IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2009-404-002786

BETWEEN	WALTER PEAK DEVELOPMENTS LTD (IN RECEIVERSHIP AND LIQUIDATION) Plaintiff
AND	THOMAS MILLAR Defendant

CIV-2009-404-8041

AND IN THE MATTER OF the Insolvency Act 2006
AND IN THE MATTER OF the bankruptcy of THOMAS MILLAR

BETWEEN	WALTER PEAK DEVELOPMENTS LTD (IN RECEIVERSHIP AND IN LIQUIDATION) Judgment Creditor
AND	THOMAS MILLAR Judgment Debtor

Hearing: 9 May 2011

Appearances: D T Broadmore for Plaintiff
A M Swan for Defendant

Judgment: 9 May 2011

ORAL JUDGMENT OF ASSOCIATE JUDGE BELL

Solicitors:
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[1] There are two matters before the Court: an application to set aside judgment and an application for adjudication in bankruptcy.

Application to set aside

[2] On 22 September 2009 Associate Judge Abbott granted summary judgment to the plaintiff against the defendant. The summary judgment was for specific performance of an agreement for sale and purchase dated 26 April 2006 and for costs. The order required the defendant to pay forthwith the purchase price of $2,300,000 plus GST and otherwise to settle the agreement for sale and purchase in accordance with its terms and, second, also to pay interest on the purchase price of $2,300,000 plus GST at the default interest rate of 12 per cent per annum from 2 May 2008 to judgment, giving a total of $384,129.28.

[3] The application to set aside is made under r 12.14 of the High Court Rules which says:

> A judgment given against a party who does not appear at the hearing of an application for judgment under rule 12.2 or 12.3 may be set aside or varied by the court on any terms it thinks just if it appears to the court that there has been or may have been a miscarriage of justice.

Judgment regularly obtained?

[4] It is first necessary to decide whether summary judgment was obtained regularly or irregularly. The plaintiff, in opposition, says that judgment was regularly obtained.

[5] The approach the Court takes in these applications varies according to whether judgment was obtained regularly or not. If judgment is not regularly obtained, the defendant is usually entitled to have judgment set aside *ex debito justitiae*. On the other hand, if judgment has been regularly obtained, the Court considers the matter along the lines laid down by the Court of Appeal in *Russell v Cox*.[1]

[1] *Russell v Cox* [1983] NZLR 654.

[6] It is necessary to consider the circumstances under which the plaintiff obtained judgment.

[7] The defendant lives in England. The plaintiff knew this, because the notice of proceeding has a notice to defendant served overseas in terms of Form G5 of the First Schedule of the High Court Rules. Under r 12.5, the defendant had to be served not less than 25 working days before the date for hearing the summary judgment application.

[8] The plaintiff served a man called Thomas Millar who lives in Christchurch. He filed a notice of opposition and an affidavit saying that he had not entered into the agreement sued on. The plaintiff realised that it had served the wrong man, but with the same name as the defendant. The man it had served was the defendant's father. When the case was called on 14 July 2009 the plaintiff had the matter adjourned to a fresh date, 22 September 2009.

[9] Under r 12.5 the defendant had to be served no later than 17 August 2009. The plaintiff applied for an order for substituted service. On 17 August 2009 Associate Judge Christiansen made an order for substituted service on the defendant by serving the defendant's father in Christchurch. The application for substituted service does not expressly refer to the fact that the defendant lived overseas, but a close perusal of the documents attached to the affidavit sworn in support of the application would have shown that the defendant lived in the United Kingdom.

[10] The plaintiff served the father with the documents, including the order for substituted service, on 25 August 2009. This was less than 25 days before the next hearing date of 22 September 2009. The plaintiff was in doubt whether the documents were served on the father had shown the 22 September call date and accordingly it re-served the father on 14 September 2009.

