IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2011-404-7422
[2015] NZHC 1691

BETWEEN	KENNETH JAMES JERARD AND LINDA IRENE LEADER Plaintiffs
AND	AUCKLAND COUNCIL First Defendant
	BRYCE WARREN PAXTON and AMANDA SARAH PAXTON Second Defendants

Continued over page

Hearing: 16 July 2015

Appearances: S J Ropati for Second Defendants (Applicants)
G R Grant for the Plaintiffs (Respondents)

Judgment: 22 July 2015

JUDGMENT OF DUFFY J

This judgment was delivered by Justice Duffy on 22 July 2015 at 12.30 pm
pursuant to r 11.5 of the High Court Rules

Registrar/Deputy Registrar

Date: .....

Solicitors: S J Ropati, Auckland
Rainey Law, Auckland

AND

BROWN BROTHERS BUILDERS LIMITED
First Third Party

IAN HUTCHINSON CONSULTANTS LIMITED
Second Third Party

BRETT CONWAY BROWN
Third Third Party

MATTHEW TICKLE
Fourth Third Party

POLE SPECIALISTS LIMITED
Fifth Third Party

DEAN HENSHAW
Sixth Third Party

SHORE PLUMBING LIMITED
Seventh Third Party

[1] The applicants, Mr and Mrs Paxton, apply to set aside a judgment given by Lang J on 10 October 2014 after a formal proof hearing on the grounds that they had a substantial defence, there has been a miscarriage of justice, and the respondents will not be prejudiced.[1]

[2] The applicants were the second defendants in claims brought by the respondents, Mr Jerard and Ms Leader, against the multiple defendants including the applicants, Auckland Council and various tradesmen. The claims related to defects the respondents had discovered in relation to a property situated at 12 Fairhaven Walk, Arkles Bay, which they purchased from the applicants in December 2005.

Facts

Procedural History

[3] The respondents commenced proceedings against the applicants on 17 November 2011 for breach of contract and negligence. The applicants instructed Carole Smith to act as instructing solicitor and William McCartney as a barrister.

[4] The applicants filed a statement of defence in June 2012. The respondents filed amended statements of claim on 18 January 2013, 23 April 2013, 10 May 2013 and 4 October 2013. The applicants did not file an amended statement of defence.

[5] A hearing was set down for 6 October 2014. On 16 July 2014, the applicants instructed Mr McCartney to advise the Court and the other parties that they would not be attending the hearing, and to cease to work on their case. The respondents filed a fourth amended statement of claim on 19 September 2014.

[6] The hearing began on 6 October 2014. There was no appearance for the applicants. On 7 October the respondents reached a settlement with the other parties present at Court. The case therefore proceeded against the applicants alone by way of formal proof. Lang J delivered a judgment on 10 October.

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1 *Jerard v Auckland Council* [2014] NZHC 2493, (2014) 15 NZCPR 906.

Judgment of Lang J

[7] Lang J first set out some of the procedural history of the case noting that the respondents had only pursued the claim against the applicants in breach of contract.[2] This claim was based on breach of warranties relating to building work contained in the agreement for sale and purchase of the property signed by both parties on 22 September 2005. Lang J noted that the applicants defended the claim up until July 2013, but thereafter took no steps to serve evidence in support of their defence or in support of their claims and did not appear at the commencement of the trial on 6 October 2014.

[8] Lang J noted that the other defendants, who did appear at the hearing, reached a settlement with the respondents whereby they would receive $260,000 from the other defendants. Accordingly, the trial proceeded by way of formal proof against the applicants.

[9] Before Lang J, the respondents sought damages calculated on the basis of the extent to which the property had reduced in value by virtue of the defects identified. This amounted to a total of $550,000 which was reduced to $290,000 because of the $260,000 paid by the other defendants.[3] They also sought general damages in the sum of $25,000.

[10] The respondents' claim was based on a clause which Lang J said was "contained in cl 6.2(5) of the agreement for sale and purchase" which was signed by the parties on 22 September 2005. This clause provided:

> Where the vendor has done or caused or permitted to be done on the property any works for which a permit or building consent was required by law:
> (a) The required permit or consent was obtained: and
> (b) The works were completed in compliance with that permit or consent; and
> (c) Where appropriate, a code compliance certificate was issued for those works; and

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2 The settlement the respondents had reached with the first defendant, the Auckland Council, required them to abandon the negligence cause of action.

3 Originally, the respondents had sought damages based on the cost of rendering the property code compliant. Lang J discussed the measure of damages as length, and was of the view that performance-based damages would have been inappropriate and resulted in a windfall for the respondents.

(d) All obligations imposed under the Building Act 1991 were fully complied with.

[11] The applicants had built the house on a section which slopes steeply from top to bottom, and was originally covered densely with trees and bush. The applicants felled a large number of trees and created a small platform by digging into the hillside. They disposed of the excavated soil by tipping it over the side of the platform. The area was then covered with gravel to form an unsealed driveway. The applicants built a house supported by poles on the platform. At the rear of the house is a back yard bounded by a steep rock face, which was exposed by the excavation. A code of compliance was issued by the Council in respect of the work carried out in relation to the construction of the house. This was later set aside.

