.

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2. THAT they deny the allegations contained in paragraph 2 of the Plaintiffs' Statement of Claim.

3. THAT they deny each and every allegation contained in paragraph 3 of the Plaintiffs' Statement of Claim.

4. THAT the said contract contained the following clauses:

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"11. If the land affected by this Agreement exceeds five acres in area this contract is subject to any necessary consent of the Administrative Division of the Supreme Court and the Purchaser will within fourteen days from the date of signature of this Agreement either:

- (a) Complete and deposit with the District Land Registrar a Declaration in conformity with Section 24 of the Land

In the Supreme
Court of New
Zealand

Settlement Promotion and Land
Acquisition Act 1952 and deliver a
copy to the Vendor, or

No. 2

Statement of
Defence

- continued

8 April 1976

- (b) Deliver to the Vendor any statement
declaration or other document
required by regulation or otherwise
to be completed by the Purchaser for
filing with an application to the
Administrative Division of the
Supreme Court and the Vendor shall
within one month from date hereof
unless such declaration shall have
been deposited as aforesaid make
application to the Administrative
Division of the Supreme Court for
any necessary consent to this
transaction 10

and each party hereto shall do all such acts
and 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
And each party shall bear his own legal and
all other costs whatsoever of, and incidental
to any such declaration application or other
process.

12. If any of the land affected by this
Agreement is held under lease or license 30
under the provisions of the Land Act 1948
this contract is subject to any necessary
consent of the Land Settlement Board being
obtained within the period referred to in
Clause 13 hereof and each party hereto
shall within fourteen days from the date
hereof make such application therefor as may
be necessary and each party hereto shall do
all such acts and things as may be necessary
or expedient for the purposes of endeavouring 40
to obtain such consent or securing
compliance with the provisions of the Land
Act 1948 and any regulations for the time
being thereunder and each party shall bear
his own legal and other costs whatsoever
of and incidental thereto.

13. 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 or shall be refused or shall be granted subject to conditions then this Agreement subject as hereinafter mentioned shall be void PROVIDED HOWEVER that if such consent shall be granted within such time subject to conditions to which the parties shall in writing agree or subject to conditions not prejudicial to the Purchaser if the Vendor shall within seven (7) days after the grant thereof give notice in writing to the Purchaser or his Solicitor of the Vendors willingness to comply with such conditions then this Agreement shall be binding upon the parties as modified by such conditions.

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14. If this Agreement shall become void as provided herein or shall herein or shall become of no effect by virtue of the provisions of the Land Settlement Promotion and Land Acquisition Act 1952 or by virtue of the Land Settlement Board refusing any consent necessary under Clause 12 hereof then if the Purchaser has duly complied with all his obligations hereunder he shall be entitled to a refund of his deposit and any other moneys paid on account of the purchase money but shall have no other claim against the Vendor."

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5. THAT the consent of the Land Settlement Board was not obtained by the 26th day of January 1976 and accordingly the said contract is void.

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6. THAT the consent of the Administrative Division of the Supreme Court was not granted by the 26th day of January 1976 but was granted at a later date to which the agreement of the Defendants was not given and accordingly the said contract is void.

7. THAT the consent of the Administrative Division of the Supreme Court was given subject to :

- (a) The consent of the Land Settlement Board; which consent has not been given,

In the Supreme
Court of New
Zealand

No. 2

Statement of
Defence

- continued

8 April 1976

In the Supreme
Court of New
Zealand

No. 2

Statement of
Defence

- continued

8 April 1976

6.

(b) That the order be not sealed until the Plaintiffs sold their present property which condition has not been agreed with the Defendants.

8. THAT the said contract purports to be signed on behalf of the abovenamed Defendant MURIEL MAY DICKENS but she did not authorise that this be done nor has she subsequently ratified the said contract on her part.

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No. 3

Notes of
Evidence

Plaintiff's
Evidence

William Henry
Osmond

Examination

No. 3

NOTES OF EVIDENCE TAKEN BEFORE
THE HONOURABLE MR JUSTICE ROPER

Hearing: 25 August 1976
Counsel: B.D. Inglis Q.C. and L.E.
Laing for Plaintiffs
J.F. Burn and R.G. Sinclair
for Defendants

MR INGLIS OPENS AND CALLS:

WILLIAM HENRY OSMOND (Sworn): I am Registrar of the Supreme Court at Invercargill. I have two files for the Administrative Division of this Court. One is 353/65 an application for consent of sale of the farm from Mr and Mrs Neylon. I produce that file as EXHIBIT A. The second is LVC 11/76 and that is an application for consent for a transfer from D.A. and M.M. Dickens to K.J. and J.A. Neylon. The application for consent is dated 23 January 1976. It was signed and filed by both vendors. The order shows approval was given on 12 February 1976 and the order was sealed on 2 March. I have a letter on the file which accompanied the application for consent, that is from Broughton, Henry & Galt, solicitors for the Vendor, Invercargill. (Counsel reads letter). I produce the file as EXHIBIT B.

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X-M: Mr BURN: Is there on that file a letter dated 23 January 1976? From Macalister Bros? Yes. Does the file show the purchasers declaration was lodged on 28 January 1976? It was declared on 28 January, unfortunately it doesn't show the date it was filed. In what terms is that declaration made, what qualifications are set out as to the other property and so on? "Our reason for desiring to acquire the property subject to the application for consent is that property has been sold but the sale is not yet unconditional. This purchase will not proceed unless the other sale does become unconditional." Is that a reference to other property owned by the purchasers? Yes. Which they have sold but not unconditionally? Yes.

On 10 February is there a letter from the Crown representative stating the Crown has no objection? Yes. But indicating the transaction would have to be subject to sale of the purchasers' existing holdings? That is correct. Does that draw attention to the fact part of the land is Crown deferred licence? Yes. Which requires consent of the Land Settlement Board? Yes. The order made on 12 February 1976 is a conditional order? That is correct. Would you read the two conditions? "Subject to consent Land Settlement Board. Order not to be sealed until purchaser's present property sold." Is that the last document on the file? No. There is a letter dated 1 March from Macalister Bros. (Witness reads letter). Following that letter did the Committee make any further order? No. Was the order sealed? It was sealed actually on 2 March. Was the seal in terms which included or excluded the matter involving the Land Settlement Board, was it served in terms of the conditional order made on 12 February or had that been taken out? The condition had been omitted. Does the order as sealed refer to the situation as far as the purchasers' present property is concerned? No it doesn't. Is there any letter, certificate or averment of any kind on the file as to whether the purchasers present property has been sold? No there is nothing on the file.

In the Supreme
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No. 3

Plaintiffs'
Evidence

William Henry
Osmond

Cross-
Examination

In the Supreme
Court of New
Zealand

No. 3
Plaintiffs'
Evidence

William Henry
Osmond

Cross-
Examination
- continued

Keith James
Neylon

Examination

REXM: Mr INGLIS: The order as sealed as an order of the Court, is that quite unconditional? Yes. You were asked about other contents of the file, is there anything on the file to indicate the vendors' intent to pull out at any stage?
No.

KEITH JAMES NEYLON (Sworn): I am the Plaintiff in this matter. I am at present a Helicopter Pilot. I have just moved from Haast to Greymouth. I was born and brought up in the Nightcaps area in Southland. My first job at the age of 16 was coalmining. I then moved on to shearing. While I was doing that I obtained a pilot's licence. That led me into aerial topdressing and helicopters in the Southland area. When I started I didn't have very much money, \$5 when I was 21 or something. I later bought a farm in the Southland area. I sold that to Mr and Mrs Robertson. That property has finally been sold. I became interested in the farm property we are discussing in this case. I consulted the land agents who were involved. The document now produced as EXHIBIT C is a circular the land agents put out. The land agents were J.E. Watson & Co.Ltd. I dealt with Mr Paul Blackler mainly in that firm. He took me out to the property. That was early November 1975. The property was to be sold by auction at that stage. I went round the property with Mr Blackler, myself, Mr Jim Thompson and Mr Dickens. Mr Dickens actually drove me round. Mr Jim Thompson was manager of the farm I actually had at that stage. I had lunch on the property with Mr and Mrs Dickens. The Dickens seemed quite happy about me being interested in the property. There was no discussion with the Dickens about the price at the time. As to any particular reason I didn't discuss the price with them at that time, not really only that it was going to auction at that stage. The date of the auction was 4 December 1975 and before then I organised finance so I could bid. My finance for the purposes of bidding, financial arrangements were made through J.E. Watsons. There was no borrowing of

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money at all from the vendors. I went to the
 auction. There were about 3 or 4 different
 guys there. I think Mr Blackler might
 have been there, Mr Halstead. Jim Thompson
 went with me. I bid for the property at the
 auction and the bidding went up to \$111000.
 That was my bid. The property did not reach
 the reserve. When the property was passed
 in we made it known to the agent we would
 leave that bid on the property. After that
 I heard back from the land agents, mainly
 that Mr Dickens was considering lowering his
 price. It was suggested round about
 \$125,000 at that stage. I didn't agree to
 that. I stuck to \$111,000. A day or two
 after that conversation I had another
 conversation with Mr Blackler of the land
 agents. That was about the price I was
 prepared to offer, I offered \$112,000. We
 said we would leave that offer in until that
 following Friday which was about the 19th or
 round about that time. After that Mr
 Blackler got in touch with me and said Mr
 Dickens had accepted our offer and would be
 forwarding the papers to me to sign. I
 never received any papers through the post,
 I was living at Haast at the time. We came
 out from Haast and signed everything up
 actually in Winton I think it was. (Witness
 refers to document). That is the offer I
 signed. That is my signature at the end and
 my wife's. Offer produced as EXHIBIT D.
 I was told by the land agents about the
 arrangements they were going to make, I
 understood Mr Dickens would be coming in to
 Invercargill to sign. That was 24
 December. We were told later on that day
 that Mr Dickens had signed. After that,
 early in January, we visited Mr Dickens'
 property. I saw Mr Dickens to speak to for
 quite a period of time. He showed Mr Jim
 Thompson and Mr Jim Wallace and myself over
 the property.

In the Supreme
 Court of New
 Zealand

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 No. 3

Plaintiffs'
 Evidence

Keith James
 Neylon

Examination

- continued

TO BENCH: Did you see Mrs Dickens? She
 was there in the background in the yard when
 we were discussing things before we moved out.

TO COUNSEL: At that stage Mr Dickens'
 attitude was very helpful, he couldn't do
 enough for us. That was the first trip I

In the Supreme
Court of New
Zealand

No. 3

Plaintiffs'
Evidence

Keith James
Neylon

Examination

- continued

made in January 1976. I made another one. At that stage I saw Mr Dickens. He took us around again, we arrived out there with a committee of the Marginal Lands Board and he showed us round the property for most of that morning to lunchtime. His attitude was very friendly. There was a third visit to the property? Not by me. I first heard Mr and Mrs Dickens were refusing to complete the sale about 7 or 8 days before we were due to move in. At that time I had sold my own property. I still want to go on with the sale. I have got the money to settle and we are ready to settle. 10

Cross-Examination XXM: Mr BURN: What date did you sell? The end of January. Was it sold? That was when everything was confirmed by. We were moving later in February. It was tied in with Mr Dickens. I knew finance was there, this particular person had three times before offered to buy the farm and he had finance arranged, it was all confirmed to me he was purchasing. Who is the purchaser? Kevin Robinson. Is he now the owner? Yes. What date did he make payment? I can't say specifically. It was paid for about the time it was confirmed on 31 January. His finance was confirmed? Yes. Do you know what I mean by settled when solicitors get together and complete? I left that up to my solicitors to sort out. You can't say when that was achieved? No. The date of settlement in your purchase of the property from Mr Dickens was to be 27 February? Yes. You say it was about one week before that date you heard Dickens was not going on? It was approximately 8 days or a week beforehand we heard the sale was not on. Did you make any attempt to discuss it with him yourself? No. Left it in the hands of your solicitors? Yes. 20 30 40

TO BENCH: Who did you get the information from Dickens weren't going to carry on? I think it was from Mr Smith, it all came at once, it was a bit of a surprise. Your solicitor? Yes, Mr Smith, my solicitor.

MR LAING CALLS:

COLIN JAMES MAIR (Sworn): I am employed as a Land Salesman by J. Watson & Co. in Invercargill. I am involved from time to time with my firm in sales of Dickens' properties at Hauroko Downs. On 24 December I went out to Winton where an agreement was signed by Mr and Mrs Neylon. (Witness refers to Exhibit D). That is the Agreement to which I refer. I was present when Mr and Mrs Neylon signed it. I later brought that Agreement back into Invercargill where it was picked up from my office by Mr Dickens. After he picked it up from me I next saw it late on 24 December. Mr Dickens had the Agreement at that time. When he brought it in to me he put it on my desk. (Witness refers to Agreement) In between times he had taken the Agreement to Mr Owen Broughton. He brought the Agreement back to me and Dickens and Neylons signatures were on it, witnessed by Mr Broughton.

In the Supreme Court of New Zealand

—
No. 3

Plaintiffs' Evidence

Colin James Mair

Examination

XXM: NO QUESTIONS.

MR LAING CALLS:

PAUL SINCLAIR BLACKLER (Sworn): I am the Real Estate Manager for J.E. Watson & Co.Ltd. in Invercargill. J.E. Watson are Stock and Station Agents predominantly. My firm was instructed to act on behalf of Mr and Mrs Dickens on the sale of the property known as Hauroko Downs. I discussed the sale with Mr and Mrs Dickens. Another member of the staff and myself went up to Hauroko Downs during August and we discussed with Mr and Mrs Dickens the best way to dispose of the property and also arranged for the property to be auctioned and took the necessary information down as instructions from the vendor. Those instructions were taken down on a selling authority. I have that selling authority. The signatures on the selling authority, there are two, D.A. Dickens and M.M. Dickens. I produce that authority as EXHIBIT E. That authority was drawn as recording my company's sole agency for the sale of the property for a period of six months and I recorded the terms under

Paul Sinclair Blackler

Examination

In the Supreme
Court of New
Zealand

—
No. 3

Plaintiffs'
Evidence

Paul Sinclair
Blackler

Examination

- continued

which it was to be auctioned. Subsequent to that the brochure produced was prepared by my company and distributed. We helped prepare it with the help of a copy service in Invercargill and Mr Dickens. In preparing that authority to sell I had ascertained the capital value of the property, \$97,500.