[11] When the matter was called on 22 September 2009, Associate Judge Abbott made an order abridging the time for the service. He did so on the basis that the service of the documents on 25 August 2009 was more than 15 working days before the case was called and abridgement was only required for the documents served on

14 September 2009. The plaintiff's memorandum and Associate Judge Abbott's minute of 22 September 2009 (which speaks of 21 days rather than 15 working days) clearly proceed on the assumption that only 15 working days were required for service. Associate Judge Abbott did not decide that he was abridging service under r 12.5. Instead, he decided on the basis that he was abridging time under r 12.7.

[12] On 4 August 2009 the plaintiff sent an email to counsel who had appeared for Thomas Millar, the father, advising of the new date of hearing. That was more than 25 working days before 22 September 2009. The plaintiff relies on that email as amounting to adequate notice to the defendant.

[13] In my judgment, it cannot be relied on for that purpose. Counsel for Mr Millar senior was instructed only by Mr Millar senior, who was no longer required to take any further steps in the proceeding. On 4 August 2009 there had been no order for substituted service on Mr Millar senior. Counsel for Mr Millar senior was Mr Swan, who has now appeared for the defendant. However, notice to Mr Millar senior from Mr Swan on 4 August 2009 cannot count as service to the defendant. There is no evidence that Mr Swan had instructions from the defendant at that time.

[14] In these circumstances, it appears that Associate Judge Abbott was misled as to the correct period of time which should be allowed for the defendant to be served. The upshot was that the defendant was not given the time allowed under the rules in which to receive the application, take advice, and decide how to take steps to oppose the application. In the absence of proper notice, the plaintiff was not entitled under the rules to seek judgment.

[15] Judgment was not regularly obtained. That entitles the defendant to have judgment set aside without further inquiry.

The defendant's grounds of defence

[16] I consider the defences raised by the defendant. I do so for two purposes: first, on the basis that as judgment is set aside, I consider the plaintiff's summary

judgment application afresh to see whether the plaintiff has established that the defendant has no defence under r 12.2(1). Second, in case I am wrong in finding that judgment was not regularly obtained, the grounds of defence are relevant to the inquiry whether there is or may have been a miscarriage of justice under the approach laid down by the Court of Appeal in *Russell v Cox*.

[17] The Court of Appeal made it clear that the discretion was unfettered but also indicated that three considerations are commonly regarded as being of key importance:[2]

a) whether the defendant has a substantial ground of defence;

b) whether the delay is reasonably explained; and

c) whether the plaintiff will suffer irreparable injury if the judgment is set aside.

[18] If, on reconsidering the summary judgment application, I find that the plaintiff has established that the defendant has no defence, then there will be a fresh order for summary judgment against the defendant. If the judgment had been regularly obtained and under the *Russell v Cox* approach I find that the defendant does not have a substantial ground of defence, then, there would not be sufficient grounds to set aside the judgment. In short, the inquiry into the grounds of defence is likely to be decisive both ways.

The agreement for sale and purchase

[19] Walter Peak Developments Limited is a development company associated with Rod Nielsen. Walter Peak Developments Limited undertook a subdivision of a 38 hectare property on the shores of Lake Wakatipu, part of the old Walter Peak Station. The title to the parent lot was SL3A/826. The development was to create nine residential lots, with each residential lot to have an undivided one-ninth share in the balance of the land which was to be approximately 32.7524 hectares.

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[2] Ibid at 659.

[20] The defendant entered into the agreement with the plaintiff to buy lot 6 which was to have an area of about 1,389m^2. The purchase price was $2,300,000 plus GST if any. The deposit was $350,000. Possession was to take place five working days after the vendor notified the purchaser's solicitor that a search copy of the title was available following deposit of the subdivision plan. The agreement uses the ADLS Agreement for Sale and Purchase (Seventh Edition) July 1999. The general terms have in some respects been subject to strike-out. They are also overridden and supplemented by further terms of sale. Clause 5 of the general terms has been altered. 5.1 reads:

> 5.1 The vendor shall not be bound to point out the boundaries of the property,

Clause 5.1(1) says:

> 5.1(1) The purchaser is deemed to accept the vendor's title in all respects.

