IN THE SUPREME COURT OF NEW ZEALAND

SC 105/2009
[2010] NZSC 90

	BETWEEN	MANA PROPERTY TRUSTEE LIMITED Appellant
	AND	JAMES DEVELOPMENTS LIMITED Respondent

Hearing: 15 June 2010

Court: Elias CJ, Blanchard, Tipping, McGrath and Anderson JJ

Counsel: J M McCartney SC and D W McMorland for Appellant
C S Withnall QC and R Ahdar for Respondent

Judgment: 23 July 2010

JUDGMENT OF THE COURT

A The appeal is allowed. It is declared that the respondent's purported cancellation on 3 November 2008 of its contract with the appellant was of no effect. The proceeding is remitted to the High Court for outstanding issues to be determined in light of this judgment. The costs order made in the Court of Appeal is set aside.

B Costs are reserved. Counsel should file memoranda.

REASONS

(Given by Blanchard J)

Introduction

[1] The appellant, Mana Property Trustee Ltd (Mana), agreed to sell vacant land in an industrial subdivision in Cromwell to the respondent, James Developments Ltd

(James). The area was still undergoing subdivision at the time of the agreement. The terms of contract recognised that a boundary adjustment would be necessary before settlement could occur. This would affect the size of the area contracted for, stated in the contract to be "4.7161 Ha more or less". In anticipation of this adjustment the parties had also agreed, in cl 18.3, that "the final area of the property as shown on the approved survey plan must not be less than 4.7150 Ha". Yet by the date on which the transaction should have been settled in accordance with the agreement, the area of land for which Mana had deposited a plan and obtained issue of a certificate of title was only 4.6990 ha. A few days later, without having given a settlement notice, James advised Mana that the contract was cancelled because of Mana's failure to comply with cl 18.3. The High Court[1] and the Court of Appeal[2] have disagreed about the validity of that purported cancellation.

[2] The issues on the appeal to this Court are:

(a) Whether cl 18.3 of the contract was an essential term (s 7(4)(a) of the Contractual Remedies Act 1979); and

(b) If so, whether James was entitled to cancel the contract by the notice it gave to Mana on 3 November 2008 without prior issuance and expiry of a settlement notice under cl 9.0 of the General Terms of Sale of the agreement form.

The facts

[3] Mana was in the course of purchasing Lots 5 and 11 at McNulty Road, Cromwell from the Central Otago District Council (CODC). Those lots were part of a subdivision of the CODC's land. In a contract made on 15 October 2007 Mana agreed to on-sell Lot 11 to James but with a reduced area. A re-subdivision would

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1 *Mana Property Trustee Ltd v James Developments Ltd* (2009) 10 NZCPR 295 (HC) per Associate Judge Osborne.

2 *James Developments Ltd v Mana Property Trustee Ltd* [2009] NZCA 483 per Hammond, Harrison and Miller JJ.

therefore be required before settlement could occur with James. The agreed price was $4.5 million. James paid a deposit of $450,000. The possession date, which was also the settlement date,[3] was to be 30 June 2008 or "the date which is five working days after the date on which the vendor notifies the purchaser in writing that a search copy, as defined in section 172A of the Land Transfer Act 1952, of the new certificate of title to the property is available (whichever is the later)".[4]

[4] The contract[5] contained printed General Terms of Sale and several typewritten Further Terms of Sale (cls 15 to 23). Clause 16.1 recorded that the CODC already had a resource consent for its proposed subdivision and that Mana had agreed with it that the CODC would alter the boundaries of Lots 5 and 11 "to enable lot 11 to become approximately 4.7161 Ha". This would "require the CODC to vary the resource consents to the proposed subdivision to accommodate increase to the size of lot 5 to not less than 7,481m$^{2"}$. The area of Lot 5 in the CODC's existing subdivision plan was 2,120m^2 so its area was being substantially increased and consequentially Lot 11 which James was buying would be reduced in size.

[5] Clause 16.2 required that, once the resource consents were varied, Mana would have a survey plan prepared, approved and deposited with Land Information New Zealand (LINZ) and would procure issuance of a separate certificate of title for the new Lot 11.

[6] The Further Terms of Sale also included the following:

> 16.3 The vendor will grant or receive the benefit of any existing easements and any easements, building line restrictions and other encumbrances, rights or obligations which either the territorial authority or LINZ need to satisfy any condition of the resource consents or to deposit the approved survey plan. The purchaser will not make any objection or requisition on the vendor's title under clause 5.2 of the general conditions of sale of this agreement about any of those easements, building line restrictions, encumbrances, rights or obligations.

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3 Clause 1.1(20).

4 Clause 15.1. In error, the agreement said in one place "whichever is the later" and in another "whichever is the sooner". Correspondence between the solicitors for the parties confirmed that "whichever is the later" was correct.

5 On the form approved by the Real Estate Institute of New Zealand Inc and the Auckland District Law Society (Eighth Edition 2006) (the REI/ADLS form).

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18. PURCHASE PRICE

18.1 The area of the property shown on the plan attached to this agreement is approximate only and is subject to adjustment on final survey. All measurements are subject to the final check by the CODC's surveyor and/or LINZ and any variation which may be found to be necessary upon such check or which the above may require.