[12] In relation to the above works, Lang J found that the applicants had breached the warranties contained in cl 6.2(5). First, the work they had carried out in relation to the building platform was undertaken without the requisite building permit; this was a breach of cl 6.2(5)(a). Secondly, the house they had built did not comply with the requirements of the building code; this was a breach of cl 6.2(5)(b). In reaching this conclusion Lang J relied on the evidence of three expert witnesses as to the defects in the property.

[13] Accordingly, Lang J awarded damages against the applicants of $290,000, this being the remainder of the difference between the current market value of the house and what the house would have been worth had it been code compliant from the outset. Lang J also awarded general damages of $15,000, and costs on a category 2B basis and disbursements totalling $209,322.57.[4] The total judgment against the applicants was accordingly $514,322.57.

[14] This judgment was sealed on 9 December 2014.

Applicants' Submissions

[15] The application to set the judgment aside is made on the basis that:

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[4] $44,823.50 being scale costs, $2,836.85 being disbursements and $161,622.22 being expert witness costs.

(a) The applicants have a substantial ground of defence which they have since discovered was never pleaded by their solicitors, and therefore never before the Court – in particular:

(i) The sale and purchase contract dated 22 September 2005 (the September contract) that the respondents were suing upon was cancelled by the applicants on 23 November 2005;

(ii) The sale proceeded after a new contract was negotiated by the parties' solicitors in December 2005;

(iii) The new contract did not contain any warranties but contained an express clause that any damages claim would be resolved in the Disputes Tribunal at North Shore.

(b) There has been a substantial miscarriage of justice resulting from the entry of judgment and, in the exercise of the Court's discretion the judgment ought to be set aside;

(c) The respondents will not be prejudiced or suffer irreparable injury as a consequence of the orders sought.

[16] The applicants' position is set out in detail in an affidavit of Amanda Paxton sworn on 2 February 2015.

Mrs Paxton's affidavit

[17] Mrs Paxton states that the applicants live in Qatar. She says that they did not become aware of the sealed judgment of 9 December until 12 December 2014, when this was sent to them by email by Mr McCartney. She states that on 16 December 2014 they obtained a copy of the substantive judgment of 9 October 2014 from the High Court. This was the first time they had seen the substantive judgment.

[18] Mrs Paxton states that she was first served a copy of the respondents' claim in about April 2012 and instructed solicitors in New Zealand to act on their behalf. She

states that their solicitors assured them that they had a good sound defence to the claim and that the statement of defence would be amended to ensure that all defences were before the Court including reliance on the fact that the original purchase agreement had been cancelled and that the new agreement stated that any claim for damages would be filed in the Disputes Tribunal at North Shore. Mrs Paxton says that the parties attended a mediation on or about 4 March 2013. Mr McCartney attended this on the applicants' behalf.

[19] Mrs Paxton then details the circumstances in which they instructed Mr McCartney to cease working on their case. She said that by that time they had spent approximately $50,000 in legal costs and asked Mr McCartney on or about 16 July 2014 to advise the Court that they would not be attending the trial. The affidavit details a number of reasons for this decision:

(a) They did not have the money to pay solicitors to defend the trial;

(b) The cost of travelling to New Zealand for a four week trial and the inability to leave their children behind and to get time off work;

(c) Mrs Paxton's health problems; and

(d) That they were under the impression that their solicitors had put their defences to the Court.

[20] Mrs Paxton states that had they known that their defences were not before the Court they would have acted differently. It was not until judgment had been entered and they instructed new solicitors to review the file they became aware that Mr McCartney had never filed an amended statement of defence.

[21] Mrs Paxton then sets out the defences that were not pleaded before Lang J. She states:

(a) The settlement date under the September contract was 4 November 2005. The respondents failed to settle on that date;

(b) On 7 November 2005 their solicitors issued a settlement notice;

(c) The respondents failed to comply with this notice by 23 November 2005 and so their solicitors cancelled the agreement;

(d) A further offer to sell the property was made on 2 December and expired at the close of business on 5 December. It was not accepted by the respondents; and

(e) A third offer was made by facsimile by their solicitor on 6 December. The respondents accepted this offer on 7 December 2005 and settlement was completed on 8 December 2005.

[22] Mrs Paxton asserts that the facsimiles between the solicitors on 6 and 7 December set out the terms and conditions of the eventual sale of the property. These did not contain any warranties. This agreement also contained a clause that the parties were to issue any claims for damages in the Disputes Tribunal at North Shore. She notes that in this regard the jurisdiction of the Tribunal at the time was $7,500 or $12,000 by consent.

[23] Accordingly, Mrs Paxton says that Lang J's decision is founded on a contract that was cancelled. Further, she states that they believed that their maximum penalty exposure to the respondents' claim would be $7,500. She says the applicants did not realise that by failing to defend the claim at trial judgment would be entered against them. She says their view was that at the trial in October 2014 the Court would consider the defences that they are now relying on, and further that those defences would come as no surprise to the respondents as the defences were canvassed at the mediation.