Clause 5.2(2) says:

> 5.2(2) If the plan has been or is to be lodged in the Land Registry Office with the 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 in all respects.

Clause 5.4 says:

> 5.4 Except as otherwise expressly set forth in this agreement, no error, omission or misdescription of the property on the title shall annul the sale and no compensation shall be payable.

[21] The standard provisions requiring the vendor to point out boundaries of a vacant residential lot, allowing a purchaser to make objections and requisitions as to matters of title and allowing for compensation for misdescription have all been expressly removed.

[22] The further terms are of the sort often found in agreements for sale and purchase prepared by developers for sale before title has deposited. To allow the vendor to create new titles, this agreement gives the vendor broad powers to carry out the subdivision consent and give effect to land use consents, provides for subdivision and infrastructure works to be carried out, allows for variations between

the plan attached to the agreement and the survey plan, allows for encumbrances and easements to be put on the title as a result of resource consent requirements, allows for consent notices under the Resource Management Act[3], and prevents the purchaser objecting to these items. The agreement also provides for land covenants that will bind all purchasers providing common standards for activities and for development. There is also a provision for a Walter Peak Development Residents Association which will bind purchasers.

[23] In its summary judgment application, the plaintiff did not provide a full version of the agreement for sale and purchase. There must have been a draft plan showing the subdivision that was to be carried out, but that was omitted from the evidence. A copy of the certificate of title for SL3A/826 was attached to the agreement. That was also omitted. The defendant provided the search copy which was attached to the agreement for sale and purchase. It is dated 6 April 2006. It shows the property as owned by Walter Peak Corporate Trustee Limited. It shows a freehold title not subject to any encumbrances. Walter Peak Developments Ltd did not become the registered proprietor until after 26 April 2006, the date of the agreement. It took title in early May 2006. The defendant has also exhibited the draft land covenants which were to bind all purchasers. These were internal covenants - the benefit and burden of those covenants apply solely within the area of the development. What the copy of the certificate of title attached to the agreement for sale and purchase did not show is that on the date of the agreement, the property was subject to covenants that had been registered against the title on 20 April 2006. These were covenants given by Walter Peak Corporate Trustee Limited in favour of a neighbour, Convelle Enterprises Limited, registered under numbers 6834919.1 and 6834919.2. Because the copy of the certificate of title attached to the agreement for sale and purchase was a search made before the date of the agreement, these covenants did not appear. The agreement for sale and purchase does not refer to these covenants.

[24] The defendant paid the deposit of $350,000. The plaintiff's solicitors gave credit for the deposit in a settlement statement they prepared on 29 April 2008.

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[3] Resource Management Act 1991.

[25] In its summary judgment application the plaintiff did not give credit for this deposit. In so far as the plaintiff did not give a credit for that deposit, the resulting judgment is erroneous and it should be set aside, at least to that extent.

[26] The new title was deposited on 18 April 2008. Lot 6 is in Identifier 346606. Its area is 1360m^2. Its legal description is Lot 6 Deposit Plan 386580 and in addition there is a one-ninth share in Lot 200 Deposit Plan 386580 in Section 2-4 Survey Office Plan 381091. The plaintiff is shown as the registered proprietor. Unlike the certificate of title attached to the agreement for sale and purchase, the new certificate of title shows a vast array of encumbrances including the land covenants in favour of Convelle Enterprises Limited, the owner of a neighbouring property.

[27] The plaintiff's conveyancing solicitors wrote, sending a copy of the new titles on 24 April. On 29 April they sent a settlement statement showing the balance payable as $2,237,659.27 after taking the deposit and other adjustments into account.