18.2 The parties agree that the purchase price shown on the front page of this agreement is calculated at the rate of $95.42 per square metre (plus GST). If the final area of the property shown on the approved survey plan is greater or lesser than 4.7161 Ha the parties will adjust the purchase price proportionately.

18.3 The parties acknowledge that the final area of the property as shown on the approved survey plan must not be less than 4.7150 Ha.

Lot 11 was described on the front page of the agreement form as containing 4.7161 ha. Hence that figure appeared in cl 18.2. It will be noted that the minimum area stipulated in cl 18.3 allowed a tolerance of only 11m^2 or a price reduction from $4.5 million of no more than $1,049.62.

[7] On 2 November 2007 surveyors for the CODC wrote to their client in its capacity as the consent authority seeking approval of a variation of the boundaries of Lots 5 and 11. They said that Lot 5 would be increased to 7,484m^2 and that Lot 11, which they called the balance allotment, would be reduced to 4.7 ha. It seems that a copy of this letter was sent to James on 4 February 2008 with notification of the new resource consent but, if James noticed that the area of Lot 11 was less than the 4.7150 ha required by cl 18.3, it made no comment.

[8] A new certificate of title for Lot 11 was eventually issued by LINZ on 15 October 2008. It showed an area of 4.6990 ha. By faxed letter of 21 October the solicitors for Mana, Graeme Skeates Law, sent the solicitors for James, La Hood Van Aart, a copy of the title and sought settlement on 28 October 2008, which was the fifth working day after 21 October (Labour Day fell in the intervening period).

[9] James's solicitors replied on 23 October. They said that the certificate of title

failed to comply with cl 18.3 of the agreement. They also raised certain other issues about services to the land. They asked Mr Skeates to take instructions from his client as to proposals for resolving all the issues. They said that in the interim, and without prejudice to their client's rights under the agreement, they believed it was prudent for the respective clients to agree that settlement be deferred until 14 November to enable discussions to be undertaken in an attempt to resolve the issues.

[10] Mr Skeates responded on behalf of his client vendor on 27 October. His letter acknowledged that the title was "60m^2 short of the size mentioned in cl 18.3 of the agreement". (That calculation was incorrect but it is not suggested that anything turns on Mr Skeates's mistake in this respect, which was soon corrected.) The letter continued:

> As I understand it, there is no major consequence to the deficiency in area. The matter is able to be addressed by monetary compensation pursuant to clause 5.4.[6] I enclose my settlement statement which provides a discount in respect of the full area shortfall at the rate referred to in clause 18.2, together with a GST Tax Invoice, Trust Account deposit details and settlement instructions.

[11] The rest of the letter was concerned with the services to the property but also said that Mana considered that an extension of the settlement date by 12 working days was significantly too long.

[12] The next letter in the correspondence between the solicitors was again from Mr Skeates, on 31 October. It referred to the earlier letters and to "various telephone calls over the last few days". Mr Skeates maintained that there was no major consequence of the deficiency in the area because it was extremely unlikely, he said, that the courts would view cl 18.3 as an essential term. He acknowledged that the discrepancy in area was actually 160m^2 but said this was likely to be viewed as "a

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[6] That clause reads:

> Except as otherwise expressly set forth in this agreement, no error, omission or misdescription of the property or the title shall annul the sale but compensation, if demanded in writing before settlement but not otherwise, shall be made or given as the case may require.

trivial area" and that James would need "to establish that an area difference of 0.003% makes a material difference to the purchaser's legal rights in respect of and usage of the land." He said that the shortfall in area made no difference at all to James's own proposed further subdivision of the property, so that it would not substantially reduce the benefit of the contract to James. After offering financial assistance to James to "resolve their issue of servicing the allotment" by way of a contribution to the cost involved, Mr Skeates concluded his letter by saying that if "the above" (apparently encompassing all points made in the letter) was not acceptable, Mana had requested a meeting in Christchurch on Monday 3 November "to sit down and resolve all outstanding issues".

[13] However, on 3 November, while Mana's representatives were actually on their way to the meeting with James, La Hood Van Aart wrote on behalf of James saying that cl 18.3 had not been fulfilled and that accordingly James gave notice cancelling the agreement. The letter sought a refund of the deposit.

[14] Mana disputed James's right to cancel the contract. It took steps to have a new plan deposited and a new certificate of title issued to achieve compliance with cl 18.3. That was accomplished on 19 November 2008 (which, as it happens, was the 12th working day after the date of James's letter purporting to cancel the contract).

