IN THE COURT OF APPEAL OF NEW ZEALAND

CA212/02

	BETWEEN	COMPCORP LIMITED Appellant
	AND	FORCE ENTERTAINMENT CENTRE LIMITED Respondent

Hearing: 21 May 2003

Coram: Gault P
Robertson J
Baragwanath J

Appearances: P J Dale for Appellant
G J Christie and M A Gold for Respondent

Judgment: 13 June 2003

JUDGMENT OF THE COURT DELIVERED BY GAULT P

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[1] This appeal is against the judgment of Chambers J delivered in the High Court at Auckland on 26 September 2002 in which he refused the appellant's application for summary judgment. The dispute between the parties relates to the interpretation of a deed of settlement entered into in May 2000 to record their agreement in full and final settlement of claims arising out of a contract for the construction of the Force Entertainment Centre in Auckland. The respondent, for whom the centre was built, is now named Sky City Metro Ltd, though no notice of that change has been filed.

[2] Some background against which the deed of settlement was executed is material. The Force group of companies, of which the respondent was a member, had borrowed money to finance the construction of the centre on terms that included

sale of the shares in the respondent to a party referred to as MTM after practical completion of the centre. MTM had put up $50 million to permit the Force group to engage the appellant to build the centre for Force. MTM had contracted with Force to buy the shares in Force. When it did, Force would have the means to pay the appellant. For reasons that are not immediately relevant MTM declined to proceed with the purchase and litigation ensued between the Force group and MTM. It was in the expectation that MTM would be obliged to proceed with the purchase that the terms of the deed we must construe were agreed.

[3] The appellant's claims for payment under the construction contract (which were in excess of the original contract price) were rejected by the respondent. The dispute between them was resolved in these terms:

2. CONTRACT PRICE

2.1 The parties agree that the final price under the Contract for the completion of all work and the remedying of all defects is $40,100,000 ("the Contract Price");

2.2 Force has at the date of this deed paid to CL $37,023,000 of the Contract Price;

2.3 Force will pay to CL the sum of $3,077,000 ("the Sum Outstanding") in the manner and at the times set out in clause 3 in settlement of the Sum Outstanding on the Contract price.

3. **PAYMENT**

3.1 Force will pay the Sum Outstanding to CL in the following manner and at the following times:

3.1.1 The sum of $650,000 will be paid to CL by Force within 3 working days after this deed has been signed and executed by both parties;

3.1.2 The sum of $555,000 will be paid to CL by Force on 20 July 2000;

3.1.3 The sum of $300,000 will be paid to CL by Force on 20 September 2000;

> 3.1.4 The balance of any Sum Outstanding will be paid to CL by Force on the sale and settlement (and no later than within 48 hours of that Settlement) of the Force Entertainment Centre by Force.
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> 3.2 Notwithstanding anything in clause 3.1 CL agrees that Force can further delay payment of the sum of $1,577,000 (or such lesser sum pro rated to $10 million) if Force is required to leave in $10 million of the purchase price in its contract for the sale of the Force Entertainment Centre or the corresponding proportion if the sum Force is required to leave in is other than $10 million (i.e. if $5 million is left in then $788,500 of the $1,577,000 balance to be the further delayed payment) and such payment shall be delayed until when Force obtains actual payment of the $10 million left in (or such sum as arises) and CL shall be entitled to interest on the payment to it at the same rate and for the same duration as the interest paid to Force on the sum left in by Force.
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> 3.3 In addition to the above, if Force is successful and wins its court case against MTM such that MTM has to settle with Force at the valuation set by the valuer and the interest claimed by MTM (being the interest MTM contends should be paid from the date of Practical Completion) is not payable by Force then Force will pay CL a further and additional payment of $500,000 which sum will be paid by Force to CL on the date of settlement as between MTM and Force.

[4] The wording of cl 3.1.4 and 3.2 was varied by the parties in the manner confirmed by exchange of letters and recorded on 18 April 2001 as follows:

> We confirm we agree that clauses 3.1.4 and 3.2 of the Deed of Settlement (the Deed) entered into in relation to the Force Entertainment Centre should have referred to the sale of the shares in Force Entertainment Centre Limited. Accordingly, we accept that the sale of all the ordinary shares in Force Entertainment Centre Limited to a party outside the Force group would trigger the payment obligations in clause 3.1.4 (as modified by clause 3.2) of the Deed.

