IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2006-404-004825

BETWEEN	TANIA JO-ANN TEIHOTUA Plaintiff
AND	MORNING STAR (ST LUKES GARDEN APARTMENTS) LIMITED Defendant

Hearing: 23 April 2007

Counsel: M Keall for plaintiff
T Herbert for defendant

Judgment: 27 April 2007 at 14:15

INTERIM JUDGMENT OF ASSOCIATE JUDGE FAIRE
[on application for summary judgment]

This judgment was delivered by me on [ ] at [am/pm],
pursuant to Rule 540(4) of the High Court Rules.

Registrar/Deputy Registrar

Date……………

Solicitors: Wadsworth Ray, PO Box 26 301, Auckland for plaintiff
LeeSalmonLong, PO Box 2026, Auckland for defendant

[1] The plaintiff purchaser applies for summary judgment against the defendant by way of an order for specific performance of a sale and purchase agreement relating to Unit A-7 in an apartment development at 53 St Lukes Road, Mt Albert, Auckland.

[2] The defendant opposes the application and asserts that it validly cancelled the agreement for sale and purchase on 18 August 2005. In addition, the defendant says:

a) It made no binding election to proceed with the contract; and

b) It did not waive its rights to cancel the agreement.

[3] The facts are not contentious. Mr Herbert, save for one matter, accepted the summary which is contained in Mr Keall's submissions. They are as follows.

[4] The plaintiff and defendant signed a sale and purchase contract on 14 February 2002. Under that contract the defendant agreed to sell principal Unit A-7 and one car park to be allocated in the defendant's proposed residential development at 53 St Lukes Road, Mt Albert, Auckland. The purchase price is $249,000.

[5] Clause 2.7 of the agreement provides as follows:

> 2.7 **Further condition:** This agreement is further conditional upon the Vendor procuring the issue of the Certificate of Title for the property in accordance with the terms of this Agreement on or before 28 January 2004. The provisions of clauses 2.2, 2.3 and 2.6 apply to the condition contained in clause 2.7.

[6] Clauses 2.2, 2.3 and 2.6 provide:

> 2.2 The purchaser acknowledges that:
>
> (a) the Condition is inserted for the sole benefit of the Vendor and the Vendor may waive the Condition at any time upon giving written notice to the Purchaser;
>
> (b) the satisfaction of the Condition is at the sole and absolute discretion of the Vendor and the Vendor will not be required to state any reasons for the Vendor's lack of satisfaction of the Condition.

> 2.3 If the Condition is not fulfilled or waived by the vendor by the date for fulfilment then either party may thereafter at any time before the Condition is fulfilled or waived, cancel this Agreement by notice in writing to the other.
>
> 2.6 If this Agreement is cancelled as a result of the Purchaser's default, the Deposit and the Net Interest will be paid to the Vendor.

[7] Clause 8.1 of the agreement contains the usual settlement provisions and is as follows:

> 8.1 **Settlement date:** Settlement will be effected and completed on the Settlement Date being the later of:
>
> (a) the fifth (5^{th}) Business Day after the date the Vendor's solicitors provide to the Purchaser (or the Purchaser's solicitors) the Certificate of Practical Completion; or
>
> (b) the fifth (5^{th}) Business Day after the date the vendor's solicitors provide to the Purchaser (or Purchaser's solicitor) a copy of the stratum estate in freehold certificate of title to the Property issued from the Land Transfer Office.

[8] The $10,000 deposit was paid.

[9] On 14 October 2003 the plaintiff and defendant varied the agreement by providing that the date for satisfaction of clause 2.7 was enlarged from 28 January 2004 to 31 March 2005. The variation agreement ratified the original agreement and confirmed that it was in full force and effect.

[10] Title to Unit A-7 did not issue until 24 August 2005.