The High Court decision

[15] Mana issued this proceeding seeking an order for specific performance of the contract by James and made an application for summary judgment which came before Associate Judge Osborne. He said that there had been no express agreement that cl 18.3 was essential, so that he had to determine whether there had been an implied agreement.[7] The exercise was an objective one, but once performance of a term was found to be essential and to require strict and literal performance, any departure from the overall requirement created a ground for cancellation. Emphasis

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7 At [38].

had been placed on the use of the imperative "must" in cl 18.3 but that was only part of the Court's inquiry. It was necessary to look more broadly at the other terms of the agreement. The Associate Judge was satisfied that the structure of cl 18 suggested at least some measure of importance to the stipulated minimum of 4.7150 ha but the question remained whether that importance was at the level of essentiality. The Judge noted that it was not the purchaser which had stipulated for cl 18.3: it was the vendor's representatives who included it in the agreement. The extrinsic evidence did not point to the term as being "of such importance to the promisee that he would not have entered into the contract unless he had been assured of a strict, or substantial performance of the promise, as the case may be, and this ought to have been apparent to the promisor", citing the test propounded by Jordan CJ in *Tramways Advertising Pty Ltd v Luna Park (NSW) Ltd*.[8] The purchaser had pointed to no particular features of the land which objectively might explain cl 18.3 as being seen as essential. Nothing in the evidence cogently pointed to the area discrepancy being commercially material. The minor variation of size from that stipulated in cl 18.3 did not go to the root or heart of the contract. The Associate Judge concluded that it was not arguable that the parties had impliedly agreed that the performance of the specific area stipulation of cl 18.3 was essential to the purchaser. Accordingly the purchaser was not entitled to cancel for breach of an essential term. An order for specific performance was made, there being no other tenable ground of defence.

The Court of Appeal decision

[16] James appealed but before the hearing took place in the Court of Appeal it was placed in liquidation. In that circumstance Mana did not wish to pursue specific performance and, on its application, the decree was discharged by the High Court. The question of whether James's cancellation was valid remained a live issue because the deposit was still held by Mana, which might also seek damages.

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[8] At [52], citing *Tramways Advertising Pty Ltd v Luna Park (NSW) Ltd* (1938) 38 SR (NSW) 632 at 641–642.

[17] The reasons of the Court of Appeal were given by Miller J. The Court took the view that the evidence of Mr Skeates to the effect that he put cl 18.3 into the contract and selected the minimum area arbitrarily was inadmissible evidence of negotiations. The Associate Judge had erred by relying on that evidence. The Court also considered that the Associate Judge had placed too much emphasis on the absence of density constraints or any commercial significance in the area discrepancy. Those matters might be taken into account as part of the context, but the question posed by s 7(4)(a), the Court said, was whether as a matter of construction the parties agreed that performance of the stipulation was essential, such that any departure from it conferred a right to cancel.[9] The purpose of the minimum area clause in this case was to deny the vendor the option, on payment of compensation, of reducing the area transferred beyond the stipulated minimum. It accepted that breach of the minimum area would sound in damages, and not merely compensation at the rate agreed upon for minor adjustments. However, the Court said, that would defeat the purpose of the clause by allowing the vendor to reduce the area on payment of money, while the purchaser would not find it easy to prove that damages should exceed the agreed rate. Counsel for Mana's inability to identify at what point the purchaser would be entitled to cancel illustrated the uncertainty that would arise if cl 18.3 was not construed according to its plain meaning. The combination of the right to adjust the area within agreed limits on payment of compensation and the imperative language of the minimum area clause – "must not be less than" – satisfied the Court of Appeal that performance was essential to the purchaser. The Court also rejected an alternative submission that even if the term was essential the discrepancy was not shown to be "commercially material". There might be room for argument in some cases about what strict performance required, it said, but this was not such a case.[10]

[18] The argument in the Court of Appeal on the point which has become the second issue in this Court does not seem to have been developed in the same way as it was in the submissions to us. The Court dealt with it briefly, recording an argument for Mana that, as the contract did not specify a time by which the

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9 At [30].
10 At [35].

minimum area was to be provided, Mana might do so within a reasonable time.[11] The Court said that it was true that the contract did not fix a date by which the title must issue but it had provided that settlement would occur five working days after notification to the purchaser that the title had issued. That was done on 21 October, thereby fixing a settlement date of 28 October. At that settlement date the final area as shown on the approved survey plan was less than the agreed minimum. The Court was therefore satisfied that cl 18.3 was breached before James cancelled on 3 November.

[19] The appeal was allowed. An order was made setting aside the summary judgment granted in the High Court.

Essentiality of minimum area

[20] It is not in dispute that Mana was on the settlement date (28 October 2008) in breach of contract because the area of the certificate of title it was asking James to receive was less than the stipulated minimum of 4.7150 ha. The first question is whether that breach could ever have justified a cancellation by James.

[21] The law on cancellation of contracts in this country was codified by s 7 of the Contractual Remedies Act 1979, as subs (1) makes clear:

> **7 Cancellation of contract**
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> (1) Except as otherwise expressly provided in this Act, this section shall have effect in place of the rules of the common law and of equity governing the circumstances in which a party to a contract may rescind it, or treat it as discharged, for misrepresentation or repudiation or breach.

Shorn of references to misrepresentation, which are not relevant in this case, subs (3) and (4) provide:

> (3) Subject to this Act, but without prejudice to subsection (2) of this section, a party to a contract may cancel it if—
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> ...

[11] At [36].

> (b) A term in the contract is broken by another party to that contract; or
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> (c) It is clear that a term in the contract will be broken by another party to that contract.
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> (4) Where ... subsection (3)(b) or subsection (3)(c) of this section applies, a party may exercise the right to cancel if, and only if,—
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> (a) The parties have expressly or impliedly agreed that ... the performance of the term is essential to him; or
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> (b) The effect of the ... breach is, or, in the case of an anticipated breach, will be,—
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> (i) Substantially to reduce the benefit of the contract to the cancelling party; or
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> (ii) Substantially to increase the burden of the cancelling party under the contract; or
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> (iii) In relation to the cancelling party, to make the benefit or burden of the contract substantially different from that represented or contracted for.