[5] This variation was initiated by the appellant's Managing Director after having learned from the media that "Sky City Limited was going to acquire the shares in Force Corporation".

[6] Of cardinal importance is that at the time of the deed the appellant had completed the building of which the respondent had taken possession. The evident

purpose of the deed was to give assurance to the respondent as to payment of an agreed price and to protect Force from being required to pay the "Sum Outstanding" until it was in funds. The payments provided for in the first three sub-clauses of cl 3 have been paid. The claims by the appellant in this proceeding are directed to the amounts specified in cl 3.1.4 and 3.3.

[7] The difficulty arises because the sale of the shares in Force Entertainment Centre Ltd did not proceed. The litigation in which the Force group sought to have MTM complete the purchase was resolved towards the end of 2001 by agreement, under which the loan was repaid from other sources and MTM's purchase obligation was cancelled.

[8] A statement to the New Zealand Stock Exchange on 29 October 2001 by Force Corporation Ltd (Now Sky City Leisure Ltd), the parent of the respondent, outlines the arrangements made. These involved a recapitalisation by means of a right's issue and refinancing of borrowings to enable settlement with MTM including repayment of the loan used to fund the construction of the centre. The right's issue was supported by the major shareholder Sky City Entertainment Group Ltd which company also underwrote the issue. The right's issue was to be completed prior to 31 January 2002. By this means the funds to repay the loan raised for construction of the centre, originally intended to come from the sale of the centre (i.e. the shares in the respondent), were obtained from the shareholders of the parent company and alternative borrowings. The shares in the respondent company were not sold and now may never be sold. So the new shareholders of Force, in effect, own the building erected by the appellant without having paid the appellant for it. The respondent's act of election not to pursue MTM brought to an end the rationale for the delay in payment, agreed to by the appellant pending completion of the MTM proceedings.

[9] The respondent refused to pay the balance of the outstanding sum ($1.577 million) to which cl 3.1.4 of the deed of settlement relates. The stance taken was that the payment was linked to the successful claim against MTM, and to the sale to MTM in terms of the contract with that party. Since that sale did not eventuate, it was said, the sum is not payable. The respondent would not have agreed to the

settlement if it had been known that the sale of the centre to MTM would not proceed. The parties settled on that common assumption, it was maintained.

[10] With reference to the amount of $500,000 claimed under cl 3.3, the respondent considered this was, in effect, a bonus payment that would be made if it eventuated that the MTM proceedings resulted in sale of the centre on the most favourable terms contended for by Force. The argument was that this outcome did not eventuate so that the additional sum is not payable.

[11] The appellant's application for summary judgment in respect of both amounts was rejected by Chambers J. He took the view that on the plain words of clauses 3.1.4 and 3.3 of the settlement agreement, Force's obligation to pay has not been triggered. Therefore, the appellant was forced to rely on implied terms in the contract which, the Judge noted, "causes difficulties on a summary judgment application, because it is never easy to determine whether terms should be implied into a contract without a consideration of all surrounding circumstances". He noted further that counsel for the appellant struggled to formulate the proposed implied terms during the course of argument, and this weighed against its claim that the terms were obvious and certain.

[12] Force had also argued a defence of common mistake – both parties to the settlement were influenced in their respective decisions to enter the contract by the same mistake, namely a view that Force would be successful in the MTM litigation. Chambers J felt this also was reasonably arguable.

[13] We find the Judge's approach to the implied terms proposed to him unsurprising. They would have been difficult to relate to the pleading in the statement of claim. It alleged that the entry by Force into the deed of settlement with MTM constituted breach of "express or implied terms" to the effect that Force was required to pursue to MTM litigation to a conclusion and enforcing sale of the shares to MTM. In this Court the argument was formulated differently by reference to an amended statement of claim. It was submitted that since settlement of the sale would not now occur, the payment should be made within a reasonable time.

[14] In respect of the claim for the $500,000 sum, Mr Dale accepted that under cl 3.3 the payment is truly contingent. But he submitted that Force should not be allowed to rely upon the failure of the contingency. Further, it was submitted that it is plain enough that whether through loss of confidence in the outcome of its proceeding against MTM, or because the new major shareholder of the Force group of companies preferred to retain the new centre (and Mr Dale submitted the latter is to be inferred), the MTM proceedings were settled voluntarily and the construction differently funded to avoid the need for it to be sold.