We obtained that from Wallace County. From the end of October to the end of November I showed some purchasers over. In particular I took Mr Neylon and Mr Thompson out to the property on 12 November. I heard Mr Neylon give evidence Mr Dickens showed us round and was most co-operative. Mr Dickens drove us in his landrover round the property and we also inspected part of the property on foot with Mr Dickens. Mr Dickens attitude at that time, the property was for sale and he showed us everything that we required to know. Mrs Dickens didn't take part in any way. We actually had lunch with Mr and Mrs Dickens, we inspected the house, we really had a look by ourselves and with Mr Dickens. The auction took place on 4 December as advertised and the highest bid was that of Mr Neylon of \$111,000. I received instructions that that bid was to stay in. Between 4 and 19 December I was involved in discussions with Mr Neylon. I rang him twice during that period of time. The first time to say whether he had left his offer and in the meantime as it got on towards Christmas I then rang him again and after speaking to Mr Neylon he said he would lift his offer by \$1,000 to \$112,000 which I submitted to Mr Dickens. As a result of submitting that to Mr Dickens, Mr Dickens said we ought to get an agreement drawn up which we did and as it was getting on towards Christmas I rang Mr Neylon and he said he was coming over for Christmas and he would also like to sign it. The agreement which was drawn up, Exhibit D, that was drawn in accordance with Mr Dickens' instructions. That agreement having been drawn I arranged for Mr and Mrs Neylon to sign it. I rang, when I knew Mr and Mrs Neylon were coming over on the 24th, I rang Mr Dickens and he

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was out at the time and he rang back on the 24th at lunch hour and said he would be coming in at the lunch hour. When I rang and he was out I spoke to Mrs Dickens. Mrs Dickens said she would get Don to ring.

In the Supreme
Court of New
Zealand

No. 3

TO BENCH: Did you tell her why you wanted Mr Dickens, you had this offer? I did. What was her attitude, she would get her husband to ring? She would get her husband to ring. At that time he was out.

Plaintiffs'
Evidence

Paul Sinclair
Blackler

TO COUNSEL: He did ring back and it was arranged he would come to town and also he would contact his solicitor and I thought he would be at home and said we would arrange for his solicitor to be available. As a result of that I didn't see him later in the afternoon, I saw him when he arrived in town but not later in the afternoon. When he came in he was by himself. I had no reaction to that really because Mr Dickens came in and I didn't ascertain whether his wife was with him or not. Later in the day I saw the agreement for sale bearing Mr Dickens' signature and I forwarded that and a copy out to the solicitors concerned. No indication was given to me that Mrs Dickens was not prepared to agree to the transaction.

Examination

- continued

XXM: NO QUESTIONS.

MR INCLIS CALLS: ALAN BEVERS BINNIE (Sworn): I am a solicitor practising in Invercargill, Partner in the firm of Stout, Hewat & Co. The year of my admission was 1937. Apart from some years at the war I have practised continuously in that firm since my admission. During that time I have been doing a great deal of rural work. In my experience most agreements for sale of rural land contain a provision that the purchaser must obtain the forms from the Land Valuation procedure and forward it to the vendor for filing. That practice is not followed in Southland to my experience, indeed the reverse is the case in that the vendor's solicitors send the application for

Alan Beavers
Binnie

Examination

In the Supreme
Court of New
Zealand

—
No. 3

Plaintiffs'
Evidence

Alan Beavers
Binnie

Examination

- continued

the statutory declarations to the purchasers' solicitors for filing. If at the time it is desired to file an application for consent the purchasers' application is temporarily unavailable in that case of course the application is signed by the vendor personally or his solicitor and filed by the vendors' solicitor or by arrangement and followed by the purchasers' solicitors at a later date. In the absence of supporting papers there is nothing unusual in that but with supporting papers it would be unusual. I am familiar with the standard form of sale stating the approval of the Land Valuation Court is to be obtained in a certain time. (Witness refers to contract). That is a contract in a standard form which I am familiar with. I am familiar with the standard clauses put in about the times for availability of finance. Practitioners in Southland customarily regard time limits, they in my experience are extremely important, if there should be any doubt about it being arranged in the time stipulated an extension is sought by written application and if available it is granted. In a case of that kind if there is any doubt that the time can be met the point is mentioned specifically. The time for obtaining consent of Administrative Division of Supreme Court is in my experience not treated with the same importance as that for finance, in fact it is treated somewhat lightly, provided that efforts are being made towards concluding arrangements for finance within the stipulated time nobody concerns themselves very much with the date for consent of the Supreme Court. Suppose the contract provides consent must be given by a particular date and when that date is approaching it is obvious consent will not be given in time but it is known the parties are taking all reasonable and proper steps to get consent, have you ever in your experience found a Southland solicitor who has taken the point the contract will be void if the Court's decision is not given in that time? (OBJECTION BY MR BURN).

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I cannot recall the point being taken in the manner you mention. Is it customary where such a time limit is drawing near for a solicitor to write letters asking if the time will be extended? In my experience it is not customary, it does happen but it is not customary. So in a case you were dealing with involving this type of clause you would not be surprised if you didn't get a letter from the other side asking for an extension of time? No I would not be.

In the Supreme
Court of New
Zealand

—
No. 3

Plaintiffs'
Evidence

Alan Beavers
Binnie

Examination

- continued

TO BENCH: In your experience in Southland what would be a normal time from the time you filed your application in the Administrative Division before you got an answer? To have a decision of the Committee, I would say 3 to 4 weeks in the absence of objection.

TO COUNSEL: Would you put yourself in the position of yourself acting for parties in a contract like this and time for obtaining consent has just expired, have you ever had an occasion where for that reason alone the contract is void? No.

XXM: Mr BURN: Until today? I am not familiar with the facts of the case. Have they not been discussed with you by solicitors for the plaintiffs? Yes. Then you are familiar with the case? Yes. You said sometimes letters will be written drawing attention of solicitors to the fact the time is drawing close? Yes. You have received on occasions letters like that? I can't recall personally. Have you perhaps sent letters like that? No I can't recall having done that. You do know it happens but can't remember if you have ever sent or received one? Not personally. If you did receive a letter that a time limit for obtaining consent was drawing close would you write back and say "Don't be silly, this is Southland", or do something to obtain it? I would do something to obtain it. Because it was a condition of the contract? Yes.

Cross-
Examination

REXM: Mr INCLIS: Because that point had been taken? Yes, because the point had been taken.

Re-Examination

In the Supreme
Court of New
Zealand

No. 3

Plaintiffs'
Evidence

Quentin McLean
Smith

Examination

MR INGLIS CALLS: QUENTIN McLEAN SMITH

(Sworn): I am a solicitor in practise at Winton and Invercargill and a partner in Macalister Bros. I came to Southland just under 12 years ago. My principal practice since that time, substantially it has been rural conveyancing. In this case I act as Mr and Mrs Neylons' solicitors. I received the contract which has been entered into between them and Mr and Mrs Dickens and noted the clause about approval of the Supreme Court being required. I learned from the vendors' solicitors that on 23 January they filed the purchasers' papers and application to the Court. They did that at my request.

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TO BENCH: Broughton, Henry & Galt were acting for the defendants? Yes.

TO COUNSEL: Broughton, Henry & Galt as far as I am aware is a well established Invercargill firm, experienced in rural conveyancing. I was conscious of the fact that in the contract the time limit for acquiring the Court's consent was given as 26 January. In view of the fact they filed an application for that consent on 23 January first of all I was most conscious of the fact the application had to be filed by 24th which was a mere 4 days after our office opened after the Christmas vacation. I was aware my client was at Haast and I had no chance of getting him down to sign the papers in time to have his declaration filed by the 24th.

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TO BENCH: With papers filed on the 23rd there was no way you could or Broughton & Galt could get an order by the 26th? No, that is so.

TO COUNSEL: At the time when I arranged for Broughton to file the application on the vendors' behalf Mr Broughton did not raise the point at that time. From my experience of Southland practitioners I would not expect him to. He did not tell me the vendors regarded time as being of the essence. My Broughton did not tell me

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the vendors regarded time as being of the essence at any time after 26 January. Mr and Mrs Neylons' declaration was completed at Winton and I brought it into town because my practice at that stage was divided between two offices. I did not file it myself but handed it to a clerk to file. Within a day of that I wrote to Broughton Henry & Galt confirming finance was available. I did that on 5 February.

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TO BENCH: The last day was 9 February? That is correct.

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TO COUNSEL: On 16 February a few days after that I wrote again to Broughton Henry & Galt enclosing a Memorandum and asking for a Settlement Statement. By that time the consent of the Land Valuation Committee had been given. Letters produced as EXHIBITS F AND G. On 24 February I received a letter dated 23 February from Broughton Henry & Galt acknowledging receipt of my earlier letter and confirming the telephone advice that Mr and Mrs Dickents had instructed them they were not proceeding with sale of the property. EXHIBIT H.

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TO BENCH: No reason given? No reason at all. No reasons given in writing, there was some discussions. The only indication given by Mr Broughton verbally was Mrs Dickens not having signed the contract personally.

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TO COUNSEL: In between the letters on 5 February and Mr Broughton's letter I had some discussions with Mr Broughton. Mr Broughton did not say anything during those discussions relating to Dickens' attitude to the transaction - I gathered he was having some difficulty with his clients and the indication given to me was that at least one of them was seeking independent advice. Did he give any indication other than that of any explanation for the attitude? Not an explanation as to their attitude but he made some comments which he asked me to treat as off the record. I prefer not to say what those comments were. I would be prepared to disclose them if His Honour directed me to.

In the Supreme
Court of New
Zealand

—
No. 3

Plaintiffs'
Evidence

Quentin McLean
Smith

Examination

- continued

In the Supreme
Court of New
Zealand

No. 3

Plaintiffs'
Evidence

Quentin McLean
Smith

Examination

- continued

On 25 February I received advice from the land agents that they had forwarded to the vendors' solicitors a cheque for the deposit. That letter was received by me on 26th. EXHIBIT I. Broughton Henry & Galt or the Dickens' new solicitors - the refund of deposit was made to J.E. Watson & Co.Ltd. because I was present there on 27 February which should have been the date for settlement when that cheque was returned. On 26 February I myself wrote to Broughton Henry & Galt a formal letter requiring settlement. EXHIBIT J. I made an appointment and saw Mr Broughton at 2 o'clock in the afternoon of that day and handed that letter to him personally. I had the amount of the purchase price with me in the form of two bank cheques. He declined them. At that stage there were again some comments off the record as to why his clients had decided not to go ahead and I prefer not to disclose what they were.

Cross-
Examination

XXM: Mr BURN: You heard evidence this morning of Mr Binnie? Yes. You told us that Mr Broughton made no statement to you that he regarded time of the essence as far as the time of consent was concerned? That is correct. And it wasn't discussed between you? There may have been a passing comment but I couldn't say yes or no. You didn't yourself give tacit consent to the date being put back? No I was concerned with getting the paper filed within one month. You were conscious of the month more than anything else. The month is a statutory matter which has to be complied with? Yes and immediately after the Christmas vacation it is a matter which any practitioner involved in rural conveyancing has to give prime consideration to. Your office opens when? 20 January. You were aware also of the 26th January date? I would have seen it in the contract, yes. When the application was made you know it was accompanied by a letter to Mr Broughton in which you informed him you would sent papers to Haast? Yes. He must have learned that from you? Yes I telephoned him to inform him my client

would have to obtain consent of the Court, couldn't file a land declaration and my client was in Haast and I was in some difficulty, would he please file the application. It is not invariable practice for vendors to apply? It is more common in Southland for the purchasers to file the papers, it is most uncommon for the purchaser to sign the papers, you usually have both sides sign the papers but the purchasers collect and file the papers. Your clients declaration appears to be signed at Winton on 28 January 1976? Yes. I can't give you the precise date it was lodged, I was working two afternoons a week in our Invercargill office and would bring the papers in and give them to the Court Clerk for filing. The sale to Neylon was still conditional at that time? Yes finance had not been confirmed, the date for confirming finance was 28 January. It was verbally confirmed to J.E. Watson & Co. Can you say when settlement of the sale of his property took place? It took place, substantial settlement took place in March, about the 19th March. Can you tell me when finance was confirmed on this present transaction? On the 5th, I was rung at Winton from Watson's office. I had a letter written and I came in that day and delivered it by hand to Broughton that day. 5th February? Yes. Had you advised the Court your client was then landless purchasers after that date? No.

REXM: Mr INGLIS: Did Mr Broughton ever suggest to you he had any objection to the deadline not being met? No. You were asked about Mr Broughton's letter to the Court accompanying the application and pointing out the papers would be arriving shortly, what point was there in his filing an application only 3 days before the deadline if everyone understood it couldn't be met? (MR BURN OBJECTS). If the contract was to be void after 26 January the Court's consent not having been acquired

In the Supreme
Court of New
Zealand

No. 3

Plaintiffs'
Evidence

Quentin McLean
Smith

Cross-
Examination

- continued

Re-Examination

No. 3

Plaintiffs'
Evidence

Quentin McLean
Smith

Re-Examination
- continued

James Robert
Thompson

Examination

before then, what would be the point of Mr Broughton filing the application? Only to establish I suppose that he went through the formality of filing but it would be only a formality. Did he ever suggest it was a mere formality? No. 23rd January was a Friday wasn't it? Yes it would be. And the 26th a Monday? Yes.

JAMES ROBERT THOMPSON (Sworn): I live at Otautau and for the last 2½ years I have managed a farm property owned by Mr and Mrs Neylon at Waireo in the Nightcaps area. While I was there the carrying capacity of that farm went up. I had a discussion with Mr Neylon about selling that property and buying another. I went with Mr Neylon and Mr Blackler to the land agent to inspect the property owned by Mr and Mrs Dickens. Mr Dickens took us round. His attitude was very helpful. We had lunch with Mr and Mrs Dickens. Her attitude was good. As to whether I understood from what Mr and Mrs Dickens said as to whether they really wanted to stay or leave, I think they wanted to leave from what they said. I went to the auction when Mr Neylon's bid was the highest bid and the property was passed in. Later in January we went to the property again. Mr Neylon and Mr Wallace and I and some others. We saw Mr Dickens again. He was helpful again. On that day I did not speak to Mrs Dickens. She was in the house. I went up to the property again on 22 February with the Marginal Lands Committee, late in February. On that third occasion I did not see Mr Dickens. The time we went up in January and saw Mr Dickens he did not say he was not going on with the sale which by then had been arranged. I was asked to go up again on 13 February 1976 with a Rural Bank Farm Appraiser. I rang the Dickens' place the evening before we went up. I spoke to Mrs Dickens. I told her I was Mr Neylon's manager. I told her I wanted to bring the Rural Bank man up and she said that was

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all right. She didn't say anything about there being no point in coming because the deal was off. The same evening I rang Mrs Dickens Mr Dickens rang me about an hour later. He had been out when I rang before. He didn't want us to come up the next day. I asked him why and he wouldn't give a reason. He just said to explain to the Rural Bank man and that he would understand. I saw the Rural Bank man the following day and told him about the conversation with Mr Dickens. We went up to the property that day on the road. I have not been on the property since or spoken to either of the Dickens since the conversation on 12 February. My first visit, before the auction, I saw Mrs Dickens then. She seemed friendly. I think it was Mr Dickens who showed us through the house. There is a little shop attached to the homestead for the benefit of people going up to Lake Hauroko. She did not take us through the shop.

XXM: NO QUESTIONS.