[22] Subsection (3)(b) is concerned with actual breach and subs (3)(c) with anticipatory breach. Subsection (4)(a) is about breach of an essential term, as alleged in this case, and subs (4)(b) describes a breach with a substantial consequence. It is not suggested that the breach in this case had a substantial consequence. Cancellation can occur in reliance on subs (4) only when the performance is essential to the cancelling party or will have one or more of the described substantial consequences for that party. Professor Burrows succinctly comments that s 7(4)(a) deals with the importance of the term which has been broken, s 7(4)(b) with the seriousness of the consequences of the breach.[12] A breach of an essential term with only a minor effect entitles cancellation under (a) and so, under (b), does a breach of any term, even a minor term, if it has a serious effect.

[23] Professor Burrows also observes that subs (4)(a) in essence preserves the common law concept of a "condition": a term which is so important that any breach of it justifies the innocent party in cancelling. He notes too that the subsection

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[12] John Burrows, Jeremy Finn and Stephen Todd *Law of Contract in New Zealand* (3rd ed, LexisNexis NZ Ltd, Wellington, 2007) at [18.2.2].

emphasises that it is essentiality to the *cancelling* party which is relevant: it is not necessary, if it ever was, that the term should be essential to both parties.[13] With that possible difference, the common law concerning identification of conditions continues to be relevant. It is helpfully addressed by Dawson and McLauchlan in the following way:[14]

> We consider that, as in the old law, the question whether a term is an essential term will fall to be decided by ascertaining the intention of the parties to be collected from the terms of the whole contract and the subject matter to which it relates. Since the question is one of the express or implied agreement of the parties, it will be the intention of the parties at the time of entering into the contract and the effect likely to be produced on the foundation of the adventure that is relevant. Strictly speaking, therefore, the consequences of the breach that have in fact taken place are immaterial to the question whether a term is essential. One useful indicator of whether a term has been agreed by implication to be essential is to ask whether the term is of such importance that it may reasonably be supposed that without such term the party not in default might never have entered into the contract at all.

The indicator mentioned in the last sentence was drawn from the judgment of Jordan CJ in *Tramways Advertising*.[15] His statement of the law was endorsed in *Associated Newspapers Ltd v Bancks*[16] by the High Court of Australia which also approved a test formulated by Morison:[17]

> You look at the stipulation broken from the point of view of its probable effect or importance as an inducement to enter into the contract.

[24] Subsection (4)(a) contemplates that the parties *either* have expressly agreed that a particular term in their contract is to be regarded as essential (to the cancelling party or to both of them) *or* must be taken to have impliedly so agreed. In both cases it is a matter of interpretation of the contract. The use of words such as "performance being essential" or "strict performance being required" would plainly fall within the former category, but no special form of words is necessary provided that it can be seen that the parties have indeed agreed that adherence to the provision in question is being treated by them as essential. The latter category, of implied

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13 Ibid at [18.2.2(a)].

14 Francis Dawson and David W McLauchlan *The Contractual Remedies Act 1979* (Sweet & Maxwell (NZ) Ltd, Auckland, 1981) at 110 (footnotes omitted).

15 At 641.

16 *Associated Newspapers Ltd v Bancks* (1951) 83 CLR 322 at 337.

17 At 336, citing CB Morison *Principles of Rescission of Contracts* (Steven & Haynes, London, 1916) at 86.

agreement on the essentiality of a term which appears in the contract, may sometimes be more difficult to establish.[18] But, again, it will be a question of interpretation, that is, ascertaining the intention of the parties as to the essentiality of the particular term from its language read in the context of the whole of the contract and the surrounding circumstances when the contract was made. Of particular importance will be what must then have been in the contemplation of the parties concerning the likely effect of a breach of the term. It will include whether a term of the same kind has customarily been treated as a condition or as an essential term under the Act, such as, in relation to a land sale agreement, a requirement for payment of a deposit within a particular time.[19] It will also include a consideration of the type of contract and whether it is one, like a mercantile contract, which normally requires strict performance.[20] The court must ask itself whether, without expressly stating that the term is essential – that is, using a form of words equivalent to the expressions of which we have given instances – the parties can be seen, in context, to have intended that that should be the position. Obviously there will be some cases where what is express shades into what must be taken to be implied.

[25] In the end, the preferable approach is to ask whether, unless the term in question was agreed at the time of contracting to be essential, the cancelling party would more probably than not have declined to enter into the contract. That question must be answered by an objective contextual appraisal which disregards what a party may unilaterally have said about its intention in that regard.

[26] When that is done in the present case we find ourselves in agreement with the conclusion reached by the Court of Appeal that the parties must indeed have regarded performance of cl 18.3 by Mana as essential for James. We say this despite recognising that a minor breach of the subclause would have had little practical significance. It can be accepted that at the time the contract was made the parties would have known that a small reduction below the agreed minimum area would be unlikely to have any real impact on James's ability to develop Lot 11, including by further subdivision. But, looking at the matter objectively, we consider that the

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18 Although the task of doing so is not likely to be as burdensome as persuading a court to imply an additional term which the parties have not mentioned.

