

IN THE COURT OF APPEAL OF NEW ZEALAND

**CA262/2015
[2015] NZCA 446**

BETWEEN

THI KIM PHUONG TO
Appellant

AND

DONGLING HUANG AND ZHIGAO LU
Respondents

Hearing: 13 August 2015
Court: Miller, Courtney and Clifford JJ
Counsel: M J Fisher and L H Hui for Appellant
G P Blanchard for Respondents
Judgment: 16 September 2015 at 11.30 am

JUDGMENT OF THE COURT

- A The appeal is dismissed.**
- B The respondents are entitled to costs on a band A basis for a standard appeal.**
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REASONS OF THE COURT

(Given by Courtney J)

[1] The appellant, Mr To, was the purchaser under an agreement for the sale and purchase of a property in Takanini. The respondents, Ms Huang and Mr Lu, were the vendors. The agreement was conditional on the purchaser satisfying himself by 14 January 2015 that the property would be suitable for his requirements. Under this “due diligence” special condition the purchaser was entitled to avoid the agreement

if the date for fulfilment of the condition passed without the due diligence condition being fulfilled. In addition, a standard printed condition permitted either party to avoid the agreement in those circumstances.

[2] The date for fulfilment of the condition passed without the purchaser giving effective notice of its fulfilment. The vendors purported to avoid the agreement. The purchaser lodged a caveat and applied for orders for specific performance of the agreement or alternatively an order that the caveat not lapse. Associate Judge Doogue dismissed both applications, holding that the due diligence condition did not preclude the vendors from avoiding the agreement under the standard printed condition.¹ The purchaser appealed.

Background

[3] The parties entered into the sale and purchase agreement on 12 December 2014. They used a standard form approved by the Real Estate Institute of New Zealand that contained the following clause 9.8:

Operation of conditions

If this agreement is expressed to be subject either to the above or to any other condition(s), then in relation to each such condition the following shall apply *unless otherwise expressly provided*:

- (1) The condition shall be a condition subsequent.
- (2) The party or parties for whose benefit the condition has been included shall do all things which may reasonably be necessary to enable the condition to be fulfilled by the date for fulfilment.
- (3) Time for fulfilment of any condition and any extended time for fulfilment to a fixed date shall be of the essence.
- (4) The condition shall be deemed to be not fulfilled until notice of fulfilment has been served by one party on the other party.
- (5) *If the condition is not fulfilled by the date for fulfilment, either party may at any time before the condition is fulfilled or waived avoid this agreement by giving notice to the other. Upon avoidance of this agreement the purchaser shall be entitled to the immediate return of the deposit and any other moneys paid by the purchaser under this agreement and neither party shall have any right or claim against the other arising from this agreement or its termination.*

¹ *To v Huang* [2015] NZHC 929.

(6) At any time before this agreement is avoided the purchaser may waive any finance condition and either party may waive any other condition which is for the sole benefit of that party. Any waiver shall be by notice.

(emphasis added)

[4] The agreement contained a number of conditions, including the due diligence condition, cl 22:

DUE DILIGENCE

This Agreement is entirely conditional upon the purchaser determining that the purchase of the property described in this Agreement comprises a commercially acceptable and viable project suitable to the Purchaser. It will be solely for the purchaser to make this determination and the Vendor will not require the Purchaser to justify or substantiate the Purchaser's decision. *Should this condition not be satisfied by 5.00 pm after 15 working days from the date of this Agreement signed by both parties, this Agreement shall be voidable at the option of the Purchaser.* In the event of the cancellation pursuant to this clause, all monies paid shall be refunded in full and neither party shall have any further claim or action against the other.

(emphasis added)

[5] It was common ground that the time and date for fulfilment of cl 22 was 5 pm on 14 January 2015. Before 5 pm on 14 January 2015 the purchaser's solicitor emailed the vendors' solicitor as follows:

The due diligence is satisfied provided that the settlement date is fixed on 20 March 15.

Please confirm.

The other conditions are satisfied.

I confirm that my client will take over the tenants and he will manage the tenancy himself.

[6] The vendors' solicitor responded the following day, 15 January 2015:

My instructions are that the vendors do not agree to the change in the settlement date and as the Agreement was not made unconditional they avoid the agreement.