Mr McCartney's affidavit

[24] Much of Mrs Paxton's evidence is disputed in the affidavit of Mr McCartney, which was sworn on 26 February 2015 after he was directed to do so by Hinton J. Mr McCartney says that he advised the applicants that they were at risk of a large judgment and advised them to settle. He notes in this regard that in March 2013 the

parties entered into a conditional settlement which included $50,000 provided by the applicants, and Mr McCarthy subsequently suggested that they increased the offer to $70,000 and then $100,000. The respondents did not ultimately sign this settlement. Further, Mr McCartney says that he advised the applicants against not appearing at trial, saying that it was very likely that there would be judgment against them. Mr McCartney states that the applicants were well aware that only one statement of defence had been filed and that amended statements of claim had been filed.

[25] With regards to their argument that the contract had been cancelled, Mr McCartney says that he was never instructed to plead this as a defence and it was not raised until after the judgment was sealed. He says that he did not lead the applicants to believe that their interests at trial would be protected by a statement of defence, and they never indicated to him that this was their belief. Rather, they said that they did not believe that the respondents could afford to go to trial. A number of emails and other documentation showing the interaction that Mr McCarthy had with the applicants and the other parties are attached to his affidavit.

[26] At the commencement of the hearing I raised with the applicants' counsel whether there was to be any cross-examination of Mr McCartney. I was told that there was not. The applicants carry the burden of satisfying the Court that the judgment entered against them should be set aside. Since Mr McCartney's evidence contradicts Mrs Paxton's, I would have expected the applicants to seek leave to cross-examine Mr McCartney. This in turn could have led to Mrs Paxton being cross-examined as well. However, counsel for the applicants informed me that the applicants accept that Mr McCartney gave the advice that he says he did. Their position is that their subjective assessment of Mr McCartney's advice was that they were protected. Accordingly, they see no need to cross-examine Mr McCartney.

[27] I intend to proceed, therefore, on the basis that Mr McCartney has provided a factually correct account of the advice and other communications that passed between him and the applicants.

Respondents' Submissions

[28] The respondents submit that the applicants failed to appear at the hearing based on a calculated gamble to save costs. They do not have a substantial ground of defence as the September contract was never validly cancelled and the facsimile of 6 December was only ever intended to be supplementary to that contract. Even if this defence was before the Court in an amended statement of defence, there was no evidence to support it, and so it is likely that it would have been have been rejected. Further, setting aside the judgment would cause significant prejudice to the respondents. Finally, the respondents argue that there were no short comings in the advice given by Mr McCartney to the applicants, and even if there were that is a separate matter for which the applicants have other remedies available to them.

[29] Accordingly, the respondents submit that there has not been a miscarriage of justice. Their submissions are largely based upon the affidavit evidence of Mr McCartney, set out above, and will be referred further in the judgment as relevant.

Relevant Law

[30] The applicants have applied under the High Court Rules, r 10.9 to have the judgment set aside. This section provides:

> **10.9 Judgment following non appearance may be set aside**
>
> Any verdict of judgment obtained when one party does not appear at the trial may be set aside or varied by the court on any terms that are just if there has, or may have been, a miscarriage of justice.

[31] In relation to an earlier formulation of r 10.9, the Court of Appeal in *Mathieson v Jones* endorsed the comments it had previously made in *Russell v Cox* that:[5]

> The test against which an application to set aside a judgment should be considered is whether it is just in all the circumstances to set aside the judgment, and the several factors mentioned in the judgments discussed should be taken, not as rules of law, but as no more than tests by which the

[5] *Mathieson v Jones* CA198/92, 11 December 1992 (CA) citing *Russell v Cox* [1983] NZLR 654 (CA) at 659. *Russell v Cox* was decided under r 265 of the Code of Civil Procedure, which did not contain a reference to a miscarriage of justice.

> justice of the case is to be measured, in the context of procedural rules whose overall purpose is to secure the just disposal of litigation.

[32] In *Jones v Chatfield*, which followed *Mathieson*, Fisher J described the then equivalent of r 10.9 as a rule that "confers a broad discretion which is not to be fettered by confining it to any rigid considerations. The ultimate question is whether it would be just in all the circumstances to set aside the judgment." Fisher J identified three considerations that he considered could provide helpful guidance on the exercise of the discretion. These were:

(a) whether the defendant's failure to appear at the trial was excusable;

(b) whether the defendant appears to have a substantial ground of defence; and

(c) whether a plaintiff would or might suffer irreparable injury if the judgment were to be set aside.[6]

[33] An additional consideration that has subsequently been recognised is the defendant's attitude to the proceedings, including whether he or she has been casual or cavalier, and whether there has been delay in applying may also be relevant.[7]

[34] I propose to use all four factors as a guide.

Evaluation – applicants' failure to appear at trial

[35] The reasons given in Mrs Paxton's affidavit for the applicants' decision not to attend the hearing relate to the cost of retaining a lawyer, travelling to New Zealand and the applicants' ability to take time off work and arrange care for their children. Mrs Paxton also relies on her claimed belief that she thought that their defence would be before the Court.

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6 *Jones v Chatfield* [1993] 1 NZLR 617 (HC). This case was decided under r 486 of the High Court Rules.

7 *Hsu v Moore Stephens Markhams Ltd* [2014] NZHC 961 at [20].