[15] This was said to have constituted a breach by the respondent of its obligation to take reasonable steps to secure the happening of a stipulated event triggering payment, so that the non-occurrence of the event cannot be relied upon. He cited (inter alia) *Barber v Cricket* [1958] NZLR 1057. As a variant of this argument he submitted that Force was not entitled unilaterally to waive the condition that would trigger the payment: *New Zealand Shipping Co Ltd v Société des Ateliers et Chantiers de France* [1919] AC 1. Underlying this submission must be the existence of an implied obligation on Force, (notwithstanding the different corporate entitles involved) to pursue the proceedings against MTM to finality.

[16] For the respondent, Mr Christie argued that the relevant provisions of the agreement relating to both sums claimed were clear and made liability for payment contingent upon the specified events. In neither case had these eventuated so that liability for payment did not arise. This was said to be supported by the use of the word “any” qualifying “sum outstanding” in cl 3.1.4.

[17] It was submitted that the background (matrix) requires full investigation at trial, and that the Court should not re-write the parties’ bargain by implying terms at the summary judgment stage. It was further submitted, that the terms the appellant now seeks to have implied do not meet the necessary requirements of business efficacy and obviousness.

[18] With reference to the claim under cl 3.3, the respondent supported the judgment of Chambers J. It was submitted that even if there were some obligation to take reasonable steps to bring the MTM litigation to a favourable conclusion, there is

no sufficient evidential foundation for the contention that Force failed to do that, so as to shift the burden to the respondent to show such steps were taken.

[19] For the respondent the defences of common mistake, frustration and that any claim by the appellant is limited to loss of a chance were maintained as reasonably arguable.

[20] Although there was much evidence and argument directed to the meaning of the relevant provisions in the deed, we consider the correct starting point to be the terms the parties agreed and signed. Clause 2 of the deed leaves us in no doubt that the sum of $3,077,000 described as "the Sum Outstanding" was agreed to be paid, and constituted a debt owing by the respondent. It was agreed to be paid "in the manner and at the times" set out in cl 3.

[21] Clause 3 provides "the following manner and the following times". There follows the machinery provision for payment in cl 3.1 as qualified by cl 3.2.

[22] We are concerned to construe the words used. It is not relevant to enquire why the word "any" replaced "the" in cl 3.1.4. The word "any" can be given meaning by reference to cl 3.2, which may have the effect of a lesser sum than $1.577 million being payable within 48 hours of the settlement of the sale of the shares in the centre-owing company.

[23] We accept that the sale contemplated in cl 3.1.4 was the proposed sale to MTM and that this was to provide the funds to enable Force to meet the balance of the contract price. That too is apparent from the terms of cl 3.2.

[24] We do not accept that the sale of the shares constitutes a condition of liability for the payment under cl 3.1.4. It is, as the introduction to cl 3 states, an identification of the time of payment. That is made even clearer by the reference in cl 3.2 to "further delay". Clause 3.1.4 concerned simply when, not whether, the respondent must pay that sum which it acknowledged the appellant had earned. Clause 3.2 had no application past the date on which Force should be put fully in funds.

[25] Once it became clear that the specified time for payment could be no longer applicable because the sale to MTM was cancelled, the time for payment of the balance of the contract price fell for determination in some other way. It being apparent that the delayed payment was to enable the respondent to acquire funds, the obvious time for payment would be when this otherwise occurred. That would have been when the Force group re-capitalised to enable the respondent to retain the centre. There could hardly be a clearer case for giving a commercial contract business efficacy. We see this as a straightforward application of *The Moorcock* (1889) 14 PD 64. Owen LJ's much quoted dictum is applicable (70):

> The question is what inference is to be drawn where the parties are dealing with each other on the assumption that the negotiations are to have some fruit, and where they say nothing about the burden of this unseen peril, leaving the law to raise such inferences as are reasonable from the very nature of the transaction.

[26] We have considered carefully the arguments advanced by Mr Christie. He submitted that even if it should be implied that the balance would be paid when Force came into funds to meet the payment, that point has not yet arrived. He referred to the underlying understanding of the parties that the sale to MTM would have generated substantial funds, and said that could not be regarded as being substituted by the recapitalisation. But sale to MTM on the optimum basis was not assumed to be inevitable, otherwise cl 3.3 would have been in different terms. This argument is merely a recasting of the contention that the liability is contingent.