The Associate Judge's decision

[7] The Associate Judge held that the 14 January email was not effective to convey that the condition had been fulfilled. This point was not live in the appeal, it being common ground that the email was not effective notice.

[8] The Associate Judge then went on to consider and reject the argument that cl 22 amounted to an express provision inconsistent with cl 9.8. He held that that if the purchaser did not give notice that the condition had been fulfilled within the requisite time he was at risk of the vendors exercising their right under cl 9.8(5) to avoid the agreement:²

I consider that the reference to the “option of the purchaser” identifies that it is the purchaser who was intended to have the benefit of the due diligence provision contained in cl 22. I accept the submission which Mr O’Callaghan [sic] made for the vendors, to the effect that the words were included in the provision to make it clear that a party may waive a condition or provision in the contract which is solely for his or her own benefit and is severable. It was not, however, a matter for the sole option of the purchaser whether he should give notice of what his stance was on the issue of due process. That is to say, the reference to voidability being at the option of the purchaser did not excuse the purchaser from communicating his decision to the vendors, which is what cl 9.8(4) and cl 9.8(5) are concerned with. There is therefore no conflict between the latter provisions and clause 22. It follows that it is not open to the purchaser to argue that provision for the matters dealt with by those two subclauses of cl 9.8 is something about which cl 22 “expressly provided”. Clause 22 did not make any provision at all for those matters, let alone an express provision.

That leads me to the conclusion that, once time became of the essence, by failing to give notice, the purchaser ran the risk that the vendors would take advantage of the position and cancel the agreement because the purchaser had not given notice that the provision was satisfied or that he waived reliance upon it.

[9] The Associate Judge appears to have considered that the purchaser was in some way obliged to give notice under the due diligence clause by the stipulated date. We do not consider that there was any such obligation. However, for the reasons that follow we agree with the Associate Judge’s conclusion as to the rights of the vendors and the risks to the purchaser when the purchaser did not give effective notice by or on the specified date.

² *To v Huang*, above n 1, at [20] and [21].

Did cl 22 preclude the vendors from avoiding the agreement?

[10] Mr Fisher, for the purchaser, focused on the Associate Judge's conclusion that there was no inconsistency between cl 9.8 and cl 22 such as to oust cl 9.8. He argued that the right to avoid conferred on both parties by cl 9.8 (which right the vendors had relied on when invoking the agreement) could not co-exist with the right conferred on the purchaser alone under cl 22. On Mr Fisher's analysis, therefore, the purchaser alone had the right to avoid the agreement for non-fulfilment of the due diligence clause and that right existed for the entire period up to settlement and, indeed, beyond settlement if the vendor did not serve a settlement notice making time of the essence.

[11] Mr Blanchard, for the vendors, emphasised the practical operation in these circumstances of cl 9.8(5). That is, it preserves the purchaser's position until the date specified in the relevant condition but after that date the purchaser and the vendor have equal rights, with either able to avoid the agreement. If a purchaser neither waives nor confirms fulfilment of the due diligence condition by the specified date the vendor will be uncertain as to whether settlement will proceed on the agreed date. If that uncertainty is or becomes unacceptable to the vendor, the vendor may avoid the agreement. Thus, a purchaser who neither waives the due diligence condition nor declares it to be satisfied by that date risks the vendor avoiding the agreement thereafter.

[12] Identically worded predecessors to this clause have been considered in previous cases, which reflect Mr Blanchard's description of how the standard clause operates in practice. In *Sanders v O'Connor*, in which Tompkins J determined that under this clause a finance condition was a condition subsequent, the Judge observed that if the condition were not fulfilled by the specified date:³

... the plaintiffs or the defendants may at any time before the condition is fulfilled or waived avoid the contract by giving notice in writing to the other. I agree with the comment made by Mr Blanchard in A Handbook on Agreement for Sale and Purchase of Land, 3 ed, para 1206 that "fulfilled" when used in the clause the second time means "fulfilled before avoidance". Thus in the present case the contract remained on foot after 12 October

³ *Sanders v O'Connor* (1986) 2 NZCPR 492 (HC) at 497.