MR LAING CALLS: MURRAY RICHARD HALSTEAD

(Sworn): I am an Executive Officer for J.E. Watson & Co. Limited. That firm has acted as both stock and station agents for Mr and Mrs Dickens and Mr and Mrs Neylon. I knew about the agreement for sale being completed from the Dickens to the Neylons. Up to 18 February this year no arrangements had been made for the sale of stock and plant owned by Mr and Mrs Dickens and not included in that date, not until that date. On that date I had a telephone conversation, I rang Mr Dickens in the evening. I asked him whether he would have enough time between the 18th and proposed date, the 26th, to get stock and plant ready for a proposed clearing sale and I requested perhaps if he did have time he contacted our stock manager and agent at Otautau to contact him the next day to go and make necessary preparations. As to the holding of the clearing sale, he said "If you like I have made enough mistakes this year already". I then went on to ask him whether he had done anything about a house or property and he replied that no, he hadn't, he thought he might go to

In the Supreme
Court of New
Zealand

—
No. 3

Plaintiffs'
Evidence

James Robert
Thompson

Examination

- continued

Murray Richard
Halstead

Examination

In the Supreme
Court of New
Zealand

No. 3

Plaintiffs'
Evidence

Murray Richard
Halstead

Examination
- continued

Cross-
Examination

22.

Fiji, in a joking fashion. In my discussion with him on the night of 18 February, the 26th was arranged for the clearing sale, following confirmation by our agent at Otautau. The clearing sale having been arranged, it did not take place.

XAM: MR BURN: Had you been involved in the negotiation over the sale prior to 18 February? Yes. You got back to Mr Dickens on 18 February specifically about the clearing sale? I was concerned at that time the proposed date was the 26th and nothing had been done at that stage to make arrangements. You also looked into the possibility of selling the house? No not at that stage, I said have you done anything about buying a house, just concern for his welfare. If he wanted that followed up you would have looked for a house? Yes I would. He made a lighthearted remark about going to Fiji? He did. You heard the contract was off? Our stock manager rang and he was told it was off. How long did the conversation go on? Telephone, I couldn't be sure, it just covered the two or three questions I asked about the proposed clearing sale. What time of evening was it? Approximately 8 o'clock, I wouldn't be sure about that. What would be the next step you would take if a clearing sale was to be proceeded with? Our stock manager and agent at Otautau would have gone to the property and looked at stock and plant and so forth and advertised at that day, I actually asked at that time if we had enough time to get the clearing sale arranged.

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REXM: NO QUESTIONS

CONCLUSION OF EVIDENCE FOR PLAINTIFFS

23.

No. 4

EXHIBITS

PART EXHIBIT "B"

[Supreme Court (Administrative Division)
File SVP. 11/76]

BROUGHTON, HENRY & GALT
Barristers & Solicitors
Invercargill.

23 January 1976.

10 The Registrar,
Administrative Division,
Supreme Court,
Don Street,
INVERCARGILL.

Dear Sir,

re: Application for Consent to
Sale - Dickens to Neylon

We enclose herewith Application for
Consent to this Transaction.

20 Messrs Macalister Bros are acting for
the purchasers and they confirm that the
Purchasers' Declaration has been forwarded
to their client at Haast for completion.

We confirm that the Purchasers'
Declaration will be filed in support of the
application when it is returned from Haast.

Yours faithfully,
BROUGHTON, HENRY & GALT

per: 'W.G. Broughton'

Encl.

In the Supreme
Court of New
Zealand

—
No. 4

Exhibit "B"

Letter dated
23 January
1976

APPLICATION FOR CONSENT UNDER PART II OR PART IIA OF LAND SETTLEMENT PROMOTION AND LAND ACQUISITION ACT 1952

In the Supreme Court of New Zealand (Administrative Division)

No. 1176

INVERCARGILL District Registry In the matter of an application under the Land Settlement Promotion and Land Acquisition Act 1952 for consent to a sale of land.

PARTICULARS OF TRANSACTION

PARTIES:

Vendor (Lessor) (1) DONN ALEXANDER DICKENS and MURIEL MAY DICKENS

(1) Give full name, address and occupation Purchaser (Lessee) (1) KEITH JAMES NEYLON and JANE AGNES NEYLON

Other parties (1) Nil

(a) Nature of transaction: Sale and purchase

(2) Give legal description, take reference and locality. Attach sketch plan on separate sheet if land not shown on survey plan.

(b) Description of land: (2) All that piece of land comprised in Deferred Payment License No. DPF275 containing 1,986 acres 1 rood 32.4 poles situated in the land district of Southland and being Sections 6, 8, 9 and 13 Block 12 Hauroko Survey District recorded in Register Book Volume B4 Folio 1124

County in which land is situate: Wallace

(c) If property is leasehold: N.A.

Name of lessor: N.A. Term of lease: N.A. Years from N.A. Rent payable: \$ N.A. Terms (if any) as to renewal or purchase: N.A.

(d) Consideration \$112,000.00

Total amount to be paid exclusive of stock, chattels or goodwill: (3) \$

(3) If transaction is a lease state term and rental.

(continued overleaf)

Handwritten initials 'AG'

(e) Latest Government Valuation:

Unimproved value: \$ 54,100 Improvements: \$ 43,400

Capital value \$ 97,500 Date of valuation: 1/7/74

(f) Application number or other particulars of the last application to the Administrative Division of the Supreme Court or the Land Valuation Court affecting the foregoing farm land (whether with or without other land):

(g) Particulars of buildings: Dwelling, Haybarn, Implement Shed, Woodshed

(h) Class of farming carried on: Sheep and Cattle

(i) Stock carried each year for past 3 seasons: Normal for this type of property

(j) Production for each year for past 3 seasons: Normal for this type of property

(k) Any special features from the viewpoint of aggregation: No

(l) (Where the application is under Part IIA of the Act)

The name of any operative regional planning scheme or proposed or operative district planning scheme under the Town and Country Planning Act 1953, and any designation or zoning of the land for any public utility, amenity, reserve, or public work, or any proposed such purpose under such operative regional planning scheme or proposed or operative district scheme:

(m) (Where the application is under Part IIA of the Act)

Where the land is not designated or zoned for any of the purposes set out in paragraph (l), relevant matters to enable the Court or Committee to satisfy itself that it is unlikely that the land will be required for any such purpose:

DECLARATION

I, WARREN GEOFFREY BROUGHTON

of Invercargill, Solicitor

*Insert Vendor,
or Lessor,
or Purchaser,
or Lessee,

as* Solicitor for the Vendors in the foregoing transaction hereby make application for the consent of the Administrative Division of the Supreme Court to the sale described therein. And I hereby solemnly and sincerely declare:

(1) That the foregoing particulars set out in this application are in all respects true and correct.

(2) That attached hereto and marked are true copies of all agreements and other documents entered into or proposed to be entered into by the parties relating to or affecting the said transactions (including full particulars of any agreement or arrangement entered into or proposed to be entered into by the parties otherwise than in writing).

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(3) That with the exception of the agreements referred to in the last preceding paragraph no agreement, whether in writing or otherwise, has been made between the parties or any of them which in any way directly or indirectly refers to or affects or is ancillary to or collateral with the transaction for which consent is applied for and no such agreement is intended to be made.

(4) That the transaction for which consent is applied has not been entered into as part of a device plan, or scheme which is or intended to be in contravention of part II or part IIA of the Land Settlement Promotion and Land Acquisition Act 1952.

(5)

And I make this solemn declaration conscientiously believing the same to be true and by virtue of the Oaths and Declarations Act 1957.

Signature: W. J. [Handwritten Signature]

Declared at Invercargill this }
23rd day of January 19 76, before me: }

[Handwritten Signature]

Justice of the Peace
or Solicitor
or Notary Public,
or Officer duly authorised
to take and receive
Statutory Declarations.

The address for service of the vendors (~~lessor~~) is at the offices of Messrs Broughton, Henry & Galt, Solicitors, 66 Don Street, Invercargill

The address for service of the purchasers (~~lessee~~) is at the offices of Messrs Macalister Bros, Solicitors, Winton

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IN THE SUPREME COURT OF NEW ZEALAND
(Administrative Division)

INVERCARGILL REGISTRY

No. LUP 11/76

IN THE MATTER of an application under
the Land Settlement Promotion and Land
Acquisition Act 1952 for consent to a
sale of land

BETWEEN: DONN ALEXANDER DICKENS &
MURIEL MAY DICKENS

Vendors

A N D: KEITH JAMES NEYLON & JANE
AGNES NEYLON

APPLICATION FOR CONSENT TO SALE
OF LAND

TYPESCRIPT OF STAMPED REMARKS - NO OBJECTION - CONSENT GRANTED SUBJ. TO CONSENT
LAND SETTLEMENT BD. Order not to be sealed until
purchaser's present property sold.

'Signature illegible'
CHAIRMAN.
12 FEB 1976

• *only to consent land settlement Act.*

(2) *[Signature]*
112 FEB 1976
20 - 20 - 12

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PROBATION, HENRY & GALT
Solicitors,
Invercargill

23 JAN 1976
INVERCARGILL

DECLARATION BY PURCHASER (~~OR LESSEE~~)

(To be used where Section 29A of the Land Settlement Promotion and Land Acquisition Act 1952 does not Apply.)

In the Supreme Court of New Zealand

~~xDistrict~~

Invercargill

Registry

In the matter of a Sale of land

Between DONN ALEXANDER DICKENS of
Tuatapere farmer and MURIEL MAY
DICKENS his wife Vendor (~~OR LESSOR~~)

and KEITH JAMES NEYLON of Haast, pilo
and JANE AGNES NEYLON his wife
Purchaser (~~OR LESSEE~~)

I, WE, KEITH JAMES NEYLON
NEYLON his wife
sincerely ~~declare~~ severally declare:

of Haast, pilot and JANE AGNES
hereby solemnly and

(1.) That ~~we are~~ ^{we are} ~~the purchasers (or lessors)~~ in the transaction referred to in ~~the attached~~ ^{this} application ~~marked~~

(2.) That the following particulars are in all respects true and correct:

(a) Particulars of all farm land, as defined in the Land Settlement Promotion and Land Acquisition Act 1952, owned, leased, held or occupied by me in fee simple or under any tenure of more than one year's duration, either severally, jointly, or in common with any other person or persons: * 381 acres 2 roods 24 perches Section 210 and parts Section 165 Block VI Wairio District including Lot 1 D.P. 1088 all Certificates of Title 89/9; 101/271 and 1A/894 (Southland Registry) L.V. \$50,000 V.I. \$6,500 C.V. \$56,500 Valuation dated March 1975

(b) Particulars of all farm land, as so defined, in which ~~I~~ ^{we} have ^{or either of us has} any estate or interest, whether legal or equitable and whether vested or contingent, under any trust, will, or intestacy: *

NIL

(c) Particulars of all farm land, as so defined, owned, leased, held, or occupied by each company, the members of which are less than 10 in number and of which ~~I~~ ^{we are members or either of us} ~~am or my wife (husband)~~ is a member, in fee simple or under any tenure of more than one year's duration, either severally, jointly, or in common with any other person or persons: *

NIL

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*Give reference to section, block, district, title reference, area, tenure, Government valuation and date thereof.

(d) Particulars of all farm land, as so defined, owned, leased, held, or occupied in fee simple or under any tenure of more than one year's duration by my wife (husband) either severally, jointly, or in common with any other person or persons:*

Not Applicable

(e) Particulars of farm land, as so defined, in which my wife (husband) has any estate or interest, whether legal or equitable and whether vested or contingent, under any trust, will or intestacy:*

Not Applicable

(f) ^{We both} ~~I~~ have attained the age of 17 years.

~~For I am under 17 years of age. Particulars of all farm land as so defined, owned, leased, held or occupied by my parents in fee simple or under any tenure of more than one year's duration, either severally, jointly, or in common with any other person or persons, or in which my parents have any estate or interest, whether legal or equitable and whether vested or contingent, under any trust, will, or intestacy:~~

~~Father:*~~

~~Mother:*~~

(g) (Where the purchaser or lessee is a company the members of which are less than 10 in number, or a trustee for such a company to be incorporated)

(1) Particulars of all farm land, as so defined, owned, leased, held, or occupied in fee simple or under any tenure of more than one year's duration by each member or intended member (as the case may be) of the company or proposed company or his wife (her husband), either severally, jointly, or in common with any other person or persons:*

Not Applicable

(2) Particulars of all farm land, as so defined, in which each member or intended member (as the case may be) of the company or proposed company or his wife (her husband) has any estate or interest, whether legal or equitable and whether vested or contingent, under any trust, will or intestacy:*

Not Applicable

(h) In case other farm land is owned, held or occupied as set out in the foregoing paragraphs (a) to (g)

(1) The class of farming carried on, stock carried, and the production each year for the past three seasons: Not Applicable See paragraph (1)

(2) Why that farm land is insufficient for purchaser's or lessee's requirements:

Not insufficient

(i) Section 29A of the Land Settlement Promotion and Land Acquisition Act 1952 does not apply to the transaction.

(j) Particulars of any estate or interest in farm land as so defined, which since the passing of the above-mentioned Act (namely, the 16th day of October 1952) ~~I~~we ^{or either of us has} have transferred, granted, leased, or otherwise disposed of to any person as trustee for any person or in respect of which since that date I have created any trust:*

NIL

(k) The type of farming proposed to be engaged in: Sheep and cattle farming

(l) ~~My~~ ^{Our} reason for desiring to acquire the property subject to the application for consent is: that property has been sold but the sale is not yet unconditional. This purchase will not proceed unless the other sale does become unconditional

(m) We are both New Zealand citizens by birth.

(3) That the documents attached to the said application ~~and marked~~ " are true copies of all the agreements and other documents entered into or proposed to be entered into by the parties and relating to or affecting the said transaction (including full particulars of any agreement entered into or proposed to be entered into by the parties otherwise than in writing.)

(4) That with the exception of the agreements referred to in paragraph 3 hereof, no agreement whether in writing or otherwise, has been made between the parties or any of them which in any way directly or indirectly refers to or affects or is ancillary to or collateral with the transaction for which consent applied for and no such agreement is intended to be made.

(5) That the transaction for which consent is applied for has not been entered into as part of a device, plan, or scheme which is or is intended to be in contravention of Part II of the Land Settlement Promotion and Land Acquisition Act 1952.

And I make this solemn declaration conscientiously believing the same to be true, and by virtue of the Oaths and Dclarations Act 1957.

Severally
Declared at ~~Winton~~ *Hant Winton*
this *28th* day
of January 19 76
before me

[Signature]
Signature
[Signature]

[Signature]

~~Justice of the Peace or Solicitor or Notary Public~~ (Or other person duly authorised to take and receive statutory declarations)

The Address for the service of the purchaser ~~(or lessee)~~ is: at the offices of Messieurs Macalister Bros., Solicitors, Great North Road, Winton.

NOTE:- In any case where the documents attached to the application cannot be produced to the deponent at the time of his making the foregoing declaration, copies of the documents referred to in paragraph 3 of the declaration should be attached as exhibits and the declaration amended accordingly.