[36] In an email dated 16 July 2014, Mrs Paxton instructed Mr McCartney to cease working on the case, she stated:

> William, Please advise the relevant parties that we will not attend the High Court hearing in October, place all outstanding documents in the dropbox and cease work on our case.
>
> ...
>
> We will not continue to incur further debt to defend this farcical case … We will not take our children out of school for up to a month and all fly to NZ, pay for accommodation in October. This adds further debt and stress on our family that we do not wish to incur.
>
> It is clear that the plaintiffs do not have sufficient funds to go to trial or provide financial reparation to us for the costs and stress we have incurred. We feel we are now in a position where it would be intolerable to pay out a further $100,000 in legal and consultant fees that we will not see returned.

[37] In response, by email dated 17 July 2014 Mr McCartney stated:

> Attached is a memorandum I have filed today advising the Court and the other parties that you have withdrawn my instructions ...
>
> Although you have withdrawn my instructions, the Court will require from you an address for service, so that the Court and other parties can serve notices and documents on you, including the briefs of evidence that are yet to come from the other parties.
>
> The most practical address for service is your email address. Can I advise the Court that notices and documents can be serve by sending them to your email address?
>
> I have to say that I think you are making a mistake in not defending this. You have a sound defence and you have assets that you stand to lose if there is a judgment against you.
>
> Everything you say about the case is true, but it carries little if any weight if no one is in court advocating your position. After the trial it will be too late to argue.
>
> It is possible you are right that the plaintiffs cannot afford to go to trial, but they have now managed to fund the production of a lot of evidence, including expert evidence, so I think you should assume they can afford to go to trial.
>
> …
>
> I have already advised you that your whole family would not need to be here for a month. It would be sufficient for Bryce to be here for a week of the trial, or potentially one or both of you giving evidence by video link (though that is not ideal).

[38] On 18 July 2014, Mrs Paxton responded by email stating:

> We are trying to consider all our options and really don't know where to go from here.

[39] Later, on 24 July 2014, Mr McCartney received a text from the first defendant's solicitor asking if the applicants would increase their settlement offer to $60,000.[8] He forwarded this to the applicants who responded stating "our offer stands at $50,000".

[40] When the first defendant's solicitor made a further query as to whether the applicants would increase their offer to $60,000 their response was "thanks William we do not have the funds available to do this".

[41] Earlier dated emails between Mr McCartney and Mrs Paxton show the advice that he had given to the applicants advising them: (a) to reach a settlement; (b) as to the likely cost of going to trial; (c) the amount recoverable if they were successful; and (d) the uncertain outcome of going to court and the attendant risk of the respondents being successful.

[42] There is nothing in the communications between the applicants and Mr McCartney that, when viewed objectively, support the applicants' asserted beliefs that even if they took no part in opposing the respondents' claim before the Court their statement of defence would be taken into account by the trial Judge, let alone be sufficient for them to win the day.

[43] In my view, the applicants made a decision not to continue to defend the case based on their assessment of the likelihood of the respondents succeeding against them. They were advised by Mr McCartney against this. It seems relatively clear from Mr McCartney's affidavit and the email correspondence to which he refers that he had told the applicants that he had not filed an amended statement of defence. Further, from my reading of Mr McCartney's evidence the defence the applicants now seek to run is not one that was discussed with him at any stage while he acted for the applicants.

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[8] Auckland Council.

[44] Insofar as the applicants now contend that they believe they would have been advantaged by Mr McCartney filing an amended statement of defence in Court, I cannot see how that could be so once they made the decision not to participate in the trial. Mr McCartney specifically advised the applicants in the email of 17 July 2014 that their defence would carry little if any weight if no one advocated their position before the Court.

[45] In *Mathieson v Jones*, the defendant applying to set aside the judgment had withdrawn his instructions before the trial, a decision he claimed was made on the basis of the cost of defending the case. The Court found that lack of funds was not the whole reason for his decision to take no part in the proceedings, and that the defendant had taken a calculated risk and relied on the counsel for the other defendants to raise the defence he wished to rely on. His failure to appear at trial was therefore not excusable.[9]

[46] Similarly, here, I think that the applicants made a decision about whether or not to proceed with the case based on their assessment of the likely risks and costs. Given their initial agreement to the settlement of $50,000 they could not have thought that their liability was limited to $7,500.[10] They also knew that the respondents had increased their claim to $980,000 in damages, and Mr McCartney had repeatedly told them that judgment would be likely to go against them if they did not appear. In my view, this was not a situation where the applicants were materially mistaken as to their position. Having received proper advice and fair warnings from Mr McCartney of the consequences that they might face, they chose not to defend the claims made against them. Thus their failure to appear is not readily excusable.

Whether the applicants have a substantial ground of defence

[47] The applicants' intended defence is that the September contract was cancelled and the sale governed by the later contract of 6 December 2005. This contract did not provide guaranties and contained a clause that all disputes would be settled in the Disputes Tribunal.

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9 *Mathieson v Jones*, above n 5.