[11] On 25 May 2005, the defendant's solicitors wrote to the plaintiff's solicitors advising in summary:

a) Of delays in relation to the subdivision process, and that

b) *We will keep you further advised as to progress with the issue of title to your client's unit once we are able to ascertain the likely time frame …* and that

c) Under the heading: "Settlement requirements" – *We will shortly forward you a power of attorney for your clients execution prior to settlement in terms of the body corporate rules which are annexed in draft form to the agreement for sale and purchase.*

[12] On 11 August 2005 the defendant's solicitors sent a further letter to the plaintiff's solicitors which advised in summary as follows:

> a) *We … are pleased to provide an update as to settlement.*
>
> b) *We anticipate that new titles for A, D and F Blocks should issue by around 19 August 2005.*
>
> c) *We accordingly enclose … Practical completion certificate in relation to the relevant block for this unit; and Code compliance certificate in relation to A Block, if applicable …*
>
> d) *We also enclose for you to arrange execution prior to settlement pursuant to clause 5.3 of the agreement: Power of attorney; and Mortgagee's letter of undertaking. The purpose of this is to give any purchaser's mortgagees notice of the staged nature of our client's development and the power of attorney required from the purchasers. The letter is intended to create a starting point for our client should consents by (sic) required from purchasers' mortgagees to progress any future works relating to the devleopment.*
>
> e) *The street address allocated to this unit is GG/19 Morning Star Place, St Lukes, Auckland.*
>
> f) *Please kindly forward us your transfer and notices of sale prepared accordingly.*

[13] The plaintiff took steps with a view to being ready for settlement. However, on 18 August 2005 the defendant's solicitors sent a letter notifying cancellation of the contract. The plaintiff's solicitors responded disputing that the defendant was entitled to cancel and advising that they would continue to proceed to settlement. Formal tender of settlement occurred on 21 October 2005.

[14] The principles applicable when an application for summary judgment is being sought are well-established. Rule 136 of the High Court Rules requires that the plaintiff satisfy the Court that the defendant has no defence. That was explained by the Court of Appeal in *Pemberton v Chappell* [1987] 1 NZLR 1 at 3 as follows:

> In this context the words "no defence" have reference to the absence of any real question to be tried. That notion has been expressed in a variety of ways, as for example, no bona fide defence, no reasonable ground of defence, no fairly arguable defence.

[15] The Court added at 4:

> Satisfaction here indicates that the Court is confident, sure, convinced, is persuaded to the point of belief, is left without any real doubt or uncertainty.
> ...

[16] To succeed with its application, Mr Keall acknowledged that the plaintiff must establish either:

a) An election by the defendant to affirm the contract; or

b) That the defendant had waived its right to rely on clause 2.7 as extended.

[17] Without one or other of the two matters raised, the defendant has a clearly arguable defence on the basis that it was entitled to exercise its right to cancel the contract pursuant to clause 2.7 as extended.

[18] The facts are not in dispute. This case turns on what the legal consequences are in respect of those facts.

[19] In *Jansen v Whangamata Homes Limited* [2006] 2 NZLR 301 at 303 the Court of Appeal accepted the analysis as to the application of the principle of election contained in the judgment of Randerson J in the High Court in that case. The principles are summarised in [14], [15], [16] and [17] of the Court of Appeal judgment and are as follows:

> [14] Randerson J referred first to this statement from Feltham, Hochberg & Leech, *Spencer Bower, The Law Relating to Estoppel by Representation* (4 th ed, 2004), p 359:
>
> > "Where A in dealing with B is faced with inconsistent courses of action which affect B's rights or obligations and knowing that the two courses of action are inconsistent and that he or she has the right to choose between them, A then makes an unequivocal choice between them and communicates that choice to B, A is prevented from afterwards resorting to the course of action which he has deliberately rejected and communicated to B his intention of rejecting. The election binds A immediately it is communicated to B and is not based on proof of detrimental reliance. It is binding at the point of communication because the underlying rationale of the doctrine is that parties to an ongoing legal relationship are entitled to know where they

> stand. B must be entitled to rely on A's deliberate choice with confidence."

[15] Following that citation, Randerson J observed at para [25]:

> "The doctrine of election is most commonly relied upon in the contractual context where there has been a breach entitling the innocent party to treat it as a repudiation in nature and to cancel the contract in consequence. However, a party may also be found to have made a binding election where he or she becomes entitled to exercise a right conferred by the contract as distinct from the general law."