[28] On 1 May 2008 the defendant's solicitors wrote, pointing out the existence of the land covenants in favour of Convelle Enterprises Limited. The letter said that the effect of the covenants was to reduce the marketability of their client's title and to prevent the vendor from passing good title. The letter said:

> Our client objects to both covenants and requires that they be removed from the title prior to settlement.

[29] The letter added:

> The existence of the covenants were never drawn to our client's attention during negotiations, leading to formation of the contract and in that respect the position in relation to the title has been misrepresented to our client and accordingly forms the basis for further objection.

[30] It asked for confirmation that the vendor would remove the offending covenants before the purchaser was required to settle. The letter also asked the solicitors to confirm:

> You are required to hold the deposit as stakeholder for the vendor and purchaser.

[31] The plaintiff's lawyers did not accept the objections made. In their letter of

6 May 2008 they pointed out that rights of requisition had been specifically removed and that the purchaser was deemed to have accepted the title in all respects. They said that the defendant did not have any contractual right to object to the title in these circumstances. They enclosed a settlement notice. The amount required in the settlement statement was $2,237,659.27 plus interest for late settlement.

[32] In their letter of 14 May, the defendant's solicitors pointed out that there had been misleading conduct on the part of the vendor because their client had never been told about the covenants during negotiations and referred to the terms in the agreement which provided for land covenants other than the ones in issue in this case. The letter contested the vendor's ability to issue a settlement notice.

[33] In December 2008 Strategic Finance, the plaintiff's financier, appointed receivers. The plaintiff has since gone into liquidation. The defendant did not settle. In 2009 the plaintiff issued the present proceeding.

[34] The defendant relies on the lodging of the land covenants in favour of Convelle Enterprises Limited as being an interest on the title to which he is entitled to object. His grounds of objection are:

a) He did not contract that he would accept title subject to these covenants;

b) In its equitable discretion the court should not order specific performance because of the plaintiff's misrepresentation as to the title; and

c) There has been misleading conduct under ss 9 and 14 of the Fair Trading Act,[4] and it is not possible to contract out of that Act.

[35] The plaintiff's response is that the defendant has accepted the title and it is not open to him to object to the covenants.

[4] Fair Trading Act 1986.

[36] The defendant also relies on a letter signed by Mr Nielsen, director of the plaintiff, dated 20 September 2008, saying that the agreement for sale and purchase is now cancelled. The plaintiff casts doubt on the authenticity of that document.

[37] It is necessary to look more closely at the plaintiff's contention that the defendant has accepted the title.

[38] The title to be conveyed was one to be created by subdivision. It is of course quite lawful for a developer such as the plaintiff to enter into an agreement to sell land with new titles to be created by subdivision: s 225(1) of the Resource Management Act.[5] In such agreements, a vendor undertakes to create a new lot out of part of a parent lot. The lot that has to be created has to be ascertained by reference to the contract. It is common practice to attach a draft subdivision plan to the agreement for sale and purchase and then refer to that plan and the applicable lot in the description of the property to be sold. The draft plan will also show the kind of interests to be created, such as easements.

[39] In addition some developers also attach copies of the resource consent but they also make it clear that delivery of the title will be subject to compliance with local government requirements, especially compliance with resource consent conditions. The title must also comply with all surveying requirements. Sometimes the need to comply with surveying requirements results in adjustments to boundaries of new lots. Overall contractual documents will define the title to be created.

[40] The clauses that the vendor relies upon for acceptance of the title are worded in the present tense. To say that someone accepts something now implies that something has been presented to them now. It does not make good sense to say that you accept something now which is to be presented to you in the future. The contract does not use the future tense. I infer from this use of the present tense that the purchaser is accepting what the vendor has presented to him as the parent title and the means by which he will create the new title. In other words the purchaser's acceptance is an acceptance that the vendor will carry out the subdivision and create

[5] Resource Management Act 1991.

a new title according to the provisions of the agreement. On the vendor doing that, the purchaser will accept the title created by that process.