10 Being the relevant cap on recoverable damages in the Disputes Tribunal.

[48] The applicants therefore characterise the 6 December 2005 facsimile sent by their solicitors at the time, Gaze Burt, as a new offer that was accepted by the respondents the next day. The 6 December facsimile states:

> Paxton to Gerard & Leader – 12 Fairhaven Walk
>
> We record out conversation today and note the agreement as follows:
>
> 1. Settlement to take place 7 December.
>
> 2. The amount to settle is as per our statement dated 10 October in the sum of $420,285.12.
>
> 3. Transfer and signed mortgage have already been supplied and we repeat the undertakings in our letter of 26 October.
>
> 4. Both parties reserve their rights to claim damages and such claims (if any) are to be lodged in the Disputes Tribunal (North Shore – being nearest the property).
>
> Thank you for your assistance which has resulted in this agreement. We look forward to settlement tomorrow.

[49] The responding facsimile states "we concur with your fax of 6 December 2005, however, we cannot guarantee settlement today, but will use our best endeavours to do so". The correspondence of 10 and 26 October is not in evidence.

[50] In his affidavit Mr McCartney states:

> My view of the letter of 6 December 2005 was that it was a variation of the original contract, not a novation. To be a novation, the letter would have to constitute the entire contract, and that did not appear to be the objective intention of any of the parties at the time, particularly when the plaintiffs denied that there had been a valid cancellation at all. In addition, it is difficult to see why either party would be reserving rights to claim damages in the Disputes Tribunal or anywhere else, unless those damages arose under the original contract. And the purchase price in the original latter was as per the pre "cancellation" settlement statement.

Thus, while Mr McCartney was acting for the applicants he never perceived the defence they would now seek to run.

[51] Mr McCartney referred to an email of 1 March 2013 from Doug Cowan, who was then counsel for the respondents. In this email, Mr Cowan argued that the reference in the 6 December facsimile to damages was referring to penalty interests and damages. Mr McCartney considered this to be an arguable point. In this regard,

the respondents had said that they would claim penalty interest as a result of the applicants not being ready to settle on the date of settlement. In a facsimile dated 16 November 2005, the respondents' solicitors had stated that "we require your confirmation that penalty interest for late settlement is payable by your client, as settlement did not occur as scheduled as your client failed to agree on retention for compensation for breach of warranty". The same day the applicants' solicitors sent a facsimile stating that "we require settlement in full and reserve our right to charge penalty interest" and "We suggest that the issue of penalty interest, if unable to be agreed upon, be dealt with in the Disputes Tribunal. In no circumstances will our client be willing to settle with your client retaining funds". Thus the question of each side claiming penalty interest was very much in issue.

[52] Most of the events leading up to the 6 December facsimile are set out in exhibits to Mrs Paxton's affidavit. The September contract provided for possession and settlement on 4 November 2005. This contract was conditional upon a LIM report being obtained and approved by the purchaser on or before 15 working days after the agreement.[11]

[53] The September contract used the seventh edition of the standard form Agreement for Sale and Purchase of Real Estate.[12] Clause 9 provides the process by which a party may cancel the contract if the sale is not settled on settlement date. The party must serve the other party a settlement notice. Clause 9.1(2) states that "the notice shall be effective only if the party serving it is at the time of service either in all material respects ready able and willing to proceed to settle in accordance with the notice or is not so ready able and willing to settle only by reason of the default or omission of the other party."

[54] On 30 September 2005, the respondents' solicitors sent a facsimile to the applicants advising that "our clients have waived all conditions and that the Agreement is now unconditional". However, a further facsimile on 3 November 2005 states that "it is now apparent that your client is in breach of the warranty

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11 Land Information Memorandum.

12 Approved by the Real Estate Institute of New Zealand and the Auckland District Law Society.

provisions of the agreement". And that "as a consequence, our clients will seek to retain funds on settlement pending your client's compliance".

[55] A further facsimile from the respondents of 4 November 2005 states "we have estimated the cost of remedying the matters relating to removal of material on the slopes of the watercourse to be $70,000, and propose withholding this amount on settlement to ensure your clients compliance". It then states "Please note that it has also come to our clients attention that construction of the driveway and retaining wall may have been in breach of the resource consent (if obtained), and we reserve our right in relation to this matter too, although we are aware that warranties do not merge on transfer of title".

[56] A responding facsimile dated 4 November 2005 from the applicants' solicitors states "our clients require settlement today". In reply on the same day, the respondents asserted their right to withhold funds on settlement for breach of warranty relying on *Lingens v Martin*.[13]

[57] Then on 7 November 2005, the respondents' solicitors sent a further facsimile noting that as of 3 November 2005, their clients were ready, able and willing to settle, subject to the amount of retention for breach of warranty. The applicants' solicitors replied on the same day stating that their clients required settlement in full and that the respondents were now in default. A settlement notice was attached to this facsimile.

[58] Further facsimiles throughout November detail discussion as to resource consent and the applicants' ability to cancel the contract. On 23 November 2005, a letter from the applicants' solicitors states "pursuant to clause 9.4 of the agreement we hereby cancel the agreement on behalf of our clients." After this letter was received there was no further direct communication between the applicants and the respondents or their respective solicitors until 2 December 2005 when a further offer was made by the applicants.

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[13] *Lingens v Martin* (1994) 2 NZ ConvC 191,940 (CA).