19 *Otago Station Estates Ltd v Parker* [2005] NZSC 16, [2005] 2 NZLR 734 at [21].

20 *Bunge Corp v Tradax Export SA* [1981] 1 WLR 711 (HL).

subclause must nevertheless have been known to the parties to be of great importance to James. As a starting point in the interpretation, it is to be observed that the clause is imperatively expressed: the area "must not be less than" the stated minimum. That, however, does not in isolation take the matter very far since non-essential terms may well use such language of command. What is decisive in this case is the use of language of that kind in the overall context.

[27] This was a contract for the sale of high-value land to a developer. But the boundaries and the final area had yet to be fixed and the parties could not have been certain what requirements might be made by the CODC as consent authority. It might have some objection to the new dimensions and areas proposed by Mana. It might possibly require a reduction in the projected size of Lot 11 which did not meet the present expectations of the parties. It was all very well to have cl 18.2 which would adjust the price downwards, but any purchaser in the position of James would also need to have in the sale contract a provision which ensured that it could not be forced to take a reduced area of land whose capacity for development may have been disproportionately reduced, thereby affecting the "foundation of the adventure", to pick up the phrase used by Dawson and McLauchlan.[21]

[28] Leaving aside for the moment the actual specification for minimum area, we would have had no doubt from the position of cl 18.3 in cl 18, and from the context generally, that the subclause was intended by both parties to be strictly complied with. If, for example, the minimum area had been taken directly from the bulk and location requirements of the district scheme, the point would be virtually unarguable. The curiosity of cl 18.3 is that it nominated a minimum area which was so close to the estimated area of 4.7161 ha. That has opened the door to an argument made for Mana that the stipulated minimum had no particular significance and that accordingly strict performance of the subclause could not have been objectively intended by the parties.

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[21] At 110, citing *Bentsen v Taylor, Sons & Co (No 2)* [1893] 2 QB 274 (CA) at 281 ("likely to affect the substance and foundation of the adventure which the contract is intended to carry out").

[29] We do not accept that argument because the fortuity of the actual choice of minimum area would then be taken to have modified the normal functionality of a provision of the kind found in cl 18. It seems unlikely that the parties would be intending to do this. If cl 18.3 is not an essential term, as one would normally expect a term of this kind to be, the provision somewhat bizarrely would have no greater operation than to convert a quantum adjustment on the basis of an agreed figure per square metre, where the final area was just above the minimum, into a claim for damages for breach, surely calculated on the same basis, in the case of a final area just below the minimum. If that were all cl 18.3 achieved, James would have no ability to rely on subs (4)(a) and would have to fall back on subs (4)(b), which would not apply unless there were a substantial consequence from the loss of area. It would lose any protection against being exposed to the risk of argument and perhaps litigation about whether the final area was so low that the bulk and location requirements affected future development or that some other matter had become significant, and so the breach might then be regarded as having a substantial consequence. The avoidance of any such argument, with the purchaser having an ability simply to withdraw from the contract if the minimum area were not available to it, is a crucial feature of a provision of the type found in cl 18. It is highly unlikely that the parties would have intended merely by their fixing of the minimum area in the particular case to remove this advantage for the purchaser. It follows that unless a term of this kind had been included and agreed to be essential, it is probable that James would have declined to enter into the contract.

[30] The admissible evidence does not reveal why the tolerance or headroom given to Mana in varying the areas of the two lots was so small. The parties are of course at liberty to make the performance of an obligation essential, regardless of how trivial or unimportant it may seem to an objective observer.[22] It was perhaps not appreciated by Mana that the choice of 4.7150 ha might cause it difficulties. Perhaps it was simply a figure inserted and accepted without due consideration. Our point is that, whatever the reason for the choice, the figure chosen should not lead the Court to a different conclusion from that which, in our view, it would obviously

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[22] NC Seddon and MP Ellinghaus *Cheshire and Fifoot's Law of Contract* (9th Australian ed, LexisNexis Butterworths, Australia, 2008) at [21.17].

reach if the figure had been much lower.

[31] For these reasons, we are of the view that the parties were agreed that the performance of cl 18.3 was essential to the purchaser.

Was substantial performance enough?

[32] It has been suggested by Dawson and McLauchlan that some essential terms, rather than requiring exact performance, may require only substantial performance.[23] They instance entire contracts, saying that there is no indication in the reports of the Contracts and Commercial Law Reform Committee,[24] on which the Act is based, that it was intended to revise or abolish the common law rule that such a contract could not be cancelled if it had been substantially performed. They argue that the distinction between exact and substantial performance could be maintained under s 7 by an interpretation of the word "performance" in subs (4)(a) on a case-by-case basis, determining whether it meant exact or substantial compliance with the term under consideration.

[33] In contrast, Professor Burrows says that the tests of essentiality under subs (4)(a) and of substantial breach under subs (4)(b) are independent, and that it is quite possible to have a case where a term is found to be essential even though the consequences of the breach in the particular case are relatively minor.[25] We have already indicated our agreement with the latter proposition. But it does not follow that the argument advanced by Dawson and McLauchlan can be dismissed. They would no doubt say that Professor Burrows is just referring to a situation in which strict compliance with a particular essential term is required and even a minor breach of it is enough to justify cancellation. A greater difficulty for Dawson and McLauchlan's suggestion is the first point about the independent operation of the two paragraphs of subs (4). If there can be no cancellation in some cases of breach of an essential term unless the failure of performance is beyond what can be seen to

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23 At 115–116.