[16] His Honour then referred to the leading authority in support of that conclusion, *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corporation of India* [1990] 1 Lloyd's Rep 391 (HL). Lord Goff of Chieveley, with whom the other Law Lords agreed, said at p 398:

> *"Election itself is a concept which may be relevant in more than one context. In the present case, we are concerned with an election which may arise in the context of a binding contract, when a state of affairs comes into existence in which one party becomes entitled, either under the terms of the contract or by the general law, to exercise a right, and he has to decide whether or not to do so.* His decision, being a matter of choice for him, is called in law an election. Characteristically, this state of affairs arises where the other party has repudiated the contract or has otherwise committed a breach of the contract which entitles the innocent party to bring it to an end, or has made a tender of performance which does not conform to the terms of the contract. But this is not necessarily so. An analogous situation arises where the innocent party becomes entitled to rescind the contract, ie to wipe it out altogether, for example because the contract has been induced by a misrepresentation; and one or both parties may become entitled to determine a contract in the event of a wholly extraneous event occurring, as under a war clause in a charter-party. *Characteristically the effect of the new situation is that a party becomes entitled to determine or rescind the contract*, or to reject an uncontractual tender of performance; but, in theory at least, a less drastic course of action might become available to him under the terms of the contract. In all cases, he has in the end to make his election, not as a matter of obligation, but in the sense that, if he does not do so, the time may come when the law takes the decision out of his hands, either by holding him to have elected not to exercise the right which has become available to him or sometimes by holding him to have elected to exercise it." (Emphasis added.)

[17] Randerson J then observed at para [26]:

> "An election may take the form of a deliberate and conscious act by the electing party or may be imputed by the law treating the electing party as having exercised an

> election irrespective of actual intention (*Champtaloup v Thomas* [1976] 2 NSWLR 264 per Mahoney JA at pp 274 – 275 and *Zucker v Straightlace Pty Ltd* (1986) 11 NSWLR 87 at p 93)."

The election submission

[20] Mr Keall submitted that the two letters of 25 May 2005 and 11 August 2005 evidenced a binding election to proceed with the contract. In particular, he relied on 11 August 2005 letter which, of course, advised that settlement was imminent and invited the plaintiff purchaser to prepare a memorandum of transfer.

[21] Mr Herbert for the defendant acknowledged that if this case was confined simply to the application of clause 2.7, the outcome would be the same as was reached by the Court of Appeal in *Jansen v Whangamata Homes Limited.*

[22] In *Jansen v Whangamata Homes Limited* the Court had to consider a sale and purchase agreement in relation to a unit. At the time the contract was signed there was no code of compliance certificate nor was there a Certificate of Title to the unit.

[23] Settlement was provided to be on:

a) The 30th of May 2003; or

b) Upon the issue of both the code of compliance certificate and the unit title, whichever occurred later.

The contract contained a special condition as follows:

> If the settlement has not occurred by the 30th of June 2003 either party may, by notice in writing to the other, cancel this agreement. In the event the deposit and all moneys paid by the purchaser shall be refunded to the purchaser and neither party shall have any right or claim against the other.

[24] Settlement did not occur by 30 June 2003 because neither the code of compliance certificate nor the unit title had issued. Matters developed between the parties. The Court of Appeal noted an important letter which has similarities to the letter of 11 August 2005 in this case. In the letter of 1 September 2003 the solicitor

for the vendor company advised that the unit was two weeks from completion. He advised that the unit plan and an application for new titles had been lodged with Land Information New Zealand. He asked the purchaser's solicitor, in anticipation of the issue of title and settlement being concluded, to forward his client's transfer. Prior to settlement taking place, the vendor gave a cancellation notice under clause 22, which is the clause which I have set out earlier. The purchasers refused to accept that cancellation. They asserted that the vendor had lost the right to terminate the agreement under clause 22 as a result having earlier elected to affirm the agreement. When the vendor refused to proceed the purchaser sued for specific performance. The Court of Appeal found that the letter written by the vendor's solicitor was clear advice to the effect that settlement would shortly take place. The Court found that the letter was a clear election on behalf of the vendor to proceed to settlement and that the vendor was not therefore permitted later to withdraw from that position.