[59] However, on 30 November 2005 the respondents' solicitors wrote to the real estate agent for the property on a without prejudice basis. The letter refers to: (a) the resource consent for works on the property being still outstanding; and (b) the Council having put a notice on the property file warning potential purchasers of unstable earthworks. There is then a complaint about the agent's assurance that there were no outstanding matters affecting the property when there were such problems and these had earlier been drawn to the agent's attention. The letter accused the agent of having therefore made a false or misleading representation in breach of s 14 of the Fair Trading Act 1986 and the Code of Ethics of the Real Estate Institute of New Zealand. The letter goes on to assert that the respondents have suffered loss including the probable loss of the deposit of $25,000 which the writer of the letter assumes has been paid to the applicants, minus a deduction for the agent's commission. The letter also states that the sale has been cancelled by the vendor. The letter then requests the agent to return the commission that it may have received to the respondents. The letter refers to the likelihood of the agent having the opportunity to re-market the property and to earn commission on any re-sale. The letter does not expressly refer to the sale.

[60] The applicants submit that the letter from the respondents' solicitors to the agent constitutes their acceptance that the September contract was validly cancelled. Accordingly, the applicants contend that this acceptance clears the way for the agreement reached on 6 December 2005 to be viewed as a discrete contract.

[61] The respondents argue that the letter to the agent was no more than their solicitor attempting to recoup what monies they could for them given the "messy state of affairs" that then existed. Thus, they reject the notion that it could amount to acceptance that the September contract was validly cancelled.

[62] A facsimile from the applicants' solicitors, purporting to be an offer, of 2 December 2005 states:

> They [the applicants] now, despite the cancellation of the contract, make the following offer:
>
> a. The notation of the LIM will be negated by Council. (It will not be removed but a new notation will in fact confirm the issue is dead.)

b. The attached engineer's report will be placed on the Court file.

c. Settlement is to take place on Monday December 5 no later than 4:00 pm.

d. The amount to settle is $420,285.12 plus additional legal fees of $2310, Lost rent $2250, Engineer's report $562.50, bridging finance, bank fees and interest $1600 and additional toll calls and cell phone calls $100. The total is therefore $427,107.62.

e. The caveat is to be removed.

f. If settlement does not take place on Monday our client will take steps to remove the caveat, seek costs on that matter, resell the property and then take an action following any resale for all losses incurred by your client's failure to settle.

[63] There is no response to the 2 December facsimile. The applicants' solicitors then sent the 6 December facsimile, which was responded to by the respondents' solicitors on 7 December.

[64] The question as to whether the applicants have an arguable defence turns on whether: (a) the September contract was properly cancelled; and if it was (b) whether the 6 December 2005 facsimile was a discrete and entire contract for the sale and purchase of the property. On the other hand, if the September contract was not properly cancelled, whether the respondents action of writing to the agent for the return of the portion of the deposit paid out as commission could amount to: (a) acceptance of a wrongful cancellation; or (b) was itself a cancellation of the September contract; and, if neither of those, (c) whether the 6 December 2005 facsimile was supplementary to and incorporated the terms of the September contract.

[65] The first step is to determine whether the September contract was validly cancelled. If it was validly cancelled, then the 6 December facsimile would have amounted to a new offer which was accepted on 7 December 2005. If the September contract was not validly cancelled it would remain on foot, and the 6 December facsimile would amount to no more than an offer to vary the terms of the September contract.

[66] Whether the September contract was validly cancelled turns on whether the correct procedure was followed as specified in the Sale and Purchase Agreement. At the time of the dispute, the respondents relied on *Lingens v Martin* for the authority that they could withhold funds on settlement for breach of warranty. This case concerned a contract using an earlier edition of the Standard Form of Agreement for Sale and Purchase of Real Estate, which did not have an equivalent to cl 6.5. The Court of Appeal held that where there had been a breach of warranty "the vendor is unable to compel settlement where the parties do not agree on the amount of compensation, or on some sensible arrangement to protect their respective interests so that settlement can proceed".[14]

[67] Relevantly, cl 6.5 of the September contract provides that "Breach of any warranty or undertaking contained in this clause does not defer the obligation to settle. Settlement shall be without prejudice to any rights and remedies available to the parties at law or in equity, including but not limited to the right to cancel this agreement under the Contractual Remedies Act 1979".

[68] The Supreme Court considered the interpretation of cl 6.5 of the seventh edition of the Standard Form Agreement for Sale and Purchase[15] in *Property Ventures Investments Ltd v Regalwood Holdings Ltd*; Blanchard J, giving the judgment of the majority said:[16]

> [73] The first sentence of cl 6.5 in isolation presents no difficulty. The breach of the warranty "does not defer the obligation to settle". Significantly, the drafters did not add "in full," which they surely would have done if that is what they meant. The second sentence creates some ambiguity. We consider that it is to be understood as looking prospectively towards the settlement which must occur unless the purchaser elects to cancel and validly does so. It reserves the purchaser's remedies "at law or in equity" available both on and after settlement. These include the remedy of equitable set-off. The express inclusion of the remedy of cancellation would make very little sense if it and other remedies were exercisable, if at all, only after settlement in full, especially when s 8(3)(b) of the Contractual Remedies Act 1979 provides that a party is not divested of property transferred in the performance of a cancelled contract. In practical terms, a purchaser who has affirmed the contract would, on the construction for which Mr Davidson

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14 *Lingens v Martin*, above n 12, at 191,946.