24 Report of the Contracts and Commercial Law Reform Committee *Misrepresentations and Breach of Contract* (1967); Report of the Contracts and Commercial Law Reform Committee *Misrepresentations and Breach of Contract* (1978).

25 At [18.2.2(a)(i)].

be substantial performance, that begins to look suspiciously like a breach with substantial consequences under subs (4)(b). That risks blurring the distinction in the separate operation of the two paragraphs which seems to have been the legislative purpose.

[34] In a case like the present, acceptance of the argument would require the Court to say that a minimum area slightly below 4.7150 ha was within an acceptable tolerance. But would that tolerance extend all the way down to the point where the reduction could be regarded as a breach within subs (4)(b), thus depriving the purchaser of the intended protection of the stipulation of a minimum area? Or would the Court have arbitrarily to fix a different and higher point at which the tolerance ran out and there had not been substantial performance of the essential requirement for 4.7150 ha? That would amount to a judicial re-writing of the figure in cl 18.3. We conclude, therefore, that even if Dawson and McLauchlan may be right, upon which we need express no concluded view, this is not a case in which substantial performance of the essential term would suffice. In fairness to Ms McCartney SC, it should be recorded that she did not press this portion of her argument on the essentiality issue.

A right to cancel?

[35] What was essential in cl 18.3 was that the vendor should on settlement provide a title with a minimum area. Importantly, however, the Contractual Remedies Act did not displace the long-established rule by which *time* for performance, that is, the time for settlement, is generally not of the essence in a land sale contract. That equitable rule is confirmed by s 90 of the Judicature Act 1908:

> **90 Stipulations not of the essence of contracts**
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> Stipulations in contracts as to time or otherwise which would not, before 13 September 1882 (the date of the coming into force of the Law Amendment Act 1882), have been deemed to be or to have become the essence of such contracts in a Court of equity shall receive in all Courts the same construction and effect as they would have theretofore received in equity.

Lindgren has observed that whereas the common law viewed only the "form" of a transaction, Equity regarded its "substance", with the implication that time stipulations were presumed to be not part of the substance. Although a vendor-purchaser contract may not differentiate on its face between its terms, its substance is the passing of title in exchange for payment (and the reciprocal promises of vendor and purchaser to that end), time stipulations for that purpose being mere matters of form.[26]

[36] Section 7 of the Contractual Remedies Act is, as we have already remarked, a code governing cancellation. It permits cancellation when an essential term is breached but leaves it to the parties to choose the respects in which a term is essential to their bargain. In determining whether they have made this choice in relation to a requirement for timely performance on a specified date, the courts continue to be guided by the prior law. A failure to settle a land sale contract on the appointed settlement date is not normally a breach regarded as having a substantial consequence enabling cancellation under s 7(4)(b). It is the same when the term which has been breached is expressly or impliedly agreed to be an essential term, unless it can also be seen that the parties have expressly or impliedly agreed that the time of performance is essential to the cancelling party (or to both). In other words, the courts normally do not attribute to the parties to a land sale contract an agreement that time for performance of the settlement obligation is essential.

[37] Clause 18.3 did not specify any time for performance of the obligation to provide a title with a minimum area. That is to be found in the provisions of the contract concerned with settlement of the transaction. As events transpired, that was supposed to occur on 28 October, which became the settlement date, but time was not expressly or impliedly of the essence in relation to that date. On the contrary, this was not a species of contract, like a unilateral contract such as an option to purchase, where it might be expected that punctual performance was of the utmost importance to the parties. It dealt with vacant land and, because of the need for variation of the boundaries, the parties obviously contemplated that there might be

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[26] KE Lindgren *Time in the Performance of Contracts* (2nd ed, Butterworths, Sydney, 1982) at [251]–[252].

substantial delay. After all, settlement was not to occur at the earliest until 30 June 2008, some eight and a half months after the date of the contract. More importantly, however, the presence in cl 9.0 of the settlement notice procedure is in itself entirely inconsistent with any notion that time would be already essential when the appointed settlement date was reached. It was therefore incumbent on James, if it wished to cancel the contract on the basis of the breach which occurred when Mana failed to settle, to issue a settlement notice, wait until its expiry and then give a cancellation notice. By that process it could demonstrate that the failure to settle in accordance with the notice was a repudiation.[27] If James had resorted to this process and Mana had not supplied a compliant title by the expiry of the notice, time would have become essential and it could have cancelled for breach of cl 18.3 even if Mana was in all other respects ready, able and willing to settle and notwithstanding that the breach (of an essential term) had only minor consequences for James.