1981. No notice in writing avoiding the contract was given by one party to the other.

(emphasis added)

[13] In *Hawker v Vickers* this Court said:⁴

... there is nothing inconsistent in providing expressly or by necessary implication for unilateral waiver of a condition up to a certain date and thereafter for allowing either party to avoid the contract for nonfulfilment of the condition. Such a provision simply recognises the commercial reality that the nature and significance to the parties of a condition in a contract may change over time or at a point in time. If the contract is fulfilled or waived, the parties then have the certainty of an unconditional contract. If not fulfilled or waived by the nominated date, each is free to end the contract by appropriate notice to the other.

[14] In *Globe Holdings Ltd v Floratos*, this Court cited that same passage and then observed:⁵

Once the time allowed for the fulfilment of the condition expires [the vendors] can forthwith give notice of cancellation if they have not already been informed that the sale will go ahead. It matters not to them whether it does so because of fulfilment or because the purchaser elects to proceed anyway. The achieving of certainty is in the vendors' own hands if there has been no action by the purchaser. If there has been a waiver the transaction proceeds as it would have done if the condition had been satisfied on the date of the waiver.

[15] Clause 9.8 does not apply where the parties expressly provide otherwise. It is, therefore, open to the parties to agree that their rights to avoid the agreement will be different from those provided by cl 9.8.

[16] There is no difference between cls 22 and 9.8 in relation to the period prior to the date specified for fulfilment of the condition: during that period only the purchaser may avoid if he or she determines the property not to be “commercially acceptable and viable”. The central question in this case is whether, by conferring on the purchaser an express right to avoid the agreement after that date, cl 22 has “otherwise expressly provided” for avoidance, in effect by conferring that right on the purchaser alone. If so cl 22 would prevail with the result that the vendors' purported avoidance would not have been effective.

⁴ *Hawker v Vickers* [1991] 1 NZLR 399 (CA) at 403.

⁵ *Globe Holdings Ltd v Floratos* [1998] 3 NZLR 331 (CA) at 339.

[17] Mr Fisher argued that cl 22 is inconsistent and/or in conflict with cl 9.8 such that the clauses cannot co-exist: cl 22 confers the right to avoid on the purchaser only whereas cl 9.8 confers that same right on both the purchaser and vendors. Mr Fisher invited us to construe cl 22 as though the word “sole” appeared before “option”. He acknowledged that this interpretation could create uncertainty for the vendors but submitted that the situation was of the kind described in *BS Developments No 12 Ltd v PB & SF Properties Ltd* where “in effect the vendor has allowed the purchaser to play all the cards” not only during the due diligence period but also subsequently and until the settlement date.⁶

[18] Mr Blanchard responded by asserting that cl 22 does not expressly provide otherwise but, in substance, simply reiterates the right already conferred on the purchaser by cl 9.8(5). He invited us to read cl 22 as though the words “at the option of the purchaser” were not included.

[19] Interpretation of the clause cannot proceed on the basis of words being either read in or excluded. The inquiry must be to find the parties’ intentions from the meaning of the words actually used. Although it is not necessary to have explicitly stated that cl 22 was intended to prevail over cl 9.8(5) there must nevertheless be an express provision to that effect.⁷ Whether the express language used is effective to provide otherwise for the purposes of cl 9.8 is an ordinary question of construction.

[20] In our view, the right of avoidance conferred on the purchaser under cl 22 is not a provision that expressly removes the right of avoidance conferred on the vendors by cl 9.8(5). The effect of cl 22 is to reiterate the right that the purchaser already has under cl 9.8(5). Clause 22 provides a date prior to the settlement before and on which the purchaser alone can confirm (including, in effect, by waiver), or avoid — time being of the essence. That date would, as Mr Blanchard submits, be otiose if the purchaser alone had the right to avoid the agreement and could do so at any time until or even beyond settlement. That is, the 14 January deadline would be unnecessary.

⁶ *BS Developments No 12 Ltd v PB & SF Properties Ltd* (2006) 7 NZCPR 603 (CA) at [37].

⁷ *Sanders v O’Connor*, above n 3, at 497.

[21] The appeal is dismissed.

[22] The respondents are entitled to costs on a band A basis for a standard appeal.

Solicitors:

D B Hickson, Auckland for Appellant

Kirkland Morrison O'Callahan, Auckland for Respondents