15 The same Standard Form as was used for the September contract in this case.

16 *Property Ventures Investments Ltd v Regalwood Holdings Ltd* [2010] NZSC 47, [2010] 3 NZLR 231; the judgment preceded these proceedings and accordingly would have been available to the parties' legal advisers

> contended, have no remedy for breach of warranty other than an unsecured claim for refund of any overpayment. The reference to cancellation is much more sensibly read as addressing the situation at the time when a purchaser becomes aware of the breach of warranty and may have a choice whether to cancel the contract or whether to proceed to settlement subject to all remedies available to a contracting party.

[69] Later, Blanchard J found:

> [84] Because Regalwood continued to insist on receiving payment in full after Property Ventures sought an abatement of the price, Regalwood was not in material respects ready, able and willing to settle in accordance with its contractual obligation. In those circumstances, assuming that there was indeed a breach of warranty, Regalwood's cancellation would be invalid.

[70] Blanchard J also found that the requirement for the party issuing a settlement notice to be "ready willing and able to settle" was continuous so that a party cannot cancel the contract unless at the time of cancellation they are also in all material respects ready, willing and able to settle.[17]

[71] In this case, facsimiles from the applicants' solicitors on 4, 14, 16 and 22 November make it clear that the applicants required settlement in full, notwithstanding the respondents seeking funds for breach of warranty provisions and seeking agreement as to "the amount on retention for breach of warranty".[18] The communications from the respondents' solicitors make it clear that they disputed the applicants were in a position to issue a settlement notice given the unresolved issues regarding the warranties. The judgment of Lang J makes it clear that the warranties had in fact been breached. It follows that at the relevant time the applicants were not entitled to demand settlement in full, and so the settlement notice was invalid. Thus, they were not entitled to cancel the September contract. It follows from this, that by wrongfully cancelling the September contract the applicants had likely repudiated it, and were thus in breach themselves.[19]

[72] Faced with an invalid cancellation the respondents could elect to accept it, in which case, once their acceptance was communicated to the applicants the contract

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17 At [82].

18 See the facsimile at 7 November 2005, Annexure G in the Affidavit of Mrs Paxton, 2 February 2015.

19 See for example *Jolly v Palmer* [1985] 1 NZLR 658 (CA) at 664; *Gazelle Properties Ltd v Hulst* HC Auckland AP36-SW02, 18 December 2002 at [19]; and DW McMorland *Sale of Land* (3rd ed, Cathcart Trust, Auckland, 2011) at [12.12].

would be at an end. Alternatively, the applicants could either affirm the contract or in the short term, simply keep their options open.

[73] The next question, therefore, is how to characterise the respondents' response to the applicants' purported cancellation. The first step the respondents took was to write to the real estate agent requesting it to pay any commission that it may have received from the respondents. The references in this letter to the sale having been cancelled coupled with the probability of the agent being able to remarket the property and obtain a further commission suggest that the respondents were treating the cancellation as effective. On the other hand, the letter was written to the agent on the basis the agent was directly liable to the respondents under the Fair Trading Act for making false representations about the property, and it suggested a way in which the agent might offer some recompense for the loss caused by this liability. My view is that the letter was not directed at the real estate agent as agent for the applicants. It would only be if the letter were written to the real estate agent as agent for the applicants that its import might be construed as evidence of the respondents having accepted the wrongful cancellation. Therefore, I do not think it probable that the letter can be read as amounting to notice given to the applicants via their agent that the cancellation of the September contract was accepted.

[74] The next step that the respondents appear to have taken is to reject the applicants offer in the facsimile of 2 December 2005. By engaging with the applicants in this way I consider that the respondents were endeavouring to reach an outcome that met their concerns about the breach of warranties. Such conduct is consistent with either the respondents biding their time, or electing to affirm the original contract. Whichever it might be, such conduct is not consistent with an election to accept the purported cancellation of the September contract.

[75] The next step that is apparent from the evidence is the offer contained in the facsimile of 6 December 2005 and the respondents' acceptance of that offer. I consider that the respondents' acceptance of the terms in the facsimile of 6 December 2005 amounts to them affirming the September contract as varied by the facsimile of 6 December 2005. This would mean that the warranties continued to form a part of the contract

[76] It follows, therefore, that the applicants' argument that the 6 December 2005 facsimile constitutes a discrete and entire contract cannot stand. Thus, they cannot mount a substantial defence to the respondents' claim based upon the idea that Lang J's judgment is founded on the wrong contract.

[77] As a second ground of defence, the applicants argue that even if the 6 December 2005 facsimile is no more than a variation of the September contract, the effect of cl 4 of that facsimile is to limit the applicants' exposure to liability under the contract to no more than the limitation on damages in the Disputes Tribunal.[20] Here the applicants would have cl 4 read as an exclusion clause.