[41] Clauses in the agreement such as 18.4(c) against lodging requisitions or making objections do not allow lodging requisitions and making objections to the title which has been made according to the contract. However they do not extend to preventing a purchaser from objecting to a title which has not been created in accordance with the contract. The purchaser has not accepted such a title.

[42] In this case the matter in issue, the covenants that were put on the title on 21 April 2006, concerns the title as it existed at the time of the agreement for sale and purchase. The agreement for sale and purchase had the copy of the certificate of title attached without the covenants recorded against it. The parties have adopted that version of the certificate of title as the appropriate title for the parent lot out of which the new title will be created. They have adopted a title which does not show the covenants in favour of Convelle Enterprises Limited. Under the contract, the provisions for creating the title for the new lot 6 do not provide for any covenants in favour of neighbouring property owners such as Convelle Enterprises Limited. The new covenants put on the title on 21 April are not covenants established in accordance with the agreement for sale and purchase. They are encumbrances to which the purchaser may fairly object.

[43] The vendor's argument is that the title in fact had the covenants attached to the title at 21 April even though that was not apparent to the purchaser at the time. The answer to that is that an estoppel has been created. Texts on estoppel sometimes refer to estoppel by convention. That simply refers to the fact that an estoppel has been created under a contract which binds the parties. The parties have chosen a particular version of facts on which they are contracting. Once they have adopted that particular version of facts it is not open to one of the parties later to say that that version is not correct. Here the parties have contracted on the basis of the certificate of title attached to the agreement for sale and purchase. It is not open to the vendor to say that the parent title is another version which was not attached the agreement for sale and purchase.

[44] The result was that when title issued, the purchaser's lawyers looked at the title and found the two covenants on the title which could not be supported by the certificate of title for the parent lot or by the provisions in the agreement for sale and purchase.

[45] The purchaser's solicitors were entitled to take objection to taking the title subject to the Convelle Enterprises Limited covenants. The vendor's acceptance argument is not a sound answer to the defence raised by the defendant.

[46] Having got to this point it is sufficient for me to say that the defendant has done enough to show that he has an arguable ground of defence on the covenant question. There is also the letter of 20 September 2008 signed by Mr Nielsen. Mr Swan's argument is that that document should be assessed at trial and should not be summarily dismissed.

[47] Mr Broadmore points out that the document does not stand up in the light of contemporaneous communications between Mr Nielsen and Strategic Finance. Mr Broadmore concedes that duplicity was open to Mr Nielsen. He also points out that the name of the company is incorrectly spelt. He casts doubt on the document because its existence was only shown very late in the piece. I would not treat the letter of 20 September 2008 as a standalone ground of defence. In other words if the defence based on the covenants did not exist I do not think that the defendant could rely on this as a basis for defence. But the document may have some weight depending on how the first issue was resolved. If the first ground of defence ultimately fails at trial I do not think that that particular document is going to assist Mr Millar in establishing a defence. On the other hand, if a trial of the case goes in Mr Millar's favour then that letter might be invoked as corroboration because the company might be shown to seen to have accepted the substance of his argument.

[48] Having concluded that the covenant defence is arguable, I do want to signal that that does not necessarily conclude matters in favour of the defendant overall. Even if a trial judge accepts my decision so far (of course it is open to a trial judge to find otherwise), there may still be other arguments available to the plaintiff which may result in an order for specific performance. It may be that the plaintiff could

persuade the court that the objections to the covenants are not so serious as to allow the defendant to raise them as grounds to object to performance, that cancellation of the agreement is not available under s 7 of the Contractual Remedies Act 1979 and that the rule in *Flight v Booth*[6] does not apply. That is a matter for the judge at trial. It is not something I need to determine today. I also note that s 15(a) of the Contractual Remedies Act saves the law as to specific performance, thereby reserving the court's discretion whether to order specific performance.

