

IN THE SUPREME COURT OF NEW ZEALAND

**SC 1/2005
[2005] NZSC 10**

BETWEEN NORMAN WILLIAM JACK AND
 JUDITH ANNE JACK
 Applicants

AND MURRAY CLIVE GUY
 Respondent

Court: Elias CJ and Keith J

Counsel: B Henry for Applicants
 P J Reardon for Respondent

Judgment: 11 March 2005

JUDGMENT OF THE COURT

- A The Court refuses to grant leave to appeal.**
- B The respondent is entitled to \$1,000 costs and reasonable disbursements, to be fixed by the Registrar in the absence of agreement.**

REASONS

[1] Mr and Mrs Jack (the plaintiffs in the High Court) and Mr Guy (the defendant) in August 1993 agreed that Mr Guy would log timber on the Jacks' farm. The agreement included these provisions

1. ... We anticipate logging your trees sometime during the summer period, but as you will appreciate we will be scheduling your harvesting with other woodlots in the general area and will keep you informed on the likely timing of this. We are aware that your preferred harvest time is February/March 1994 and will, if practicable, comply with this however contractors schedules and an early onset of winter have to be considered.

...

7. As discussed Resource Consents, further investigation of logging technique and road siting, are necessary. Therefore confirmation of our harvesting contract is vital to ensure adequate time for planning and preparation. Confirmation within 7 days would be appreciated. Costs associated with Resource Management application, consent and requirements are to be met by you.

[2] In a telephone conversation in late September, Mr Guy told Mr Jack that he would have to harvest the trees by the end of October. Mr Jack had not obtained the resource consent at that time – he had not even sought it – and he had taken no action in respect of roading. He was accordingly not in a position to allow the harvesting on his farm to take place. Mr Guy concluded that it was not going to be possible for Mr Jack to be ready so that his trees could be harvested in the same general period as he was harvesting other woodlots in the area. Mr Guy then indicated to Mr Jack that the deal was off.

[3] Two Judges in the Court of Appeal held that that was a valid cancellation, rather than, as the Jacks would have it, a wrongful repudiation. The proceeding accordingly failed. (The third Judge, like the High Court Judge, also rejected the claim but on the alternative analysis that the relationship between the parties was one of agency rather than a contract of sale. This leave application has proceeded on the sale analysis.)

[4] In their written submissions supporting their application for leave to appeal, the Jacks identify the following broad issues as governing the respondent's ability to cancel the contract when he did:

- a) Did the contract fix a time for the obtaining by the Appellants of roading and resource consent?
- b) If it did, had the Appellants breached that term prior to the September 1993 telephone call in which the Respondent advised that the deal was now off?
- c) Who has the burden of proof where the party who has failed to perform the agreement asserts the agreement is cancelled due to the other party not being able to fulfil one of the agreement's conditions in time.

Those issues, they contend,

raise important issues of contract law relating to how a “by when” date in a contract is determined when the parties have not given a specific date in their agreement for the performance of certain obligations and what rules of cancellation apply to a party wanting to cancel for failure to meet timeframes apply.

Further, they will suffer a substantial miscarriage of justice if the appeal is not heard by this court. That second proposition appears to be presented only as a consequence of the first. We consider that we are able to determine the application on the written submissions before us.

[5] The first and second issues do not present any matter of general or public importance or a matter of general commercial significance as s 13 of the Supreme Court Act 2003 relevantly requires. They relate only to the particular facts of this case. The second, we note, should be worded in terms of the power of the respondent to cancel if it is clear that the stipulation in the contract *will* be broken by the applicants: see para [43] of the judgment of the Court of Appeal.

[6] The third issue might qualify – we express no view on that – but the factual findings made in the High Court and confirmed in detail in the Court of Appeal strongly support Mr Guy’s case even were the onus to be put on him. As indicated, the miscarriage of justice ground must also fall away. No other basis for granting leave was proposed.

[7] Accordingly, we are not satisfied that it is necessary in the interests of justice for the Court to hear the proposed appeal, and the application for leave fails.

Solicitors:
Denis Gates, Whangaparaoa for Applicants
Cooper Rapley, Palmerston North for Respondent