ORDER OF LAND VALUATION COMMITTEE

In the Supreme Court of New Zealand
(Administrative Division)

No. LVP 11/76

~~XXXXXX~~
INVERCARGILL Registry

IN THE MATTER of an application
under the Land Settlement Promotion and Land
Acquisition Act 1952 for consent to a
of land

Between DONN ALEXANDER DICKENS & MURIEL Vendor/~~XXXXXX~~
MAY DICKENS

and KEITH JAMES NEYLON & JANE AGNES Purchaser/~~XXXXXX~~
NEYLON

BEFORE THE SOUTHLAND LAND VALUATION COMMITTEE

On reading the application of WARREN GEOFFREY BROUGHTON of Invercargill, Solicitor
for consent to a sale

in respect of the land described in the schedule hereto

~~* And on hearing~~

IT IS ORDERED that *(the consent of the Administrative Division of the Supreme Court of New Zealand be granted to the transaction *pursuant to Part II (or Part IIA or under both Part II and Part IIA)) of the Land Settlement Promotion and Land Acquisition Act 1952:

~~* Upon the following conditions~~

SCHEDULE

An Estate in fee simple in all that piece of land containing 1,986 acres 1 rood 32.4 poles being Sections 6, 8, 9 and 13 Block 12 Hauroko Survey District the said land being held by the Vendors at the date of their Application for Consent under Deferred Payment Licence DPF 275 recorded in Register Book Volume B4 folio 1124 (Southland Registry)

Dated at Invercargill this 12th day of February, 1976.

Sealed at the office of the Supreme Court at Invercargill this 2nd day of March 1976.

1976.

(Deputy) Registrar.

(Deputy) Registrar

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Solicitors for the applicant: Messrs Macalister Bros.,
Solicitors, Invercargill.

*Delete where not applicable.

Memorandum of an Agreement

made this

Twenty Fourth day of *December* one thousand nine hundred and *Twenty Five*
Donn Alexander Dickens, Farmer of Kihumu, Valley
Tuatapuere and his wife Mariel May Dickens of
the same address

(hereinafter referred to as the Vendor) of the one part and

Keith James Nylon, Helicopter
operator of Naast. P.O. and his wife Jane Agnes
Nylon, of the same address.

(hereinafter referred to as the Purchaser) of the other part WHEREBY the Vendor agree to sell and the Purchaser to purchase ALL THAT piece or parcel of land more particularly described in the Schedule hereto on the terms and conditions following that is to say:—

1. The price is *One Hundred and Twelve Thousand Dollars (\$112,000-00)*

(a) The sum of *Five Thousand Dollars (\$5,000-00)*

has been paid to J. E. W. ... as a deposit and as part payment of the purchase money and is hereby acknowledged.

(b) The balance of the said purchase money shall be paid as follows:—

Cash on Date of Possession and completion of documents.

21 58 76 91 11

20
25th Aug 76
Nylon Dickens
D. P. R. P. W.

And if from any cause whatever (save the default of the Vendor) any portion of the purchase money shall not be paid upon the due date the Purchaser shall pay to the Vendor interest at the rate of *5* per centum per annum on the portion of the purchase money so unpaid from the due date until completion of the purchase but nevertheless this stipulation is without prejudice to any of the Vendor's rights or remedies under this Agreement.

2. Upon payment of the said purchase money and all interest thereon and other moneys (if any) then due hereunder the Vendor and all other necessary parties (if any) will execute a proper assurance of the said land such assurance to be prepared by and at the expense of the Purchaser and to be tendered to the Vendor for execution.

3. Possession shall be given and taken upon the 27th day of February 1976 up to which date all outgoing and incomings shall be apportioned. From the time of signature of this Agreement by the parties hereto (or if this contract is a conditional contract then from the time when this contract becomes effective) the property hereby agreed to be sold is at the risk of the Purchaser with regard to fire tempest earthquake or deterioration of any kind except and to such extent as any loss or damage may be due to the negligence or default of the Vendor. Pending possession being given to the Purchaser and subject to the Purchaser obtaining the sanction of the Insurance Company concerned and subject to the rights of mortgagee of the said land the Vendor will hold the existing policy or policies of insurance in trust for the Vendor and the Purchaser according to their respective right and interests therein.

4. The Vendor shall not be bound to point out the boundaries of the land hereby agreed to be sold and no further or other evidence of the identity of the said land with the property described in the deeds relating thereto beyond such (if any) as may be gathered from the descriptions in such deeds shall be required and the Purchaser shall admit such identity.

5. Any objection to or requisition on the title which the Purchaser shall be entitled to make must be stated in writing to the Vendor's Solicitors within twenty-one days hereof (time being essential) and in default thereof the same shall be held to be waived and the title to have been absolutely accepted by the Purchaser. In the event of the Vendor being unable or unwilling to remove or comply with any such objections or requisitions the Vendor shall be at liberty notwithstanding any intermediate negotiations by notice in writing to the Purchaser to rescind this contract in which case the Purchaser shall receive back the deposit without interest but shall have no claim whatsoever on the Vendor for the expense of investigating the title or for compensation or otherwise howsoever.

6. If the Purchaser shall make default in payment of any instalment of the purchase moneys hereby agreed to be paid or of interest thereon or in the performance of observance of any other stipulation or agreement on the part of the Purchaser herein contained and such default shall be continued for the space of fourteen days then and in such case the Vendor without prejudice to his other remedies may at his option exercise all or any of the following remedies namely:—

- (a) May rescind this contract of sale and thereupon all moneys theretofore paid shall be forfeited to the Vendor as liquidated damages.
- (b) May re-enter upon and take possession of the said lands and property without the necessity of giving any notice or making any formal demand.
- (c) May re-sell the said lands and property either by public auction or private contract subject to such stipulations as he may think fit and any deficiency in price which may result on and all expenses attending a re-sale or attempted re-sale shall be made good by the Purchaser and shall be recoverable by the Vendor as liquidated damages the Purchaser receiving credit for any payments made in reduction of the purchase money. Any increase in price on re-sale after deduction of expenses shall belong to the Vendor.

7. If any misdescription errors or omissions shall be discovered in this Agreement it shall not annul the sale but shall be the subject of compensation to be ascertained if the parties cannot agree by arbitration under the law relating to arbitration in New Zealand.

8. The Vendor shall not be liable to pay or contribute towards the expense of the erection or maintenance of any fencing.

9. The property is bought and sold free of/subject to existing tenancies (if any).

10. The Purchaser shall before the expiration of three months from the date hereof duly stamp either the counterpart of this Agreement or an assurance in pursuance thereof and in default thereof the Vendor may stamp this agreement and recover the cost from the Purchaser

11. If the land affected by this Agreement exceeds five acres in area this contract is subject to any necessary consent of the Administrative Division of the Supreme Court and the Purchaser will within fourteen days from the date of signature of this Agreement either:

- (a) Complete and deposit with the District Land Registrar a Declaration in conformity with Section 24 of the Land Settlement Promotion and Land Acquisition Act 1952 and deliver a copy to the Vendor, or
- (b) Deliver to the Vendor any statement declaration or other document required by regulation or otherwise to be completed by the Purchaser for filing with an application to the Administrative Division of the Supreme Court and the Vendor shall within one month from date hereof unless such declaration shall have been deposited as aforesaid make application to the Administrative Division of the Supreme Court for any necessary consent to this transaction

and each party hereto shall do all such acts and 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. And each party shall bear his own legal and all other costs whatsoever of and incidental to any such declaration application or other process.

12. If any of the land affected by this Agreement is held under lease or license under the provisions of the Land Act 1948 this contract is subject to any necessary consent of the Land Settlement Board being obtained within the period referred to in Clause 13 hereof and each party hereto shall within fourteen days from the date hereof make such application therefor as may be necessary and each party hereto shall do all such acts and things as may be necessary or expedient for the purposes of endeavouring to obtain such consent or securing compliance with the provisions of the Land Act 1948 and any regulations for the time being thereunder and each party shall bear his own legal and other costs whatsoever of and incidental thereto.

13. If any such consent where necessary shall not be granted by the 1/2nd day of 19 or such later date as the parties agree on or shall be refused or shall be granted subject to conditions then this Agreement subject as hereinafter mentioned shall be void PROVIDED HOWEVER that if such consent shall be granted within such time subject to conditions to which the parties shall in writing agree or subject to conditions not prejudicial to the Purchaser if the Vendor shall within seven (7) days after the grant thereof give notice in writing to the Purchaser or his Solicitor of the Vendor's willingness to comply with such conditions then this Agreement shall be binding upon the parties as modified by such conditions.

14. If this Agreement shall become void as provided herein or shall become of no effect by virtue of the provisions of the Land Settlement Promotion and Land Acquisition Act 1952 or by virtue of the Land Settlement Board refusing any consent necessary under Clause 12 hereof then if the Purchaser has duly complied with all his obligations hereunder he shall be entitled to a refund of his deposit and any other moneys paid on account of the purchase money but shall have no other claim against the Vendor

15. The conditional sale evidenced by this Agreement has been made through [Name] Member Real Estate Institute of New Zealand (Inc.) whom the Vendor has appointed and doth hereby appoint as his agent to effectuate such sale but no remuneration for the agency shall be payable if the Vendor shall have made all necessary application for consent but the consent of the Administrative Division of the Supreme Court or the Land Settlement Board as the case may be is not granted to the sale either in terms of this Agreement or subject to conditions which are acceptable by or become binding on the parties PROVIDED that if the Crown pursuant to its rights under the Land Settlement Promotion and Land Acquisition Act 1952 takes or acquires the property then commission will be payable as on a sale on the amount payable by the Crown by way of purchase price or contribution.

Section of that Act shall be deemed a reference also to any amendment for the time being of that Act and of that section and in particular to the Land Settlement Promotion Amendment Act 1959.

34

June 17. This date refers to the Farming Purchase Agreement which was made in the name of the said property of the 8th day of February 1976.

June 18. The Vendor will in this case agree to sell the said property into soft terms, this contract to be drawn up in a proper and businesslike manner.

June 19. The Vendor will in this case agree to sell the said property at a price and under the terms of the said contract, a further title at this date refers to the Farming Purchase Agreement by date of possession.

June 20. Included in the Purchase Price is all fitted glass windows, light fittings, doors, windows, and all temporary or permanent items is included by the Vendor's purchase.

June 21. The Vendor agrees to carry on Farming the said property in the same manner as in the past, and not to be carried on in any other manner.

THE SCHEDULE

All that land, as hereunto set forth in reference Patent License Number
D.P.C. 275, and recorded in Register Book Volume 6.4. Folio 1124,
Archieve Equity and all the improvements thereon, containing
130. acres 1 Rod 32.4 Paces, More or Less, being sections 6, 8, 9
and 13, Block 12, Newarko County District.

IN WITNESS whereof the said parties have executed these presents.

Witness
[Signature]

Vendor(s) Signature
R.D. Dickens for self and
Ch. D. Dickens

Witness
[Signature]

Purchaser(s) Signature
[Signature]

AGENCY AUTHORITY TO SELL PROPERTY

MESSRS J. E. WATSON & CO. LTD.

No. _____

Dear Sirs,

The following are the Particulars of Property, Price and Terms referred to in the Conditions printed on the reverse of this form.

SITUATION: District Lefteron Valley Rail Quatipere 23 miles Exchange 31A. Quatipere
 School (Primary) Cliffdale School (Secondary) 1977 Quatipere
 Roads 1/1000 School Bus at present 3 1/2 miles
 AREA: being converted of 4 acres 2 Roods Total 1986 - 1 - 32.4 Acres In Grass _____ In Crops 1/1000 25 acres
 Ploughable _____ Wheel or Crawler _____
 VALUATION: Date 1978 L.V. _____ C.V. 97500-00
 TENURE: Free Hold Freehold L.I.P. _____ Crown Lease _____
 Rental _____ Expiry Date (C.L.) _____
 RATES: County 458-84 Catchment _____ Rabbit Board _____
 SUB-DIVISION: Number Paddocks - Main 20 to 60 acre Paddock Holding _____
 Type of Fences Goodlyst Post - steel Monitors & wire Good
 WATER: Dwelling 6000 Gall - underground Tank Paddocks Water
 BUILDINGS: Dwelling 3 bedroom B.R. Home - 9 year old - Central Heating - 1400 sq. ft. - includes all fitted floor coverings - light fittings + Drapes
Rain 60 end - 3 stand - Commiser 450 sq. ft. Covered Yards 3 Bays 3 Bays 1 Bay
 Woolshed _____ Hay Barns 4000 bales - 2 2 Bay timber 3 Bays 1 Bay
One Hut and one sleepout

STOCK WINTERED 1975-76 Season. 1000 M. & Romney breeding ewes
43 Adult breeding cows. 34 2 year old Heifers - 30 2 year old
 PRICE Property to be auctioned TERMS Under normal terms of Auction

MORTGAGE DETAIL (If App.) _____

REMARKS All Hay made on property -

Legal description: secs. 8 & 9, Part Section 6,
Block 12, Hauko Survey District
Containing 1986 acres - 1 Road - 32.4 Acres more or less
Acres.
 D.A. DIKENS 28.7.75

This property is to be sold under the provisions of the Land Transfer Act 1952.

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To J. E. WATSON & CO. LTD

P.O. Box 812

Invercargill.

In consideration of your placing my property described on reverse on your books and advertising it at your own expense I HEREBY APPOINT you my sole agent for the sale of such property at the price and on the terms and conditions herein set forth for 3 months from date and I ALSO AUTHORISE you to sign a contract and receive a deposit on my behalf.

If the property is sold by you or through your instrumentality, or to anyone introduced through your agency or if while it is in your hands as sole agent it is sold by you or any other person or myself, either at the price and on the terms stated below, or such other price and upon such terms and conditions as are acceptable to me, I agree to pay you commission on the sale price in accordance with the relevant scale of charges of the Real Estate Institute of New Zealand.

If with my consent an exchange of the property be effected by you or through your instrumentality, or if an exchange of my property be effected for that of any person as sole agent, you shall be entitled to commission from me as upon a sale, notwithstanding that you may be entitled to receive commission from the other party to the exchange.

If as a result of or consequent upon negotiations for any such sale or exchange the property is acquired by the Crown under the powers conferred upon it by the Land Settlement Promotion Act, 1952, I will pay you commission at the rate aforesaid computed on the purchase price or compensation payable by the Crown.

If any such sale or exchange is subject to the consent of the Land Valuation Court or is dependent upon the filing of an appropriate declaration with the District Land Registrar, and the contract becomes void or ineffective through failure on my part to ensure that all necessary steps are taken to obtain such consent or have such declaration filed, I shall nevertheless pay you the same amount by way of commission as though such sale or exchange were duly completed.

DATED the 28th day of August 1975

Signature D. D. Dickens
M. M. Dickens

Address Private Bag
Guatapore R.D.

SKETCH PLAN OF LOCALITY

all name of Executors, Donna Alexander Dickens
and Maribel May Dickens

Property to be Auctioned 4th Day December 1975.

Inspection of Property to be started 29th October

The sum of \$1000-00 to be spent on brochures & Advertising,

the first day of Advertising to be 25th October 1975.

Total of Area fenced for deer 70 acres in two separate blocks.

B. P. Petrol Company to be consulted as to transferring of licence

M. D.
D. D.

SUP:

25th Aug. 76

Neylon Dickens

PRINTED AT THE PRESS

D

38

39.

No. 9

EXHIBIT "F"

In the Supreme
Court of New
Zealand

No. 9

MACALISTER BROS.
Barristers & Solicitors

16th February 1976

Messrs Broughton, Henry & Galt,
Solicitors,
P.O. Box 910
INVERCARGILL

Exhibit "F"

Letter dated
16 February
1976

Dear Sirs,

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Dickens to Neylon

We enclose a Transfer herein for perusal and if in order for execution by your clients. We have omitted the title reference because a new title will issue on the freeholding of the deferred payment licence. At the same time the area will be converted to a metric measurement and for that reason we have omitted the area on the Transfer as well.