[49] Outside the contractual arguments and discretionary relief, there are questions under ss 9 and 14 of the Fair Trading Act. I note that relief under the Fair Trading Act is also discretionary. The Court has powers also to avoid and vary contracts under s 43(2). I mention these simply to indicate the kind and range of issues that might arise at a defended hearing.

Other factors under *Russell v Cox*

[50] I consider the remaining two factors under *Russell v Cox*. The defendant acknowledges that he did receive copies of the Court documents from his father during 2008. He did not take any steps at that time to deal with the proceeding. Mr Swan mounts an argument that under r 11.11(5) of the High Court Rules the plaintiff was obliged obligation to serve the judgment. There is no evidence that the order for specific performance was served. Even so, the defendant has not, in my view, adequately explained his delay in taking steps. The plaintiff is on good ground in criticising his dilatoriness.

[51] On the third point, whether the plaintiff will suffer irreparable injury if the judgment is set aside, I can see no serious injury to the plaintiff if judgment is set aside. In particular I discussed case management directions with counsel. I am confident that this case can be brought on for hearing promptly so that the merits of the case can be determined fully.

[52] I have already held that the judgment was irregularly obtained. If I am wrong on that and I was required to apply the approach under *Russell v Cox*, I would still

[6] *Flight v Booth* (1834) 1 Bing NC 370, 131 ER 1160

find for the defendant in that he has substantial grounds of defence, first with the incorrect calculation of the purchase price and second with the land covenants. Although his conduct in not taking steps promptly is unsatisfactory I consider that there has been a miscarriage of justice which requires that he be given the opportunity to raise his defences before the court.

[53] I make these orders:

a) I grant the application to set aside the summary judgment.

b) On rehearing the summary judgment application, I dismiss that application.

Bankruptcy application

[54] There are problems with the bankruptcy proceeding. The first is that the bankruptcy notice is founded on the non-payment of penalty interest in the order for specific performance made by Associate Judge Abbott on 22 September 2009. The question here is whether a bankruptcy notice can be issued for a judgment given for penalty interest which is coupled with an order for specific performance.

[55] In *Takitimu Estate Limited v Dickson*,[7] Associate Judge Christiansen held that an order for specific performance of an agreement for sale and purchase could not found a bankruptcy notice because of the interdependent nature of obligations under an agreement for sale and purchase. When the court orders specific performance of an agreement for sale and purchase, payment of the purchase price is inter-dependent with transfer of the title. Accordingly it would not be open to the plaintiff in this case to ask for a bankruptcy notice founded on non-payment of the purchase price because payment of the purchase price is inter-dependent on the transfer of the title. That cannot be a basis for a bankruptcy notice, which is grounded on a final and unconditional liability to pay under a judgment or order.

[56] The issue here is whether the penalty interest is a stand-alone obligation

[7] *Takitimu Estate Limited v Dickson* CIV-2008-4250585, HC Invercargill, 17 March 2009.

independent of the obligation of the vendor to transfer title. The obligation to pay penalty interest in this case comes under clause 3.9 of the general terms of the agreement for sale and purchase. In my judgment interest payable for late settlement before there has been any cancellation is payment of part of the purchase price. When the court ordered the plaintiff to specifically perform the agreement for sale and purchase, it required payment of the purchase price and payment of the purchase price included payment of the penalty interest. It is different from penalty interest payable under clause 9.4 (3) where damages recoverable by a vendor after cancellation may include penalty interest. There the payment of penalty interest is a stand-alone obligation and is not inter-dependent on transfer of the title.

[57] Accordingly my provisional view is that there are at least strong doubts whether the bankruptcy notice was valid as it is founded on an obligation to pay where there was an inter-dependent obligation.