[27] The additional payment provided for in cl 3.3 is, as the appellant concedes, truly conditional. We do not accept that it must be construed so as to carry an obligation to prosecute (and win) the MTM litigation. The clause is quite capable of operating to require payment of the additional sum only if the stated eventuality occurred. Settlement of litigation by way of compromise is commonplace and a contractual obligation to prevent that would need to be clearly expressed. The circumstances of this case are remote from those in cases such as *Barber v Cricket* in which the courts have disallowed reliance on a condition which a contracting party, for whose benefit it was inserted, has taken no reasonable steps to satisfy. In any event, even if we had been persuaded that Force was under a duty to take reasonable steps to prosecute the litigation to finality, we would not be prepared, on a summary

judgment application, to determine that, in the circumstances, the settlement arrived at was inconsistent with that obligation. Nor at this stage would we be prepared to characterise the settlement with MTM as waiver of the condition.

[28] We are satisfied the Judge was correct to refuse summary judgment in respect of the additional payment of $500,000.

[29] It is necessary to consider the additional defences only insofar as they relate to the payment claimed under cl 3.1.4. They do not include the loss of a chance point which was advanced only on the claim under cl 3.3.

[30] The frustration argument was accepted by Mr Christie to fall away should we find (as we have) that the obligation to pay the sum of $1.577 million is not contingent.

[31] There remains the defence of contractual mistake. The submission was that the parties entered into their deed of settlement under the common mistaken belief that Force Corporation Ltd and Force Holdings Ltd were going to be successful in the proceedings against MTM. It was said that:

> Although not specifically pleaded as such, this was a mistake as to a present/past fact at the time the settlement agreement was entered into. The mistaken fact was that Compcorp had achieved practical completion in terms of the MTM plans by 30 December 1999. Practical completion would lock MTM into purchasing the shares in the Centre for $74 million dollars and thus, the litigation would succeed.

[32] Counsel referred to the following passage in the affidavit of Mr Garner of Force.

> It was clear to all involved that Compcorp's claim depended on the MTM funds becoming available to FECL. It was also clear at the time the Settlement Deed was executed FECL and Compcorp had the same expectation that FECL were definitely going to succeed in the MTM litigation and FECL would therefore be in a position to compel MTM to purchase the Centre on the terms contained in the original deal with MTM. In those circumstances, it would be a win for both FECL and Compcorp and FECL were happy to resolve Compcorp's claim on the

basis of linking payment to Compcorp to the success in the MTM litigation.

[33] A difficulty with this argument is that the asserted common belief cannot reconciled with the terms of the deed. By providing for, in effect, a bonus payment in the event of full success against MTM, the parties must have contemplated the prospect of something less. Further, to agree to the time of the payment of the $1.577 million being delayed pending, but not contingent upon, the settlement of the sale to MTM (as we have held), the parties must be taken to have recognised that eventually the payment would be made (even if the sale did not eventuate).

[34] In formulating the common mistake on which the parties are said to have proceeded, Mr Christie focussed on the fact of actual completion giving rise to an obligation on MTM to purchase. But that was the very subject of the MTM litigation so in reality the alleged mistake was as to the future outcome of that litigation. This was recognised by Mr Holdaway in his affidavit. Mr Christie did not seek to argue that a common mistaken belief as to a future eventuality could qualify for relief under the Contractual Mistakes Act 1977 (see Burrows, Finn & Todd, *Law of Contract in New Zealand* (2 ed) para 10.3.2). Nor did he satisfy us by reference to the evidence of a basis for the contention that the appellant shared the claimed mistaken belief. Contracting in the expectation of a course of events does not give rise to vitiating mistake if matters do not turn out as expected.

[35] There is the additional requirement for relief under the Act that the mistake resulted in a substantial inequality in values exchanged, or a benefit substantially disproportionate to the consideration (s6(1)(b)). Such a result is not apparent from the fact of settlement of a dispute as to a contract price subject to staged payments of the outstanding balance.

[36] Such are the difficulties with the defence of mistake that we are not persuaded it can be elevated to reasonably arguable.

[37] Accordingly, we allow the appeal and order the entry of summary judgment for the sum of $1.577 million with interest thereon from the date of recapitalisation of the Force group (31 January 2002) at the rate of seven percent per annum to the

date of this judgment. In respect of the claim for the additional payment of $500,000 the appeal is dismissed. That matter is remitted to the High Court.

[38] Each party has succeeded in part. In this situation costs both in the High Court and this Court should lie where they fall.

Solicitors:
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Simpson Grierson, Auckland, for Respondent