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Our Property Speculation Tax Certificate is enclosed together with a Sale Notice.

Would you please let us have a settlement statement.

Yours faithfully,
MACALISTER BROS.

Per: 'Q.M. Smith'

40.

No. 10

In the Supreme
Court of New
Zealand

EXHIBIT "G"

MACALISTER BROS.
Barristers & Solicitors

No.10

5th February 1976

Letter dated
5 Feb. 1976

Messrs Broughton, Henry & Galt,
Solicitors,
P.O. Box 910
INVERCARGILL

Dear Sirs,

Dickens to Neylon

10

We confirm that our clients have been able to arrange the necessary finance to declare this contract unconditional. We will let you have a transfer in a few days and shall be glad to receive a settlement statement in due course.

Yours faithfully,
MACALISTER BROS.

per: 'Q.M. Smith'

No.11

No. 11

Exhibit "H"

EXHIBIT "H"

20

Letter dated
23 Feb. 1976

BROUGHTON, HENRY & GALT
Barristers & Solicitors

23 February 1976

Messrs Macalister Bros.,
Solicitors,
P.O. Box 14,
WINTON.

Dear Sirs,

re: Dickens to Neylon

We acknowledge receipt of your letter enclosing Memorandum of Transfer for execution

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41.

We confirm our telephone advice that our clients have instructed us they are not proceeding with the sale of the farm property and under these circumstances have refused to call and execute the transfer.

Yours faithfully,
BROUGHTON, HENRY & GALT

per: 'W.C. Broughton'

In the Supreme
Court of New
Zealand

No.11

Exhibit "H"

Letter dated
23 Feb. 1976

- continued

No. 12

EXHIBIT "I"

10 J.E. WATSON & CO.LTD.

25 February 1976

M/s Macalister Bros.,
P.O. Box 14,
WINTON.

ATTENTION: Mr Q. Smith

Dear Sir,

20 We have this day forwarded to Broughton, Henry & Galt a cheque for \$2,380.00 being balance of Deposit after deducting our commission of \$2620. in settlement of the sale D.A. & M.M. Dickens to K.J. & J.A. Neylon.

We understand you are trying for settlement on due date hence the payment of our balance prior to 27th.

Yours faithfully,
J.E. WATSON & CO.LTD.

'N.J. Hardaker'

COMMISSION MANAGER

No.12

Exhibit "I"

Letter dated
25 Feb.1976

42.

No. 13

In the Supreme
Court of New
Zealand

EXHIBIT "J"

MACALISTER BROS.
Barristers & Solicitors

—
No.13

26th February 1976

Letter dated
26 Feb. 1976

Messrs Broughton, Henry & Galt,
Solicitors,
F.O. Box 910
INVERCARGILL

Dear Sirs,

re: Dickens to Neylon

10

We acknowledge your letter of February 23rd. We note that no reason has been given in it for the refusal of your clients to execute the Transfer. Our view is that the contract is now unconditional and we are ready and willing to settle, on behalf of our clients, on the date for settlement stated in the contract.

If settlement is not possible on that date, our instructions are to issue a Writ for Specific Performance of the contract. In the meantime a Caveat is being registered against the Deferred Payment Licence.

20

If your clients continue to refuse to complete the transaction, in terms of the contract, apart from seeking an Order for Specific Performance, our clients will seek damages for all additional expenses that they incur as a result of such refusal. Such expense will include all grazing charges resulting from our clients being unable to shift their present livestock from their Nightcaps property to the one being purchased from your clients and, if our clients are eventually forced to sell such livestock, all additional income tax liabilities that will incur as a result of

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43.

having to dispose of the stock. Such tax liabilities will arise from having to sell the livestock at a market price substantially above their standard tax values. We expect that such additional tax liabilities will be at least \$16,000.00.

Yours faithfully,
MACALISTER BROS.

Per: 'Q.M. Smith'

In the Supreme
Court of New
Zealand

No.13

Letter dated
26 Feb. 1976

- continued

No. 14

No.14

10

REASONS FOR JUDGMENT OF ROPER J.

Hearing: 25 August 1976

Counsel: B.D. Inglis Q.C. and L.E. Laing
for Plaintiffs
J.F. Burn and R.G. Sinclair for
Defendants

Judgment: 3 September 1976.

Reasons for
Judgment of
Roper J.

3 Sept. 1976

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This is an action for specific performance of a contract for the sale of a farming property of about 2000 acres near Lake Hauroko in Southland. The facts are not in dispute.

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At the end of August 1975 the firm of J.E. Watson & Co.Ltd, Stock and Station Agents of Invercargill, was instructed by the Defendants to arrange the sale of their property "Hauroko Downs", and was appointed sole agent for a period of six months. It was thought desirable to offer the property at auction and this was arranged for the 4th December. The Plaintiffs, who then owned a farm at Wairio, in the Nightcaps district, attended the auction and made the highest bid of \$111,000. That bid was below the reserve and the property was passed in, but Mr Neylon informed Watsons real estate manager, Mr Blackler, that his bid of \$111,000 would remain open for acceptance. Through

In the Supreme
Court of New
Zealand

No.14

Reasons for
Judgment of
Roper J.

3 Sept. 1976

- continued

December Mr Blackler attempted to finalize a sale and had several discussions with both parties with the result that the Neylons increased their offer to \$112,000. This was submitted to the Defendants who indicated their willingness to sell at that figure. An agreement for sale and purchase was signed by both Mr and Mrs Neylon, and Mr Dickens on behalf of himself and his wife, on the 24th December. Having regard for the provisions of The Land Settlement Promotion and Land Acquisition Act 1952 and certain specific provisions of the present agreement relating thereto no more inconvenient date could have been chosen to conclude a sale of rural land. 10

The agreement is on the standard form approved by the Real Estate Institute of New Zealand (Incorporated) for sales of rural land. The only clauses to which I need refer are 11, 12 and 13, which provide: 20

"11. If the land affected by this Agreement exceeds five acres in area this contract is subject to any necessary consent of the Administrative Division of the Supreme Court and the Purchaser will within fourteen days from the date of signature of this Agreement either: 30

- (a) Complete and deposit with the District Land Registrar a Declaration in conformity with Section 24 of the Land Settlement Promotion and Land Acquisition Act 1952 and deliver a copy to the Vendor, or
- (b) Deliver to the Vendor any statement declaration or other document required by regulation or otherwise to be completed by the Purchaser for filing with an application to the Administrative Division of the Supreme Court and 40

the Vendor shall within one month from date hereof unless such declaration shall have been deposited as aforesaid make application to the Administrative Division of the Supreme Court for any necessary consent to this transaction

In the Supreme
Court of New
Zealand

—
No.14

Reasons for
Judgment of
Roper J.

3 Sept. 1976

- continued

10 and each party hereto shall do all such acts and 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. And each party shall bear his own legal and all other costs whatsoever of and incidental to any such declaration application or
20 other process.

12. If any of the land affected by this Agreement is held under lease or license under the provisions of the Land Act 1948 this contract is subject to any necessary consent of the Land Settlement Board being obtained within the period referred to in Clause 13 hereof and each party hereto shall within fourteen days from the date hereof make such application therefor as may be necessary and each
30 party hereto shall do all such acts and things as may be necessary or expedient for the purposes of endeavouring to obtain such consent or securing compliance with the provisions of the Land Act 1948 and any regulations for the time being thereunder and each party shall bear his own legal and other costs whatsoever of and incidental thereto.

40 13. 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 or shall be refused or shall be granted subject to conditions then this Agreement subject as herein-after mentioned shall be void PROVIDED

In the Supreme
Court of New
Zealand

—
No.14

Reasons for
Judgment of
Roper J.

3 Sept. 1976

- continued

HOWEVER that if such consent shall be granted within such time subject to conditions to which the parties shall in writing agree or subject to conditions not prejudicial to the Purchaser if the Vendor shall within seven (7) days after the grant thereof give notice in writing to the Purchaser or his Solicitor of the Vendors willingness to comply with such conditions then this Agreement shall be binding upon the parties as modified by such conditions."

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These same clauses were considered by Cooke J. in Peeters and Another v. Schimanski [1975] N.Z.L.R. 328; and in Goode v. Scott [1976] N.Z.L.R. 293 our Court of Appeal had before it clauses to a like effect.

The present agreement was also subject to the condition that the Plaintiffs arrange finance by the 9th February - a deadline which was in fact met.

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The defences raised in the statement of defence are :

1. That the consent of the Land Settlement Board having not been obtained by the 26th January (in terms of clause 13) the contract was void.
2. That the consent of the Administrative Division of the Supreme Court having not been granted by the 26th January, and no extension of that time having been agreed to, the contract was void in terms of Clause 13). (Such consent was necessary because the Neylons already owned a farm.)
3. That the consent of the Administrative Division was given subject to conditions, which had either not been complied with, or agreed to by the Defendants.
4. That the agreement had been signed on behalf of the Defendant Muriel May Dickens without her authority and that there had been no subsequent ratification by her.

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Mr Burn specifically abandoned the defence in 4 above and made no submissions on 3. As to the first ground of defence, namely that the consent of the Land Settlement Board had not been obtained within the time limit, the Land Valuation Committee, as delegate of the Court, consented to the application for consent to sale of the land "subject to the consent of the Land Settlement Board." It is common ground that the Committee in making its consent subject to that condition mistakenly believed that the land in question was held under a deferred payment licence, whereas in fact this was a sale of a freehold interest, to which the consent of the Land Settlement Board is not required nor could be given. I regard the condition as a nullity and indeed the order as sealed makes no reference to it. I reject Mr Burn's submissions on that point and come to what is really the crux of the matter - namely the effect of the failure to obtain the consent of the Administrative Division of the Court, through the Land Valuation Committee, by the 26th January. Clause 13 of the agreement provides that if that deadline is not met the agreement "shall be void". The consent was actually given on the 12th February.

The solicitors involved in the transaction were Mr Smith of Macalister Bros for the Plaintiffs and Mr Broughton of Broughton Henry & Galt for the Defendants.

It appears that because of the intervention of the Christmas legal vacation nothing was done in the transaction until offices re-opened on the 20th January. Mr Smith deposed that he was aware that there was a time limit for obtaining the Administrative Division's consent, but it is very apparent that he was even more aware of the fact that in terms of s.25(1)(a) of the Act the application for consent had to be made within one month - namely the 24th January. That was his primary concern and he was faced with a difficulty. His

In the Supreme
Court of New
Zealand

—
No.14

Reasons for
Judgment of
Roper J.

3 Sept. 1976

- continued

In the Supreme Court of New Zealand

No.14

Reasons for Judgment of Roper J.

3 Sept. 1976

- continued

clients were in Haast and he had no chance of getting them to his office in time for their declaration to be signed and filed by the 24th. He therefore arranged with Mr Broughton that the latter file the application on the vendor's behalf. Mr Broughton apparently agreed to do that for on the 23rd January he duly filed an application for consent, declared by himself as solicitor for the vendors. The application was accompanied by this letter -

10

" 23 January 1976

The Registrar,
Administrative Division,
Supreme Court,
Don Street,
INVERCARGILL.

Dear Sir,

re: Application for Consent to Sale - Dickens to Neylon.

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We enclose herewith Application for Consent to this Transaction.

Messrs Macalister Bros are acting for the purchasers and they confirm that the Purchasers' Declaration has been forwarded to their client at Haast for completion.

We confirm that the Purchasers' Declaration will be filed in support of the application when it is returned from Haast.

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Yours faithfully,
BROUGHTON, HENRY & GALT "

The 23rd January was a Friday and the time for obtaining the Court's consent expired on the Monday. It is obvious that in the circumstances there was just no possibility of the deadline being met. The purchasers' declaration was signed on the 28th January. There is nothing to indicate when it was filed but on Mr

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Smith's evidence it would probably have been filed that day or perhaps the following day.

In the Supreme
Court of New
Zealand

On the 5th February Mr Smith wrote to Mr Broughton confirming finance and on the 16th (by which time the Court's consent had been granted) he wrote again enclosing a transfer for perusal and execution. He received the following reply -

— — —
No.14

Reasons for
Judgment of
Roper J.

" 23 February 1976

3 Sept. 1976

10 Messrs Macalister Bros,
Solicitors,
P.O. Box 14,
WINTON

- continued

Dear Sirs,

re: Dickens to Neylon

We acknowledge receipt of your letter enclosing Memorandum of Transfer for execution.

20 We confirm our telephone advice that our clients have instructed us they are not proceeding with the sale of the farm property and under these circumstances have refused to call and execute the transfer.

Yours faithfully,
BROUGHTON, HENRY & GALT "

On the 26th February he wrote the following:

30 "Messrs Broughton, Henry & Galt,
Solicitors,
P.O. Box 910
INVERCARGILL

Dear Sirs,

re: Dickens to Neylon

We acknowledge your letter of February 23rd. We note that no reason has been given in it for the refusal of your clients to execute the Transfer. Our view is that the contract is now unconditional and we are

In the Supreme
Court of New
Zealand

ready and willing to settle, on behalf of our clients, on the date for settlement stated in the contract.

No.14

Reasons for
Judgment of
Roper J.

If settlement is not possible on that date, our instructions are to issue a Writ for Specific Performance of the contract. In the meantime, a Caveat is being registered against the Deferred Payment Licence.

3 Sept. 1976

- continued

If your clients continue to refuse to complete the transaction, in terms of the contract, apart from seeking an Order for Specific Performance, our clients will seek damages for all additional expense that they incur as a result of such refusal. Such expense will include all grazing charges resulting from our clients being unable to shift their present livestock from their Nightcaps property to the one being purchased from your clients and, if our clients are eventually forced to sell such livestock, all additional income tax liabilities that they will incur as a result of having to dispose of the stock. Such tax liabilities will arise from having to sell the livestock at a market price substantially above their standard tax values. We expect that such additional tax liabilities will be at least \$16,000.00.

Yours faithfully,
MACALISTER BROS.

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In anticipation of taking over "Hauroko Downs" the Plaintiffs had sold their farm at Nightcaps hence the reference to removal of stock from that property.

Mr Burn submitted that because of the failure to obtain the Court's consent by due date the contract was void. He referred to the observations of Cooke J. in Peeters case (supra) where the same problem had arisen. At page 332 Cooke J. said -

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"The consent of the Administrative Division was necessary. It was not granted by 31 August 1973 and the parties did not agree on any later date.

Prima facie, therefore, the agreement became void under the express provisions of cl.13. The purpose of that clause was to enable the parties to know where they stood by the date there specified.

10 In the absence of circumstances precluding him from relying on the point, the vendor is clearly entitled to take advantage of the clause and to assert that the contract was at an end, even although his motive for doing so be to escape from a transaction of which he has repented."