[58] Second, leave was not sought to serve the bankruptcy notice abroad. The creditor applied for substituted service in New Zealand. Nevertheless the creditor knew that the debtor was overseas and knowing that it ought to have obtained leave under s 17(3) of the Insolvency Act 2006. The application would have required consideration of the factors under r 6.28 of the High Court Rules.

[59] Section 17(4) makes it clear that when leave is sought to serve a bankruptcy notice on someone overseas the Court fixes the time for compliance with the notice. Because the creditor did not apply for leave, the notice was issued on the basis of the standard 10 days for someone served in New Zealand. The notice was defective because the Court has not fixed the time for compliance.

[60] There are good grounds to question whether an act of bankruptcy has occurred. At any rate, with the setting aside of the judgment on which the bankruptcy notice is founded the application for adjudication in bankruptcy cannot continue. I dismiss the application for bankruptcy.

Case management directions

[61] The case CIV-2009-404-2786 is to be heard for three days beginning *19 September 2011*. I give these directions:

a) The defendant is to file and serve his statement of defence by *23 May 2011*;

b) Both parties are to file and serve affidavits of documents by *20 June 2011*;

c) Inspection of documents is to be completed by *4 July 2011*;

d) The setting down date is *1 August 2011*.

[62] I reserve leave to the parties to apply generally for any further directions that are required. Neither counsel has had the opportunity to confer with clients as to availability for trial and the date given for trial may cause understandable difficulties. If there are issues that arise with discovery or inspection counsel should feel free to file a memorandum seeking a conference at short notice to resolve any such issues.

Costs

[63] I have heard counsel as to costs. Mr Broadmore initially asked that costs be reserved. Mr Swan seeks costs.

[64] On setting aside applications it is unusual to award costs against a plaintiff. Often the defendant is required to pay costs because he has come to court seeking an indulgence. However, this is one of those unusual cases where the judgment was obtained irregularly and the defendant is entitled to have judgment set aside *ex debito justitiae*. He is not seeking an indulgence. He is entitled to require the court to set the judgment aside. The plaintiff has unsuccessfully opposed the application. This is a case where costs follow the event.

[65] I also add this. To a certain extent the plaintiff has created problems which resulted in the judgment being entered. First, there was the short service. If the plaintiff had been more careful about complying with the rules it may have avoided that problem. Second, I am concerned about the state of the original application for summary judgment. I have referred to the fact that the plaintiff did not disclose all of the agreement for sale and purchase. By not including the entire agreement it did not allow the court to see the matters that would expose the defence that the defendant has raised. Third, I am very concerned to read in the affidavit in support the claim by the receiver of Walter Peak Developments Limited that the defendant has not disputed his liability in any way. In my judgment that statement is quite incorrect. I am disappointed that the solicitors who prepared this application allowed the receiver to make that statement. They would have known that that was incorrect. They had the conveyancing file. They would have seen from the conveyancing file the issues that the defendant's solicitors had raised when settlement was demanded. They would have known that grounds to dispute performance were raised at the time and in a timely manner. Because of these defects Associate Judge Abbott held that there was no defence. If the purchaser's complaint about the covenants had been disclosed, it would have been apparent that there was an arguable defence. This is a case for departing from the normal practice on setting aside applications and for requiring that costs be awarded against the plaintiff on the summary judgment application as well as the setting aside application.

[66] I deal with costs this way: the defendant has the costs on applying to set aside as an interlocutory application. The hearing has taken half a day. There are no additional costs for the hearing of the bankruptcy proceeding, but the defendant has costs for other steps taken to oppose the bankruptcy application. All costs are on the 2B basis.

[67] In case the plaintiff wants to take this matter any further it may be helpful if I record the basis on which I have heard the case today. The defendant's application to set aside judgment was an application heard in chambers and the plaintiff has the remedies available for a review of a chambers decision. I have also dismissed the summary judgment application. I heard that in court. The remedy for that is appeal,

not review. I dismissed the bankruptcy application in court. The remedy for that is appeal.

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R M Bell
Associate Judge