[38] Recognising the inherent difficulty in arguing that on 28 October time was already of the essence of the (essential) obligation to produce a title complying with cl 18.3, Mr Withnall QC, appearing for James, developed an argument designed to show that it was unnecessary for James to give a settlement notice before cancelling because it was no longer possible for Mana to remedy its breach of cl 18.3. He submitted that the vendor, Mana, was given by the contract only one opportunity of depositing a survey plan in relation to which the new certificate of title would issue. If the vendor failed to deposit a plan which complied with cl 18.3, counsel said it thereby committed a breach of that clause which it could not remedy by later substituting another, compliant plan and obtaining issue of a corresponding certificate of title. The basis for this argument, Mr Withnall explained, was that cl 18 twice spoke of the *final* area of the property shown on the approved survey plan, namely the plan in respect of which the vendor had obligations under cl 16.2. Counsel also observed that as cl 15.1 provided only five working days before settlement was due, this could not give the vendor time to substitute a compliant title. We reject this argument. It is highly unlikely that the parties would have had

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[27] *United Scientific Holdings Ltd v Burnley Borough Council* [1978] AC 904 (HL) at 946; *Louinder v Leis* (1982) 149 CLR 509 at 526. A failure to comply with a settlement notice or a notice making time of the essence has also been said to demonstrate that the breach now has substantial consequences in terms of s 7(4)(b): *MacIndoe v Mainzeal Group Ltd* [1991] 3 NZLR 273 (CA) at 280 per Cooke P.

any such intention if the vendor was able to correct its plan before 30 June 2008.[28] The clause in question must have had the same meaning and operation both before and after that date. The word "final" appears to have been used to make a contrast with the original plan of subdivision which was being varied. Contrary to Mr Withnall's argument, it may actually indicate the possibility of an intermediate attempt to produce a compliant title. However that may be, we are satisfied that there is nothing in the terms of contract which would prevent the vendor from extricating itself from the difficulty caused by the non-compliance of its plan if it could do so before time for performance became essential. In this case it was able to do so and achieved issue of a compliant certificate of title on 19 November. Mr Withnall endeavoured to make something of the fact that the alternative settlement date of five working days after issuance of the title did not give the vendor time to substitute a compliant title. But that argument assumed what it sought to prove. There was time to fix the problem if a settlement notice had to be given.

[39] Then Mr Withnall pointed out, quite correctly, that the settlement notice procedure did not apply to breaches other than failure to be ready, willing and able to settle on the settlement date. Here, he said, the vendor had committed a breach of an express term of the contract before the settlement date arrived. It would have been an error for the vendor then to resort to the settlement notice procedure as that would, it was submitted, affirm the contract and prevent cancellation. This was, with respect, unconvincing. There was no existing breach of contract in relation to the plan until the settlement date arrived. But even if there had been such a prior breach, to which the settlement notice procedure therefore could not apply at the time of the breach, James could not cancel in reliance upon that prior breach under s 7(4), for the reasons already given. It could have cancelled, however, if the prior breach had amounted to repudiatory conduct on the part of Mana (under s 7(2)). But repudiation was argued for James in the High Court and the Associate Judge found against it. There was no appeal against that part of his decision. Rightly so, for the material before the Court demonstrates that Mana at no stage took the position that it would not comply with its obligations. It appears to have been keen throughout the

[28] Settlement was to occur on the later of this date or five working days after notification of issuance of the new title.

correspondence at the end of October to attempt to resolve all outstanding issues. An argument that there had been an anticipatory breach falling within subs (3)(c) likewise could not assist James because it was never clear that Mana would, on a date for settlement of which time was essential, be unable to supply a compliant title and thus would be in breach of cl 18.3 in a way which would give rise to a right of cancellation under subs (4). Such a breach, if it does not amount to a repudiation, can be the ground of cancellation only under subs (4).

[40] The incidental argument that, if there had in fact been a breach giving rise to a right of immediate cancellation, issuance of a settlement notice would be an affirmation of the contract, negativing the ability thereafter to cancel on the strength of that breach, was plainly erroneous. Far from constituting an affirmation in relation to the breach to which it is directed, a settlement notice is a means of putting the giver of the notice in a position to cancel by demonstrating or confirming, should the recipient not comply with a notice, that the recipient is in repudiatory or substantial breach. To treat a settlement notice as a form of affirmation would be to make a mockery of its very rationale. If the notice is good and the recipient fails to comply with it, then the giver of the notice is entitled to cancel.[29]

[41] Two other arguments advanced for James should be mentioned. In the first of them, Mr Withnall invoked a statement by Knox CJ in *Bell v Scott*.[30] The Chief Justice was speaking of the doctrine of rescission brevi manu. He said that where it was clear that time was not of the essence of a contract for the sale of land the purchaser was not entitled before the time for completion had arrived to treat the contract as no longer binding on him "unless it is quite clear that the vendor has no title to the property sold or to a material portion of it, or that his only title is contingent on the volition of a third person". Therefore:[31]

> If the vendor shows that he is neither able to convey the property himself nor able to compel a conveyance of it from any other person, the purchaser may repudiate the contract before the time for completion has arrived.

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29 Compare *Parsot v Greig Developments Ltd* [2009] NZCA 241, (2009) 10 NZCPR 308 at [8] where the Court of Appeal appears to have misunderstood in the final sentence of that paragraph what Tipping J was saying in *Steele v Serepisos* [2006] NZSC 67, [2007] 1 NZLR 1 at [61]–[62]. If the notice was properly given there would be more than merely a risk that the recipient would be found to have repudiated.