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20 In that case the Plaintiffs sought, unsuccessfully, to overcome the difficulty by relying on the principle that a party cannot take advantage of his own default, but in the present case Mr Inglis advanced quite different reasons why the Defendants should be precluded from relying on the breach. It appeared to me that the Plaintiffs' submissions on this point rather changed direction in the course of the hearing. In his opening Mr Inglis submitted, first, that time for fulfilment of the condition never having been made of the essence it was not open to the Defendants to take advantage of the provisions of clause 13, and secondly, that in any event there had been a waiver of the time provision. In 30 his final address Mr Inglis appeared to abandon his proposition that time had never been made of the essence and argued waiver and estoppel. Whether he did in truth abandon the time point matters little for I am satisfied that that plea was not open. The principle of law applicable is contained in the leading authority of Aberfoyle Plantations Ltd. v. Cheng [1960] A.C. 115. In that case Lord Jenkins delivering the 40 judgment of the Judicial Committee said at page 125:

"Where a conditional contract of sale fixed (whether specifically or by reference to the date fixed for completion) the date by which the condition is to be fulfilled, then the date so fixed must be strictly adhered to, and the time allowed is not to be extended by reference to equitable principles."

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I believe the principle to be that where a date for performance of a condition is specified the condition must be strictly complied with. Time is of the essence and the equitable principle of making time of the essence has no application.

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Roper J.

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- continued

I come now to Mr Inglis submissions of waiver and estoppel. As evidentiary support for these pleas Mr Inglis adduced evidence from a senior practitioner, Mr Binnie, who has had many years experience in Southland in the field of rural conveyancing, as to the accepted Southland practice concerning applications under the Land Settlement Promotion and Land Acquisition Act 1952. The points which emerged from his evidence may be summarised thus :

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1. That while most agreements for the sale of rural land provide that the purchaser obtain the necessary documents to be filed and forward them to the vendors' solicitor for filing, the Southland practice is that the vendors' solicitors send the application or other documents to the purchasers' solicitor for filing. If the purchasers' declaration is not immediately available (as was the case here) the practice is for the vendor or his solicitor to sign the application and file it, with the purchasers declaration being filed later.

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2. That while conditions concerning the availability of finance are regarded as extremely important and are strictly complied with, times fixed for obtaining the consent of the Administrative Division of the Court are not so regarded, and indeed are treated somewhat lightly.

3. Mr Binnie could not recall any occasion when the time point had been taken when it was known that the other party was taking all reasonable steps to obtain the Court's consent.

40

I do not think Mr Binnie's evidence of what is accepted practice in Southland is of the slightest help to the Plaintiffs' cause even if it does differ materially from practice elsewhere in New Zealand, which I would be inclined to doubt. I think the simple fact is that practitioners, and I am sure Southland practitioners are not alone in this, regard the obtaining of the Court's consent to the sale as something of a formality and of no real importance. The fact that strict compliance is rarely if ever insisted upon would encourage that view, although in the light of several recent cases including Peeters and Another v. Schimanski and Goode v. Scott (supra) and the unreported decision of White J. in Biggs Service Stores Ltd. v. Mercantile Development Ltd. (Wellington Registry A.46/75 Judgment 30 April 1976) (1976 Recent Law Vol. 2 No. 7 at page 186), a "light hearted" approach to such conditions subsequent would now seem inappropriate. On the question of who would make the first move towards preparing and filing the necessary documents, I do not recall that Mr Smith was looking to Mr Broughton to make the running until after he had informed Mr Broughton of his difficulty in obtaining the purchasers' declaration. The provision in the agreement is clear. It enables the parties to know where they stand by a specified date and to that end ensures that they do all that could reasonably be done to obtain the consent by due date.

Apart from reliance on "local practice" Mr Inglis referred to other circumstances which he claimed indicated waiver or compliance with clause 13, and in particular the course of conduct between Messrs Smith and Broughton between the 20th and 23rd January, and Mr Broughton's action in filing the application on the 23rd January with the covering letter referred to above. It is quite clear that at no time between the 20th and 23rd January did either solicitor refer to the limitation of time in clause 13. There was no specific enquiry from Mr Smith as to the possible consequences of non-fulfilment, and no undertaking of any sort from Mr Broughton that

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the time limit would be waived. The question just did not arise.

There is no doubt that compliance with such a condition may be waived, although it would appear that where the time for fulfilment is of the essence, waiver must be effected before the time expires (see Scott v. Rania [1966] N.Z.L.R. 527). I think I am correct in saying that Mr Inglis presented his submissions on that basis. He claimed that there was a waiver prior to the 26th January and supported that contention in part by the course of events after the 26th. 10

Waiver may be implied from conduct, and what Mr Inglis relied on was Mr Broughton's conduct in : (1) The failure of Mr Broughton to respond positively and promptly to Mr Smith's letters confirming finance and enclosing a transfer; (2) that on or about the 18th February Mr Dickens took some steps to organise a clearance sale of surplus stock not included in the agreement with the Plaintiffs; (3) Mrs Dickens' failure to inform the Plaintiffs' manager on or about the 18th February that the contract was at an end when the latter was making arrangements to call at the property with a Rural Bank farm appraiser. 20

Whether Mr Broughton's alleged representations by conduct are relied upon to support waiver or promissory estoppel it is clear that what the Plaintiff must show is that they were unambiguous representations, arising as the result of a positive and intentional act done (or perhaps not done) by him with knowledge of all the material circumstances, and that the Plaintiffs acted in reliance on the concession (See Watson v. Healy Lands Ltd. [1965] N.Z.L.R. 511 at page 514). Mr Inglis submitted that Mr Broughton's silence on the question of fulfilment of the condition was not a neutral silence, but that the silence coupled with his actions amounted in effect to a confirmation that the transaction was 30 40

proceeding despite the impossibility of performance of the condition by the 26th January.

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10 In my view the evidence is against such a contention. On being requested by Mr Smith to file the application to the Court Mr Broughton had no alternative but to comply, for the agreement itself provides "that each party shall do all acts and things as may be necessary or expedient for the purposes of endeavouring to obtain (the Courts) consent", and I see no reason why Mr Broughton should have accompanied his compliance with Mr Smith's request with some form of caution. Although the agreement was in terms rendered "void" by non-compliance with the condition I think "voidable" more accurately described the effect, and who could say what stand the vendors, or indeed 20 the purchasers, would take on the 27th January when the condition had not been fulfilled. (Although the matter was not argued and it in no way affects my conclusions, I have serious reservations whether anything done, or not done, by Mr Broughton as solicitor could amount to a waiver in the absence of express instructions from his clients.)

Reasons for
Judgment of
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3 Sept. 1976

- continued

30 I have sympathy for the Plaintiffs in their predicament but I am satisfied that their claim must fail.

There will be judgment for the Defendants with costs of \$300 and disbursements as fixed by the Registrar.

'C.M. Roper J.'

In the Supreme
Court of New
Zealand

ORDER OF THE COURT

BEFORE THE HONOURABLE MR JUSTICE ROPER

No.15

Friday the 3rd day of September 1976

Order of
the Court

3 Sept. 1976

UPON READING the Writ of Summons and Statement of Claim and the Statement of Defence in this action and UPON HEARING Mr B.D. Inglis Queens Counsel and Mr L.E. Laing on behalf of the Plaintiffs and Mr J.F. Burn and Mr R.C. Sinclair on behalf of the Defendants and the evidence adduced by or on behalf of the Plaintiffs THIS COURT HEREBY ORDERS that judgement be entered for the Defendants in the action for Specific Performance of a contract for sale and purchase between the Plaintiffs as purchasers and the Defendants as vendors AND HEREBY FURTHER ORDERS that the Plaintiffs pay to the Defendants the sum of \$300.00 together with disbursements to be fixed by the Registrar for their costs of and incidental to the said action.

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By the Court

'W.R. Beadle'

L.S.

Deputy Registrar

57.

No. 16

In the Court
of Appeal of
New Zealand

NOTICE OF MOTION ON APPEAL

IN THE COURT OF APPEAL OF NEW ZEALAND

No.16

No. C.A. 90/76

Notice of
Motion on
Appeal

BETWEEN KEITH JAMES NEYLON of
Haast, Pilot and
JEAN AGNES NEYLON
his wife

8 October 1976

Appellants

A N D DONN ALEXANDER
DICKENS of Tuatapere,
Farmer and MURIEL
MAY DICKENS his wife

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Respondents

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TAKE NOTICE that on the day of
1976 this Honourable Court WILL BE MOVED by
Counsel for the Appellants on the first day
of the commencement of the next sitting of
this Honourable Court or so soon thereafter
as Counsel can be heard on appeal from the
whole of the Judgment of the Supreme Court
of New Zealand bearing date the 3rd day of
September 1976 and delivered by Mr Justice
Roper at Invercargill UPON THE GROUNDS that
the said Judgment is erroneous both in fact
and in law.

DATED at Invercargill this 8th day of
October 1976.

'L.E. Laing'

Solicitor for the Appellants

In the Court
of Appeal of
New Zealand

No. 17

REASONS FOR JUDGMENT OF RICHMOND P.

No.17	<u>Coram:</u>	Richmond P. Woodhouse J. Cooke J.	
Reasons for Judgment of Richmond P.	<u>Hearing:</u>	17 March 1977	
6 April 1977	<u>Counsel:</u>	B.D. Inglis Q.C. and L.E. Laing for Appellants J.F. Burn and P.J. Headifen for Respondents	
	<u>Judgment:</u>	6 April 1977	10

The facts of this case are fully set out in the judgment which Woodhouse J. is about to deliver. It is unnecessary for me to repeat them and I shall proceed at once to a consideration of the several questions arising as a result of the submissions which Mr Inglis made to us in support of the appeal.

1. Does Clause 13 of the contract apply to a consent by the Administrative Division of the Supreme Court? 20

Mr Inglis submitted that clause 13 applied only in cases where consent of the Land Settlement Board was required. This argument was not advanced in the Supreme Court. I agree with Woodhouse J. that in its context clause 13 is grammatically capable of applying to a necessary consent of the Administrative Division of the Supreme Court as well as to a necessary consent of the Land Settlement Board. I can think of no sensible reason why the draftsman should have intended clause 13 to apply only in the one case and not in the other. I accordingly construe the clause as intended to apply to both. 30

2. Was time of the essence under Clause 13?

I agree with Roper J. that, in the light of the decision of the Privy Council in 40

10 Aberfoyle Plantations Ltd. v. Cheng [1960]
 A.C. 115, the provisions of clause 13 as to
 the date by which the consent of the Court
 should be granted, namely by the 26th day of
 January 1976, should prima facie be construed
 as making time of the essence. However
 evidence was called at the trial as to the
 general attitude of legal practitioners in
 Southland towards such a clause. It was
 20 said that it was not customarily treated as
 of any particular importance. Roper J.
 took the view that no such custom had been
 proved as would affect the ordinary interpre-
 tation of the clause. Whatever may have been
 the attitude of legal practitioners in
 Southland I do not think that such attitude
 amounts to a custom of a kind which the
 Courts should treat as being known to and
 30 accepted by the parties to contracts for the
 sale and purchase of land. It would not in
 my view be of a sufficiently notorious kind.
 I accordingly agree with the learned Judge
 on this point.

30 Next it was submitted by Mr Inglis
 that the circumstances surrounding the parties
 at the time when the contract was signed on
 24 December 1975 were such that the parties
 must have realised that it would be impossible
 to obtain the consent of the Court by the
 26th day of January 1976. It may be that
 this was in fact the position but no evidence
 was given to support such a contention and
 for myself I simply do not know what might
 have been the result if special and urgent
 efforts had been made to have the matter put
 before a Land Valuation Committee. I
 accordingly feel unable to accept this
 particular submission.

40 In the result I am not persuaded
 that on the true construction of the contract,
 as at the time when it was entered into,
 time under clause 13 was not of the essence.

3. Waiver and Estoppel

In the Supreme Court Roper J.
 approached these questions by reference to
 the tests laid down by Woodhouse J. in

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- continued

Watson v. Healy Lands Ltd. [1965] N.Z.L.R. 511, 514. In that case my brother Woodhouse discussed the difficulty of deciding what is the true nature of waiver at common law and its relationship to estoppel generally and in particular to promissory estoppel. He thought that whether or not the representation relied upon as a waiver is really a sort of estoppel, the representee must show that two elements at least have operated - 10

- (a) "That there was an unambiguous representation arising as the result of a positive and intentional act done by the representor with knowledge of all the material circumstances" and
- (b) "That, relying upon that representation, he has carried out the new arrangement".

Both in the Supreme Court, and again in this Court, Mr Inglis laid great stress on the arrangements which were made between Mr Smith (as solicitor for the purchasers) and Mr Broughton (as solicitor for the vendors) on or about 20 January 1976. That was the day when Mr Smith's office re-opened. The contract was dated 24 December 1975 and it seems from the evidence that Mr Smith had not seen it until his office re-opened, although a copy had been sent to him by the real estate agents on the evening of the same day as the contract was signed. He was very conscious, when he looked at the contract, of the fact that the month allowed for filing an application for the consent of the Court (under s.25 of the Land Settlement Promotion and Land Acquisition Act 1952) would expire on 24 January, which was a Saturday. He realised, and there is no dispute about this, that it would be physically impossible for him to obtain a purchasers' declaration from his clients (who were living in Haast) quickly enough for it to be filed with the vendors' application for consent in time to comply with the statute. Mr Smith said in evidence that he noticed the date of 26 January as it appeared in clause 13 of the 20 30 40

agreement, but he does not appear to have been particularly concerned about the provisions of that clause as compared with the effect of non-compliance with the statute. No doubt this was because of the attitude of local practitioners to which I have already made reference. Be that as it may, he telephoned Mr Broughton and explained his difficulties and asked Mr Broughton to file the vendors' declaration and Mr Broughton agreed to do this. Mr Broughton then filed the vendors' application for consent in the Court and at the same time wrote to the Registrar a covering letter, the full text of which is set out in the judgment which Woodhouse J. will deliver. It is apparent from this letter that Mr Broughton also agreed to Mr Smith obtaining a declaration from the purchasers as quickly as possible even though it was quite obvious at that stage that the consent of the Court could not possibly be obtained by 26 January in terms of clause 13.

Roper J. found as a fact that no express reference to clause 13 was made during the discussion between Mr Smith and Mr Broughton. He then considered whether the conduct of Mr Broughton satisfied the requirements as to waiver or estoppel discussed in Watson v. Healy Lands Ltd. (supra) and, as I understand his judgment, came to the conclusion that Mr Broughton's actions did not amount to a sufficiently unambiguous representation. The Judge thought that they were reasonably explainable on the basis that Mr Broughton was obliged under clause 11 to take all necessary steps to endeavour to obtain the consent of the Court. He also thought, although clause 13 provided that in the event of consent not being granted by 26 January 1976 the agreement would be "void", that its effect could more truly be regarded as rendering the agreement voidable. The Judge considered that it was reasonably possible that Mr Broughton was prompted simply by an anxiety to keep the agreement alive for the purposes of the Land Settlement Promotion and Land Acquisition Act 1952 while leaving

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it open as to whether or not the vendors would proceed in the event, which was inevitable, that consent would not be obtained by the specified date.