[78] The terms contained in the facsimile of 6 December 2005 are set out at [48] herein. Clauses 1, 2 and 3 of that facsimile are clearly intended to be contractual terms that to the extent they are at odds with the terms in the September contract, serve to alter those terms. Clause 4 is different: it records the parties reserving their rights to claim damages and stipulates that any such claims are to be lodged in the Disputes Tribunal.

[79] It is well settled that what is alleged to be an excluding or limiting term must be an integral part of the contract.[21] It is not clear to me that the parties intended cl 4 to be a term of the contract. The factual matrix of this contract includes a delayed settlement with each party alleging the other was liable to pay penalty interest as a result of that delay. The variation achieved by the exchange of correspondence on 6 and 7 December 2005 overcame the impasse that had prevented the parties settling earlier. The respondents' solicitors' facsimile of 7 December 2005 recorded their agreement with the facsimile of 6 December 2005, and went on to say that they could not "guarantee settlement that day but would use their best endeavours to do so". Ordinarily agreement to alter a settlement date to a later time would preclude any claim for damages for failure to settle on the earlier date. However, here the original settlement date had already passed. The parties were attempting to reach a

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[20] As noted, under s 10 of the Disputes Tribunals Act 1988, the Tribunals jurisdiction was limited to claims for amounts under $7,500, or $12,000 by consent in 2005. In 2009 this limit was increased to $15,000 or $20,000 by consent.

[21] Burrows, Fin and Todd *Law of Contract in New Zealand* (4th ed, Lexis Nexis, Wellington) at [7.2.1].

common position so that the sale of the property could proceed. For whatever reason they chose to exclude potential liability for failure to the settle on the original date from what was agreed in December 2005. This is understandable as it would have been silly to allow the resolution of the disputed matters to founder on something like liability for penalty interest between the original settlement date of 4 November 2005 and new proposed date of 7 December 2005. Thus the insertion of cl 4 can be seen as indicative of the parties' intention to put the question of liability for penalty interest to the side. In this regard, I consider it important that cl 4 refers to both parties reserving their rights as regards damages. Read in this way cl 4 does not operate as a term of the contract at all. It simply documents the parties' recognition that each retains the right to pursue penalty interest claims for the failure to settle on the original settlement date.

[80] For cl 4 to be read as a contractual term that was intended to limit the applicants' entire contractual liability to the respondents for a breach of the contractual warranties to a damages claim brought in the Disputes Tribunal clearer language to that effect was required.

[81] If I am wrong and cl 4 is a contractual term of the variation, even then I do not consider that it can have the broad scope for which the applicants argue. The authors of the *Law of Contract in New Zealand* state that there is "an uneasy tension between the broad *Vector Gas* principle*s* and the interpretation of exclusion clauses". Here they point to the Court of Appeal's continued application of the contra proferentem rule when interpreting exclusion clauses.[22] In the present case, on its face cl 4 is ambiguous. I consider that whether the principles in *Vector Gas* are followed or the contra proferentem rule is followed the outcome would be the same.[23] There is nothing about cl 4 or the factual matrix surrounding the December 2005 contract that could suggest the true intentions of the parties were that cl 4 would operate as an exclusion clause of such a broad scope that it would preclude the respondents from suing the applicants in this Court for breach of the warranties in cl 6.2(5). Nor can the applicants discharge the onus that the contra proferentem

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22 Burrows, Fin and Todd, above n 20, at [7.3.1].

23 *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5, [2010] 2 NZLR 444.

rule places upon them in order to reach such an interpretation. It follows that cl 4 does not have the effect upon which the applicants' arguments rest.

[82] As the applicants have offered nothing else by way of an available defence it follows that they have no substantial defence to the respondents' claim.

Prejudice to the respondents

[83] The respondents have raised a number of arguments in relation to the harm to them if the judgment is set aside. They state in affidavits that that the issues with the house have had a significant emotional and financial effect on them and that they have been battling to get compensation for their house since 2006. Further, they feel unable to move on with their lives, despite the fact that they separated in 2010. Additionally, the respondents will be out of pocket if they cannot now recover against the applicants. They agreed to the settlement amount with the other parties because they were confident they could recover money from the applicants as well. Further, as part of the settlement with the other defendants they abandoned their negligence claim against the applicants. I accept the respondents' arguments on this topic. For all of the aforegoing reasons, I am satisfied that the respondents would suffer undue prejudice if the judgment were set aside.

Delay

[84] Although the applicants did not make this application until February of this year, I accept their argument that they were unaware of the judgment until December. Taking into account the closure of the Court over the holiday period, I do not think there has been unreasonable delay in bringing the application, although, given the fact that they knew that there was a hearing against them, it might have been prudent for them to inquire as to the result.

Conclusion

[85] I am satisfied that there is no excuse for the applicants' failure to defend the proceedings. I am also satisfied that the applicants do not have a substantial ground of defence. They have acted without delay, but in view of the other findings that I

have reached this factor carries little weight. For the reasons given above, I do not think that the circumstances of this case show that it would be in the interests of justice to set aside the judgment. Accordingly, the application is dismissed.

[86] The findings that I have made on the application to set aside Lang J's judgment mean that there is no longer any proper basis for the interim stay of proceedings made by Moore J to remain in place. Accordingly, that is set aside.

[87] The parties have leave to file memoranda on costs.

Duffy J