30 *Bell v Scott* (1922) 30 CLR 387.

31 Ibid at 392.

The doctrine of rescission brevi manu has not survived the passage of the Contractual Remedies Act.[32] Furthermore, in the present case the doctrine would not have applied because none of the exceptional situations mentioned by Knox CJ existed. By virtue of its contractual arrangements with the CODC, Mana was able to compel a transfer of the property from the CODC. The difficulty related to the position of the boundary between Lots 5 and 11, both of which Mana was acquiring from the CODC. It happened that, in the end, Mana resolved its difficulty by acquiring an additional piece of land from the CODC, but there is nothing in the material before us suggesting that Mana was under any legal inhibition preventing it from reducing the area of Lot 5 and correspondingly increasing the area of Lot 11 so that the minimum area was thereby achieved. Mr Withnall also pointed to Mana's dependence on obtaining a new resource consent from the CODC, saying that its ability to give compliant title was therefore contingent on the volition of a third person. However, what Knox CJ was surely referring to was a situation in which a third party's volition emanated from its title. The Chief Justice was not contemplating the need to obtain a statutory consent from a third person like a territorial authority.

[42] Mr Withnall referred also to a right of a cancellation which he said James had under the requisitions clause which is found in cl 5.2(2) and (3) of the General Terms of Sale. We should say at the outset that, in order to counter the suggestion by Mana that the very existence of the requisitions clause meant that Mana was entitled to more than one try at issuing a compliant title, Mr Withnall had first argued that the requisitions clause had no application. He said it was overridden by one of the Further Terms of Sale introduced into the standard form by the parties. This was cl 16.3, set out at [6] above, under which the purchaser agreed not to make any objection or requisition on the vendor's title about existing easements or any new easements, building line restrictions, encumbrances, rights or obligations which it was necessary to create to satisfy any condition of resource consents or to deposit the

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[32] Continuing recognition of the doctrine is inconsistent with the statutory codification in s 7(1) of the right of cancellation. It must be considered to have been subsumed in the rule in the section concerning anticipatory breach: see DW McMorland *Sale of Land* (2nd ed, Cathcart Trust, Auckland, 2000) at [9.17(a)].

approved survey plan. It is plain, however, that a right to requisition existed under cl 5.2 in respect of other matters. As an alternative, therefore, and now accepting that the requisitions clause applied, Mr Withnall sought to take advantage of it for his client.

[43] The requisitions clause provided as follows:

> (2) If a plan has been or is to be submitted to LINZ for deposit in respect of the property, then in respect of objections or requisitions arising out of the plan, the purchaser is deemed to have accepted the title except as to such objections or requisitions which the purchaser is entitled to make and notice of which the purchaser serves on the vendor on or before the fifth working day following the date the vendor has given the purchaser:
>
> (a) notice that the plan has been deposited; or
>
> (b) notice that (where a new title is to issue for the property) the title has issued and a search copy of it as defined in section 172A of the Land Transfer Act is obtainable.
>
> (3) If the vendor is unable or unwilling to remove or comply with any objection or requisition as to title, notice of which has been served on the vendor by the purchaser, then the following provisions will apply.
>
> (a) The vendor shall notify the purchaser ("a vendor's notice") of such inability or unwillingness on or before the fifth working day after the date of service of the purchaser's notice.
>
> (b) If the vendor does not give a vendor's notice the vendor shall be deemed to have accepted the objection or requisition and it shall be a requirement of settlement that such objection or requisition shall be complied with before settlement.
>
> (c) If the purchaser does not on or before the fifth working day after service of a vendor's notice notify the vendor that the purchaser waives the objection or requisition, either the vendor or the purchaser may (notwithstanding any intermediate negotiations) by notice to the other, cancel this agreement.

Counsel's argument was that James had made an objection or requisition arising out of the plan. It had done so by its letter of 23 October 2008. That can be accepted. Then it was said that Mana had been unable or unwilling to remove or comply with the objection or requisition and had given a vendor's notice under cl 5.2(3) by its

letter of 27 October, that James had not notified any waiver of the objection or requisition, and therefore James had the right to cancel the agreement under para 5.2(3)(c), which it had done by its letter of 3 November. The problem with this argument, which was apparently not advanced in the Courts below, is that Mana's letter of 27 October was plainly not a statement of inability or unwillingness to remove or comply with the objection or requisition. It was not a vendor's notice under cl 5.2(3). In acknowledging in that letter that the title was less than the size required by cl 18.3, Mana was in fact accepting the requisition but hoping to persuade James to take monetary compensation for the deficiency. It follows that it was para (b), rather than para (c), of cl 5.2(3) which operated. It therefore became a requirement of settlement that the objection or requisition should be complied with before settlement. It was not, but establishing that position takes James no further than its argument on essentiality.

[44] We therefore conclude that James did not validly cancel the agreement on 3 November.

Result

[45] The appeal is allowed and it is declared that James's purported cancellation of the contract on 3 November was of no effect.

[46] The proceeding is remitted to the High Court for outstanding questions to be determined in light of this Court's judgment. The costs order made in the Court of Appeal is set aside.

[47] Costs are reserved. Counsel should file memoranda.

Solicitors:
Hoffman Law, Auckland for Appellant
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