In this Court Mr Inglis submitted that the Judge was in error when he took the view that Mr Broughton was obliged, even at that late stage, to file a vendors' declaration. With respect, I think that Mr Inglis is correct on this point as clause 11 makes it clear that the obligation of the vendor to make application to the Court depends upon prior receipt from the purchaser of the purchasers' declaration. As to the other point which weighed with Roper J., I think it is as well to say that in my opinion the word "void" where used in clause 13 means what it says. It will be noticed that this word is used in clause 13 not only to describe the result if consent is not obtained by the date specified in the clause but also to describe the result if consent to the transaction is refused by the Court. Section 25(5) of the Land Settlement Promotion and Land Acquisition Act 1952 provides that a transaction which is entered into subject to the consent of the Court shall not have any effect unless the Court consents to it. It is difficult therefore to see how a transaction as regards which the Court has actually refused its consent could be regarded as voidable rather than void. The word "void" in clause 13 also applies in circumstances where a consent is granted subject to conditions which are not complied with. Under s.25(4) it is provided that the transaction, in such circumstances, shall be "deemed to be unlawful and shall have no effect". Although I think that the word "void" in clause 13 means what it says it does not necessarily follow that in practice a failure to obtain consent by the date specified will have the result of bringing the agreement automatically to an end, in a situation where none of the statutory provisions to which I have just referred applies. If failure to obtain consent

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results from the default of one party then it may not be open to that party to assert non-fulfilment - see Scott v. Rania [1966] N.Z.L.R. 527, at 534 para. 5 - per McCarthy J. It must I think be accepted also that 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 - see Scott v. Rania at p.535 para. 6.

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In the present case however, and with respect to the Judge, I think that the actions of Mr Broughton could be reasonably 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, in my opinion, he was not obliged to take in accordance with the strict legal position. More importantly, by agreeing to the late filing of the purchasers' declaration he was allowing Mr Smith and his clients to incur expense and trouble which was quite pointless unless time under clause 13 was being treated by the vendors as at large in the circumstances.

I have however found difficulty in arriving at any conclusion on the evidence that Mr Smith actually drew the foregoing inference from the actions of Mr Broughton. In other words, I have difficulty in applying any principle of waiver or estoppel which requires proof that Mr Smith was actually induced by any such representation to rely on it and to act upon it. It may be a somewhat fine distinction but it seems on the evidence that Mr Smith was simply not worrying about clause 13; this because of his knowledge of the common attitude of solicitors in Southland towards such a clause. Certainly Mr Smith made no such claim when he gave evidence. The furthest he went was to comment that Mr Broughton had not raised the point. He said - "From my experience of Southland practitioners I would not expect him to".

I have however come to the conclusion that the evidence does establish a waiver

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by mutual agreement. Undoubtedly Mr Broughton agreed to accept from Mr Smith a method of performance of the purchasers' obligation to supply a declaration which was different from the strict method of performance prescribed by the contract. He also agreed to file the vendors' application for consent in circumstances where the vendors were not contractually bound to do so. On the other hand Mr Smith agreed to obtain and make available the purchasers' declaration at some trouble and expense to himself and his clients, in circumstances where it would not be possible to do this until after 26 January - that is to say at a time when, if time was to be treated by the vendors as of the essence, the contract would be void and the purchasers no longer under a duty to supply a declaration. This arrangement was not a mere indulgence by one party, but one made for the mutual benefit of both vendors and purchaser. I think that the arrangements were sufficiently supported by consideration on both sides to amount to a parcel variation of the terms of clause 11 of the contract. I am also of opinion that a sufficient written record of the arrangement, for the purpose of enabling its express terms to be proved, is to be found in Mr Broughton's letter of 23 January addressed to the Registrar.

As I have said, it does not appear to me to be made out by the evidence that Mr Smith actively addressed his mind to the effect of his arrangements with Mr Broughton upon the date specified in clause 13. But I see no reason why ordinary principles of necessary implication should not apply to the agreement reached between them. Had the point been raised by an "officious bystander" I feel confident that in all the circumstances both Mr Smith and Mr Broughton would undoubtedly have answered - "of course that date can't strictly apply". In other words I think that it was a necessary incident of their arrangements that they were treating time under clause 13 as not being of the essence. It was not suggested, if time were held to be at large,

that when the vendors repudiated the contract in February time had become of the essence in such a way as would justify that repudiation. I would accordingly allow the appeal.

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10 The Court being unanimous, the appeal is allowed and the judgment entered in the Supreme Court is vacated. In lieu thereof the appellants will be entitled to a decree of specific performance. Leave is reserved to the parties to apply to this Court should any difficulty arise as to the form of the decree and any incidental orders.

Reasons for
Judgment of
Richmond J.

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20 The appellants are entitled to their costs of the appeal, including an allowance for extra counsel, which are fixed at \$550.00, together with proper disbursements, including such sum as may be allowed by the Registrar for the cost of cyclostyling. They are also entitled to their costs and disbursements in the Supreme Court, to be fixed by that Court.

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No. 18

No.18

REASONS FOR JUDGMENT OF WOODHOUSE J.

Reasons for
Judgment of
Whitehouse J.

30 This case concerns the proposed purchase by the appellants ("the purchasers") of a farm property of about 2,000 acres in Southland. They entered into an agreement for sale and purchase with the respondents ("the vendors") on 24 December 1975 which was conditional in two respects. The one condition related to the ability of the purchasers to make satisfactory arrangements for finance by 9 February 1976. No question has arisen concerning that matter. The other condition was that the consent required pursuant to the Land Settlement Promotion and Land Acquisition Act 1952 should be obtained by 26 January 1976. In the event approval was not given until 12 February and the order of the Court was not sealed until 2 March. No point is made however, of the time that elapsed between 40 the time of approval of the transaction and the formal sealing of the order. The

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Reasons for
Judgment of
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simple issue is whether in all circumstances of the case the delay beyond 26 January justified the vendors in their subsequent refusal to perform the contract. Roper J. held that it did and refused the purchasers specific performance of the contract.

The agreement for sale and purchase seems to have been prepared by the land agent who had been engaged by the vendors and he may not have appreciated that difficulties could arise in relation to obtaining the consent by 26 January, taking into account the absence of most lawyers from their offices during the legal vacation which had commenced by 24 December and would not end in the Southland district until 20 January. In the event the agreement was received and examined by the solicitor acting for the purchasers (a Mr Smith) after he had returned to his offices from the legal vacation. He realised at once that time was very short and in particular that the declaration by the purchasers which would be needed to support an application to the court for consent to the transaction could not be completed and filed in the registry of the court for several days at least because his clients were at a distance, at Haast. He also appreciated that the statutory period for filing an application for consent of the court was to expire on 24 January failing which the contract would be of no effect. He thereupon telephoned Mr Broughton, the solicitor acting for the vendors, to explain that the transaction was one in respect of which the consent of the Court was required and that acting for the purchasers he was in a difficulty because their declaration could not be made quickly available. He requested Mr Broughton to file the application for consent on behalf of the vendors with advice that the purchasers' declaration would follow. Mr Broughton agreed to deal with the matter in this fashion and on 23 January an application by the vendors for consent to the transaction was duly filed together with a covering letter addressed to the registrar

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of the court and dated on the same day.
The text of Mr Broughton's letter reads:

In the Court
of Appeal of
New Zealand

"re: Application for Consent to Sale
Dickens to Neylon.

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We enclose herewith Application for
Consent to this transaction.

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Judgment of
Woodhouse J.

10 Messrs Macalister Bros are acting for
the purchasers and they confirm that the
Purchasers' Declaration has been
forwarded to their client at Haast for
completion.

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We confirm that the Purchasers'
Declaration will be filed in support of
the application when it is returned from
Haast."

20 Mr Smith proceeded to obtain a declaration
by the purchasers and it was duly filed with
the court some days after the application
had been lodged; and the consent was duly
obtained prior to the date mentioned in the
written contract for settlement.

30 In the meantime the purchasers had
completed arrangements for the sale of a
farming property of their own and on 5
February Mr Smith advised Mr Broughton that
the purchasers had "been able to arrange the
necessary finance to declare this contract
unconditional." There was no reply to that
letter and on 16 February he forwarded a
transfer to Mr Broughton for perusal and
execution by the vendors. However on 23
February the latter replied by advising that
the vendors had given instructions that they
did not intend to proceed with the sale of the
farm property and for that reason they had
refused to call in order to execute the
transfer. No reason was given in the letter
for the refusal of the vendors to go forward
with the transaction but Mr Broughton
40 indicated verbally to Mr Smith that they
claimed there had been no contract between
the parties because Mrs Dickens (one of the
vendors) had not signed the contract personally.

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The purchasers made formal demand for settlement on 26 February and tendered the purchase price the following day. And on 11 March proceedings were issued claiming specific performance of the contract. On 8 April a statement of defence was filed and it was then claimed for the first time that the contract had become void by reason of the delay which had occurred beyond 26 January in obtaining the consent of the court. 10

The issues raised on the appeal are:

- (1) that the contract does not contain any specific provision limiting the time in which the relevant consent was to be obtained;
 - (2) that even if reference in the contract to 26 January could be related to the day by which the particular consent under discussion was to be obtained then time was not of the essence of the contract; 20
- and
- (3) in any event any strict limitation as to time had been waived by the vendors; or they were estopped from raising the point.

The first of those matters depends upon the construction and effect of clauses 11, 12 and 13 of the agreement as follows: 30

"11. If the land affected by this Agreement exceeds five acres in area this contract is subject to any necessary consent of the Administrative Division of the Supreme Court and the Purchaser will within fourteen days from the date of signature of this Agreement either:

- (a) Complete and deposit with the District Land Registrar a Declaration in conformity with Section 24 of the Land Promotion and Land Acquisition Act 1952 and deliver a copy to the Vendor, or 40

(b) Deliver to the Vendor any statement declaration or other document required by regulation or otherwise to be completed by the Purchaser for filing with an application to the Administrative Division of the Supreme Court and the Vendor shall within one month from date hereof unless such declaration shall have been deposited as aforesaid make application to the Administrative Division of the Supreme Court for any necessary consent to this transaction

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and each party hereto shall do all such acts and 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. And each party shall bear his own legal and all other costs whatsoever of and incidental to any such declaration application or other process.

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12. If any of the land affected by this Agreement is held under lease or license under the provisions of the Land Act 1948 this contract is subject to any necessary consent of the Land Settlement Board being obtained within the period referred to in Clause 13 hereof and each party hereto shall within fourteen days from the date hereof make such application therefor as may be necessary and each party hereto shall do all such acts and things as may be necessary or expedient for the purposes of endeavouring to obtain such consent or securing compliance with the provisions of the Land Act 1948 and any regulations for the time being thereunder and each party shall bear his own legal and other costs whatsoever of and incidental thereto.

13. 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 or shall be refused or shall be granted subject to conditions then this

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Reasons for
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Woodhouse J.

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Agreement subject as hereinafter mentioned shall be void PROVIDED HOWEVER that if such consent shall be granted within such time subject to conditions to which the parties shall in writing agree or subject to conditions not prejudicial to the Purchaser if the Vendor shall within seven (7) days after the grant thereof give notice in writing to the Purchaser or his Solicitor of the Vendors willingness to comply with such conditions then this Agreement shall be binding upon the parties as modified by such conditions."

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It will be noticed that both clause 11 and clause 12 deal with the possible need for consent to the contract but it is only clause 11 that has application in the present case. The following clause 12 is concerned with the rather more limited number of transactions which concern land held under lease or licence pursuant to the provisions of the Land Act 1948; and the present agreement does not affect any such land. However it is contended on behalf of the vendors that the words, "if any such consent" at the beginning of clause 13 refer only to the consent that might have been needed in terms of clause 12: that they do not embrace the sort of consent mentioned in clause 11 and which, of course, is needed in the present case. The point is made that although clause 12 speaks expressly of the contract being subject to the Land Settlement Board consent "being obtained within the period referred to in clause 13", there is no similar and express reference in clause 11 to that same period. It is said that grammatically the words in clause 13 refer back only to the consent mentioned in the immediately preceding clause 12 and that such a construction is reinforced by the specific reference to time in the latter clause. Alternatively an argument was addressed to the court that if it should be thought that there were some ambiguity associated with the issue of construction then certain of the surrounding circumstances pointed to the same interpretation.

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In my opinion the opening words of clause 13 relate to both types of consent. It may be thought inconsistent on the part of the draftsman to include a specific reference to time in the one clause and not in the other. But where both types of consent to a contract were needed it would be pointless to require the consent of the Land Settlement Board by a particular date while leaving a more flexible period available for obtaining the no less essential consent of the Administrative Division of the Supreme Court. I think the words, "any such consent" where they appear in clause 13 refer both to clause 11 and to clause 12. It happens that the contract is contained within a printed form which has been designed to provide for each of two possible statutory requirements; but the draftsman cannot have intended to put a specific time limit upon the one matter while leaving open the more numerous transactions likely to need the sort of consent referred to in clause 11. The drafting may seem inelegant but I think it is unambiguous and that clause 13 clearly controls the time within which the consent mentioned in clause 11 is to be obtained.

The second point is whether the time fixed for satisfaction of the condition as to consent is to be regarded as of the essence of the contract. Roper J. so held and, with respect, I agree with him. Equity will not interfere with a condition as to time where the stipulation has clearly been intended by the parties to be observed precisely. In the present case, subject to certain provisos which are not relevant to this particular issue, the contract was made to depend upon the fulfilment of a condition that the necessary consent should be obtained by 26 January. It was provided that failure to meet that time limit would render the contract void; and I think that in the context that last word means exactly what it says. During the hearing there was some discussion by counsel concerning a so-called custom or practice said to have grown up in the Southland district to the effect that goodwill and mutual understanding in the legal

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profession had rendered the condition as to time flexible on the basis of reasonableness. But I am quite satisfied that whatever may be the informal practice in this regard the intention of the parties themselves as disclosed by the contract was that time should be treated as of the essence.

The third ground of appeal is that if the condition as to time had to be met precisely then the need to do so was waived by the vendors: that their solicitor agreed to extend the time by acceding to the request of the solicitor acting for the purchasers that the vendors should file their application for consent by 24 January and that at the same time he would inform the court that the necessary declaration by the purchasers would be provided at a later date; and that in the circumstances both solicitors realised that this certainly could not be done before 26 January. It was said in the alternative, but as part of the same submission, that by words and conduct the vendors are estopped from raising the condition as to time against the purchasers' claim for specific performance. 10 20

The rather ambivalent form of the submission itself may be some reflection of the various and not entirely harmonious attempts that have been made from time to time to analyse waiver as a concept within the law of contract. One problem is that like the word estoppel, the term waiver has been used in a number of different ways. In relation to estoppel that sort of problem is described by Jordan C.J. in O'Connor v. S.P. Bray Ltd (1936) 36 S.R. (NSW) 76 at p.80. He there refers to the origins of common law estoppel and the eventual "infiltration in the first half of the nineteenth century of the equitable doctrine of estoppel by representation"; and at p.82 he mentions the confusion that can arise unless the individual types of estoppel are distinguished and recognised for what they really are. Then in 9 Halsbury 4th Ed. para 571, by reference to 30 40

waiver, there is a similar indication of the vagueness that can attach to a word when it is used in different senses; and the paragraph includes a reference to waiver in situations which really create an election "between two mutually exclusive rights." Nevertheless in the law of contract, as that paragraph indicates, the term "waiver" has been aptly used and understood over a long period to describe the process, usually quite informal, "whereby one party voluntarily grants a concession to the other party" to adopt the words of the same paragraph of Halsbury, "by not insisting upon the precise mode of performance provided for in the contract, whether before or after any breach of the term waived." In my opinion the doctrine, considered in that sense, continues to operate and to have binding effect.