[25] Mr Herbert submitted that the factual position and, in particular the relevant clauses in *Jansen v Whangamata Homes Limited* differed from the instant case because of the wording of clause 2.3. He submitted that the fact that clause 2.3 makes reference to either party after the date when the condition is not fulfilled by being able to cancel:

> at any time before the condition

is actually fulfilled contains a contractual formula from which the parties cannot depart unless they do so, in this case, by the vendor giving a specific notice in writing waiving the need to comply with clause 2.7.

[26] Accordingly, the issue raised by Mr Herbert is whether a party with an express contractual right to cancel a contract *at any time* until a particular condition is fulfilled or waived can be prevented from exercising that right if that party suggests by that party's actions that it will keep the contract on foot.

[27] Mr Herbert's submission is that the additional words are inconsistent with and thus override the application of the doctrine of election to this case.

[28] I accept Mr Herbert's submission that the Court of Appeal decision in *Jansen v Whangamata Homes Limited* turned on the fact that the contractual right to cancel the contract after the non-fulfilment of the relevant condition was expressed in general terms. The words used were *may cancel.* It was because the right to cancel was so general that the Court needed to interpret it. Having regard to the parties' intentions and taking particular account of the extras and variations that had to be paid after the date of non-fulfilment of the condition the Court interpreted the contractual right to cancel consistently with the doctrine of election, ie as not giving rise to a continuing right to cancel that would be unaffected by the parties' subsequent conduct.

[29] I do not accept that it necessarily follows that a contractual right to cancel the contract *at any time* until a condition is waived or satisfied means that the right continues to exist regardless of the parties' subsequent conduct.

[30] Rather, the position is that the right to cancel *as modified by the common law* exists until the condition is waived or satisfied. In other words, the right to cancel exists until the time the condition is waived or satisfied so long as nothing has taken place to prevent the exercise of that right. In the case of the doctrine of election, that requires that the parties' conduct has remained neutral until that time. In short, the contractual term should be interpreted consistently with established common law doctrine unless the term can be said to expressly override it. The term does not do so in this case.

[31] Further, the provision in *Jansen v Whangamata Homes Limited* is not that dissimilar in form to the condition in the present case. A right to cancellation that exists until a condition is waived or satisfied is arguably just as indefinite and imprecise as the general right to cancel in *Jansen v Whangamata Limited.* Holding that the parties had a continuing day-to-day right to cancel unaffected by the parties' conduct in this case would give rise to just the same problems. While the plaintiff did not have to pay for extras and variations as in *Jansen v Whangamata Homes Limited*, the parties would nevertheless remain in *a state of uncertainty as to the nature of their ongoing legal relationship*: See *Jansen v Whangamata Homes Limited* at [32].

[32] The above interpretation of parties' rights to cancel when a contract is unfulfilled is consistent with established practice. In DW McMorland Sale of Land 5.12, the author warned about the very situation that has occurred in this case where he says:

> If the condition has failed without the default of either party, and the benefit of the condition is still required by one party, again the only practical course is for the party to avoid the contract; that party must be wary of conduct amounting to election or to estoppel preventing the exercise of that right.

Conclusion

[33] I conclude that the defendant's conduct in this case amounts to an affirmation of the contract. The defendant is therefore prevented from exercising its right to cancel. In short, the defendant has elected to continue with the contract by virtue of, in particular, the letter of 11 August 2005.

[34] Ordinarily the conclusion to which I have reached would justify an order for summary judgment being made by way of an order for specific performance. Two matters, however, have arisen that may impact on the appropriateness of that. The first is that I was told of the existence of possible tenants in the subject property. The second is a late allegation, not substantiated by any evidence, to the effect that the plaintiff may have onsold and that therefore that the appropriate remedy may well be one in damages. Counsel, therefore, invited me, having regard to these matters, to issue my judgment making a specific ruling and then call for submissions as to the appropriateness of the judgment having regard to that ruling.

[35] For these reasons, then, I rule that the plaintiff is entitled to the relief sought in the application for summary judgment but I shall delay entering judgment so that counsel have the time to consider the appropriate form of judgment and to submit a memorandum on same. If the memorandum has not been submitted to me on a consent basis by Thursday, 3 May 2007, this proceeding shall be listed in the chambers list at 11.45am on 4 May 2007 for consideration of the appropriate orders.

[36] In the circumstances, I reserve costs.

JA Faire
Associate Judge