It is suggested in Chitty on Contracts, 23rd Ed. para 1241, that waiver probably had its origins in the need to mitigate a strict application of the provisions of the Statute of Frauds, 1677, which otherwise would require any modification of a written contract to be in writing, no matter how comparatively insignificant the change and regardless of any consideration of practical or commercial convenience. But waiver has never been accepted or regarded as a means whereby the basic structure of a contract could be varied or some alteration made in the consideration to be given and received. It has aimed simply at providing an efficacious method of enabling concessions to be made concerning the strict performance of what may be described rather loosely as machinery provisions. Often enough it has been said that it is difficult to distinguish between a variation agreed upon as a matter of contract and the sort of forbearance intended to operate as a waiver. There are criticisms too (provided at length, for example, by Mr J.S. Ewart in his book "Waiver Distributed") that the concept of common law waiver to which I have been referring has no rationale and no independent existence: that all the so-called "waiver" situations

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must be categorised as properly within the area of election on the one hand, or recognised as founded upon some sort of estoppel on the other. I had occasion to refer to some of these matters in Watson v. Healy Lands Ltd. [1965] N.Z.L.R. 511 at p.514. But I there expressed the opinion that at least it could be said that a waiver involved first, "an unambiguous representation arising as the result of a positive and intentional act done by the representor with knowledge of all the material circumstances", although the intention may be implied from all the relevant circumstances; and second, that the party relying upon it must be able to show that "he has carried out the new arrangement". With all respect to those who doubt the separate existence of a common law waiver, I do not resile from the view I then expressed and I would merely add (to make the point quite explicit) that in the case of a waiver of this sort there is never any need for the party acting in terms of the indulgence to show detriment. In this respect I think waiver is quite unqualified. A similar conclusion has been reached by the High Court of Australia in relation to those cases of election where the choice is to affirm or disaffirm the contract: see Sargent v. A.S.L. Developments Ltd (1974) 131 C.L.R. 634 per Stephen J. at 647. 10 20 30

When the facts of the present case are examined it is clear that when Mr Smith, acting for the purchasers, telephoned his opposite number, acting for the vendors, his immediate and urgent purpose was to ensure that the contract should be kept alive. He realised that by reason of the Land Settlement Promotion and Land Acquisition Act 1952 it would cease to have any effect if the application for the consent mentioned in clause 11 were not filed in the registry of the court by 24 January. To avoid that statutory effect he requested Mr Broughton to file an application on behalf of the vendors, after explaining that the necessary declaration by the purchasers could not be provided for several days. Of course 40

clause 11 of the contract provides that the purchasers' declaration should have been delivered to the vendors within fourteen days of the execution of the agreement. Obviously that had not been done. So Mr Smith was really requesting the indulgence of the vendors in two respects: first that they should put aside the failure to deliver the purchasers' declaration within the fourteen day period; and, second, that they should ensure that the contract remained effective beyond 24 January (a Saturday) by filing their application for the court's consent. It is agreed that Mr Broughton had authority to speak for the vendors and acted on their behalf when he acceded to the request. He thereupon proceeded to give effect to the arrangement that had been suggested by Mr Smith. He obtained and filed the application by the vendors; and in addition he forwarded to the registrar of the court the accompanying letter to which reference has been made in which he explained the absence of the purchasers' declaration by indicating the arrangement that had been made to have it filed "when it is returned from Haast."

Some point was made on behalf of the vendors that anything done by Mr Broughton to keep the contract in being beyond 24 January related merely to the statutory time limit for filing the application, with some sort of unspoken reservation that in no way was his agreement to co-operate intended to modify the contractual provision requiring that the consent of the court should be given by 26 January. For my part I think that argument assumes not only a delicacy of judgment by Mr Broughton that is unlikely enough in itself but also that the arrangement that was then translated into action could have no practical purpose. For both he and Mr Smith knew that an application filed on Friday 23rd January could not possibly produce a consent of the court within the contractual time limit about to end on the following Monday - and this even if the purchasers' declaration had been already available. Certainly it is not shown in the evidence that during the

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telephone conversation there was express reference to the fact that if the application was to serve its purpose of obtaining a consent that had any meaning there must be a consequential extension of the time mentioned in clause 13. But, with all respect to Roper J. who took a different view, I think it would be unreal to regard Mr Broughton's agreement with Mr Smith as something which was to be limited in its effect merely to the filing of the application. That sort of effect would have been achieved merely by filing the application. But in addition there was the supplementary explanation that Mr Broughton thought it proper, if not necessary to provide as part of the practical arrangement made with Mr Smith: that in due course the application would be supported by the other necessary papers to be completed by the purchasers themselves. Those steps were consciously intended by Mr Broughton, and so by the vendors, to produce an effective end result; and that conscious intention was undoubtedly shared by the purchasers through their solicitor. He had the agreement before him and gave evidence that he was aware of the time limit in clause 13 in addition to the proximity of the statutory time limit which he had calculated by reference to the date on which the agreement had been executed. So I am satisfied that 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. I think therefore that the vendors waived the strict requirement as to time and that they were not justified in their refusal to complete.

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I would allow the appeal and order specific performance.

REASONS FOR JUDGMENT OF COOKE J.

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As to the interpretation of clause 13 of the contract of 24 December 1975, I agree with Roper J. that the time specified for obtaining any necessary consent, namely by 26 January 1976, should be treated as initially of the essence. I also agree that the Judge was right in his assumption that the words 'any such consent where
10 necessary' relate not only to any necessary consent of the Land Settlement Board but also to any necessary consent of the Administrative Division. The arrangement of clauses 11, 12 and 13 points to this interpretation, and it is unlikely that the parties to such a contract would attach greater or different importance to Land Settlement Board consent than to Administrative Division consent.

I think that 'void' in clause 13 means
20 what it says. That is to say, if a 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 are taken in accordance with the proviso to the clause to keep it alive. The scheme of the clause, including the proviso, is such that to treat 'void' as meaning merely voidable by one of the parties taking positive steps to cancel the contract
30 seems to me too strained a construction.

The decision of this Court in Barton v. Russell (7 July 1975, C.A. 33/75) is distinguishable. The context and subject-matter of the clause there were materially different. Similarly the clause in Suttor v. Gundows Pty Ltd. (1950) 81 C.L.R. 418 was materially different in its wording. But, being a purely contractual stipulation, this provision in clause 13 could be varied by agreement or waived, or one party by his
40 conduct could be precluded from taking advantage of it. This appears consistent with the speeches of the House of Lords in New Zealand Shipping Co. Ltd. v. Societe des Ateliers [1919] A.C. 1, the substance of which decision is, I think, correctly stated in the headnote.

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As to waiver, with respect I am not persuaded by the crucial point in the learned Judge's reasoning, which was that on 23 January 1976 Mr Broughton had no alternative but to comply with Mr Smith's request. By clause 11(b) the purchaser was required within fourteen days of the agreement to deliver to the vendor his declaration under the Land Settlement Act for filing with an application. Even assuming that in a contract with as tight a time schedule as this one the time of fourteen days was not of the essence, the fact remains that by 23 January the purchaser was so seriously in default that there was no longer any possibility of obtaining consent by 26 January. It was not the fault of the solicitors on either side that this situation arose. The awkward time schedule was evidently not suggested by them. But, having regard to the terms as to time in the contract signed by the parties, it seems to me that by 23 January there was a fundamental breach by the purchaser, in the sense in which that term is used for instance in the Suisse Atlantique case [1967] 1 A.C. 361. (Throughout this judgment 'purchaser' and 'vendor' are used in the singular, as in the contract itself, since nothing turns on the fact that the parties on each side were husband and wife.) The vendor was accordingly entitled to rescind on that day. Instead the vendor's solicitor, as to whose authority no point is taken by the vendor, agreed to and did file an application for consent to the contract, notifying the Registrar in the covering letter that the purchaser's declaration would be filed when returned from Haast. On behalf of the vendor the solicitor knew of the facts constituting the breach by the purchaser. For the reasons given by Stephen and Mason JJ. in Sargent v. A.S.L. Developments Ltd (1974) 131 C.L.R. 634, 642-6, 656-8, it is immaterial that the solicitor may not have had the right to rescind in mind; it is enough that he knew all the facts giving rise to that right.

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As I see it, by filing the application, knowing of the fundamental breach, the vendor by his solicitor waived that breach, in the sense that he elected not to rescind for it and affirmed the contract. Within the proposition stated by Lord Wilberforce in Mardorf Peach v. Attica Sea Carriers [1977] 1 All E.R. 545, 551, the filing of that application in these circumstances was 'clear and unequivocal' evidence that the vendor was actively keeping the contract alive. Within Mason J.'s proposition in the Sargent case at p.656, he was exercising a right to apply for consent arising by or under the contract.

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The question then becomes one of the extent of the waiver. The very reason why the breach waived was fundamental was that it meant inevitably that consent could not be obtained by 26 January. The filing of an application for consent on 23 January, with full knowledge of the breach and the impossibility, was pointless if the contract was to come to an end three days later. In common sense and fairness, as I see it, the vendor should be held to have elected to treat the contract as one which would not come to an end of 26 January. It is not consistent with what was done on 23 January that the time specified in clause 13 was to remain of the essence.

The making of the application on 23 January is attributable to the purchaser also. Having procured it by request, he should equally be bound by the implication. In any event, the evidence does not establish that at the date when the contract was made it would have been impossible to obtain consent by 26 January; the impossibility that developed must be regarded as caused by the purchaser's default. As he could not take advantage of his own wrong, he could not have been heard to say that the contract ended on 26 January: 9 Halsbury's Laws of England, 4th ed. para. 533 and the authorities there cited.

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If detriment to the other party be needed, as Sir Alexander Turner thinks is the case with one kind of election (Spencer Bower and Turner on Estoppel by Representation, 322-5), it is to be found here. The purchaser by his solicitors proceeded to complete and file his declaration, to give notice that finance had been arranged, and to prepare and forward a transfer, no doubt incurring costs in these steps, before the vendor resiled. On the evidence, 10 including the evidence about Southland practice, I think that as a result of the telephone conversation between the solicitors on 23 January, Mr Smith naturally and reasonably took it for granted that the vendor was treating the contract as alive; and that this remained the position until well into February. As for detriment to the vendor, if that be relevant, the vendor acted on the purchaser's request by filing the 20 application and at least for some time co-operated in arrangements with a view to completion.

For these reasons I think that each party was precluded from asserting that the contract became void on 26 January - the vendor by waiver; the purchaser perhaps by waiver also, but certainly because he could not take advantage of his own default. And each party acted to his detriment on the understanding 30 that the contract was being kept alive. 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.

An alternative route to the same result would be to treat the arrangement between 30 the solicitors on 23 January as an implied agreement on a later date for the purposes of clause 13. There appears to be no reason why an agreement that consent may be obtained within a reasonable time should be outside the scope of this clause. It is clearly within its spirit. The date could then be rendered certain by

reasonable notice from either party. To give business efficacy to the dealings of 23 January it may be that such an agreement should be implied. But the case for the purchaser has not been presented in quite that way, and I prefer to base my judgment on the reasons already given. It has not been contended for the vendor that if the provision as to 26 January was waived there was any delay thereafter entitling the vendor to refuse to complete. For these reasons I would allow the appeal and order specific performance.

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No. 20

No.20

JUDGMENT OF THE COURT OF APPEAL

BEFORE: THE RIGHT HONOURABLE MR JUSTICE
RICHMOND, PRESIDENT
THE RIGHT HONOURABLE MR JUSTICE
WOODHOUSE
THE HONOURABLE MR JUSTICE COOKE

Judgment of
the Court
of Appeal

6 April 1977

WEDNESDAY the 6th day of April 1977

THIS APPEAL coming on for hearing on the 17th day of March 1977 AND UPON HEARING Mr B.D. Inglis, Q.C. and Mr L.E. Laing of counsel for the Appellants and Mr J.F. Burn and Mr P.J. Headifen of counsel for the Respondents THIS COURT HEREBY ORDERS that the appeal be and the same is hereby allowed, and that the Judgment entered in the Supreme Court be and the same is hereby vacated, and in lieu thereof IT IS HEREBY ADJUDGED ORDERED AND DECREED that the Respondents specifically perform the contract referred to in the Plaintiffs' Statement of Claim AND THIS COURT HEREBY FURTHER ORDERS that leave be and the same is hereby reserved to the parties to apply as to the form of the said decree and any incidental orders AND THIS COURT HEREBY FURTHER ORDERS that the Respondents pay to the Appellants their costs of the appeal, including an

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allowance for second counsel, fixed in the sum
of \$550, together with disbursements,
including such sum as may be allowed by the
Registrar for the cost of printing the Case
on Appeal AND THIS COURT HEREBY FURTHER
ORDERS that the Respondents pay to the
Appellants their costs and disbursements in
the Supreme Court, to be fixed by that
Court

BY THE COURT

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L.S.

'D.V. Jenkin'

REGISTRAR

No.21

No. 21

Order Granting
Final Leave to
Appeal to Her
Majesty in
Council

4 July 1977

ORDER GRANTING FINAL LEAVE TO APPEAL
TO HER MAJESTY IN COUNCIL

Monday the 4th day of July 1977

Before the Honourable Mr Justice Richmond,
the Right Honourable Mr Justice Woodhouse,
and the Right Honourable Mr Justice Cooke.

UPON READING the Notice of Motion filed
herein and the Affidavit of Peter John
Headifen sworn in support; and upon hearing
Mr P.J. Downey of Counsel on behalf of the
Respondents and Mr J.O. Upton of Counsel on
behalf of the Appellants consenting hereto;
this Court hereby orders that final leave
to appeal to Her Majesty in Council from the
whole of the judgments of this Court bearing
date the 6th day of April 1977 be and the
same is hereby granted to the Respondents;
and hereby further orders that the costs of
and incidental to the said Notice of
Motion and this Order be reserved.

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By the Court

L.S.

'D.V. Jenkin'

REGISTRAR

CERTIFICATE OF REGISTRAR OF COURT OF
APPEAL OF NEW ZEALAND.

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New Zealand

No. 22

Registrar's
Certificate

26 August
1977

10 I, DOUGLAS VICTOR JENKIN, Registrar of the
Court of Appeal of New Zealand DO HEREBY
CERTIFY that the foregoing 82 pages of
printed matter contain true and correct
copies of all the proceedings, evidence,
judgments, decrees and orders had or made in
the above matter, so far as the same have
relation to the matters of appeal, and also
correct copies of the reasons given by the
Judges of the Court of Appeal of New Zealand
in delivering judgment therein; such reasons
having been given in writing:

20 AND I DO FURTHER CERTIFY that the Respondents
have taken all the necessary steps for the
purpose of procuring the preparation of the
record, and the despatch thereof to England,
and has done all other acts, matters and things
entitling the said Respondents to prosecute
this Appeal

AS WITNESS my hand and Seal of the Court
of Appeal of New Zealand this 26th day of
August 1977

'D.V. Jenkin'

L.S.

REGISTRAR

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

Respondents

RECORD OF PROCEEDINGS

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