IN THE SUPREME COURT OF NEW ZEALAND

SC 85/2008
[2010] NZSC 47

BETWEEN	PROPERTY VENTURES INVESTMENTS LIMITED Appellant
AND	REGALWOOD HOLDINGS LIMITED Respondent

Hearing: 25 June 2009

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

Counsel: A J Forbes QC for Appellant
N R W Davidson QC and H M Smith for Respondent

Judgment: 28 April 2010

JUDGMENT OF THE COURT

A **The appeal is allowed and the orders made in the High Court on the summary judgment application are set aside. That application is dismissed.**

B **The proceeding is remitted to the High Court.**

C **The respondent must pay the appellant costs in the sum of $15,000 together with its reasonable disbursements to be fixed if necessary by the Registrar. The costs order in the Court of Appeal is reversed.**

REASONS

	Para No
Elias CJ	[1]
Blanchard, McGrath and Wilson JJ	[28]
Tipping J	[89]

ELIAS CJ

[1] Regalwood Holdings Limited obtained in the High Court summary judgment for a declaration that it had validly cancelled a contract to sell to Property Ventures Investments Limited a commercial building for a purchase price of $1,500,000.[1] The basis of cancellation was Property Ventures's failure to settle on Regalwood's settlement statement for the balance owing on the purchase price (after payment of the deposit of $100,000), time having been made of the essence. Regalwood also obtained summary judgment for forfeiture of the deposit and for discharge of Property Ventures's caveat against Regalwood's title. An appeal by Property Ventures to the Court of Appeal was dismissed.[2] In holding that Regalwood had been entitled to cancel the contract, the High Court and Court of Appeal rejected Property Ventures's contention that the cancellation was invalid because Regalwood was not in a position to perform its obligations as vendor under the contract while in material breach of a contractual warranty as to compliance at settlement with the Building Act 1991.

[2] It was assumed for the purpose of the summary judgment proceedings that Regalwood was in breach of the warranty because determination of the question of breach (which is not conceded by Regalwood) was accepted to be a dispute of fact not suitable for resolution on summary judgment application. The effect of the assumed breach was substantially to reduce the benefit of the contract to Property Ventures as purchaser. Affidavit evidence before the High Court, untested because of the course taken, estimated the costs of achieving compliance with the Building Act at $500,000. Despite the significance of the assumed breach in a contract for a total purchase price of $1,500,000, the Courts below were in agreement that it could not justify Property Ventures in declining to settle but simply left it free to obtain damages in an action brought after settlement. That conclusion was reached in application of clause 6.5 of the Agreement for Sale and Purchase, in the form contained in the seventh edition (2) of the standard terms for sale and purchase of real estate approved by the Real Estate Institute of New Zealand and Auckland District Law Society:

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1 *Regalwood Holdings Ltd v Property Ventures Investments Ltd* (2007) 9 NZCPR 703 (HC).

2 *Property Ventures Investments Ltd v Regalwood Holdings Ltd* [2008] NZCA 422, [2009] 1 NZLR 481.

> 6.5 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 or 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.

[3] I am of the view that summary judgment should have been declined and the claim by Regalwood should have proceeded as an ordinary action. On the facts assumed for the purposes of summary application I consider that the plaintiff could not have satisfied the Court that the defendant had no defence to the claims.[3] If Regalwood were found at trial to be in breach I consider it would follow from the apparent materiality of the breach to the subject of the contract that Regalwood was not entitled to serve its settlement statement under clause 9.1 of the Agreement for Sale and Purchase. In those circumstances it would not have been "in all material respects ready able and willing to proceed to settle" in accordance with its obligations.[4] Clause 6.5 would not apply since the purchaser would not then have been under an "obligation to settle". If the matter proceeds by way of ordinary claim Property Ventures itself would have had the opportunity to cancel and counterclaim for relief under s 9 of the Contractual Remedies Act 1979 or for damages or, alternatively, to seek specific performance of the contract with abatement of the purchase price or other conditions. I consider that the breach of warranty would amount equally to misdescription of the property within the scope of clause 5.4 of the agreement.[5] (In this, I disagree with the view taken in the Court of Appeal, and adopted by Blanchard and Tipping JJ in this Court, that a warranty as to the condition of property on settlement is not a misdescription within the meaning of clause 5 because not of present fact at the time of the contract.) But, in any event and irrespective of the application of clause 5.4, it is my view that such material breach of warranty would exclude the operation of the settlement requirement in clause 6.5.

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[3] As required to resist summary judgment: High Court Rules, r 12.2.

[4] *Holmes v Booth* (1993) 2 NZ ConvC 191,633 (CA); *Lingens v Martin* (1994) 2 NZ ConvC 191,940 (CA).

[5] Clause 5.4 provides:

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

[4] The validity of the vendor's cancellation was not suitable for summary determination. On any view, the vendor would not have been able to obtain specific performance on the assumed facts, at least without abatement of the purchase price. The discretionary remedy of declaration should not have been granted in such circumstances on summary application. The serious dispute on the facts had to be addressed in determining whether the purchaser had a defence to the claims for declaration of validity and forfeiture of the deposit. The materiality of any breach had to be assessed in order to do equity between the parties.

[5] I would therefore allow the appeal and remit the matter to the High Court. I reach the same outcome as Blanchard and Tipping JJ more directly. I do not agree with the view that the "settlement" referred to in clause 6.5 can mean something less than the settlement envisaged by the contract (payment of the balance of the purchase price). An interpretation which results in the extent of the purchaser's settlement obligation being a matter for re-negotiation or estimation in all cases of breach of warranty under clause 6 (immaterial as well as material) would I think lead to undesirable uncertainty and would bring about the very gamesmanship clause 6.5 seems to have been designed to prevent.[6] *Lingens v Martin*[7] did not suggest such result in relation to a breach of warranty which was also a misdescription of the subject of the contract. The Court of Appeal there, while referring to the opportunity for the parties to agree on a compromise, looked to the ability of either party to seek specific performance as the mechanism for resolution, should agreement not prove possible and the purchaser wish to proceed. The jurisdiction of the Court to grant specific performance on conditions (including compensation in abatement of the purchase price) allows either party to bring matters to a head and avoids making either an unsecured creditor as to significant value transferred at settlement ahead of a proper reckoning. It was open to either party to sue for specific performance without giving a settlement notice.[8]

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[6] DW McMorland *Sale of Land* (2nd ed, Cathcart Trust, Auckland, 2000) at [8.22].

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

[8] As clause 9.7 of the standard Agreement for Sale and Purchase makes clear.

Background

[6] The facts are fully canvassed in the judgment of Blanchard J. Of significance is Property Ventures's response to Regalwood's settlement notice,[9] which raises the absence of acknowledgments by the vendor of compensation or of compliance with its obligations under the contract. The letter of 20 May 2005 makes it clear that Property Ventures was considering cancellation and damages or alternatively a claim for specific performance with abatement of purchase price, but indicates that it lacked information about the impact of the apparent breach, the cost of remedying it and the vendor's attitude to compensation. That lack of information was confirmed by the subsequent letter of 7 April 2006.[10] Property Ventures's solicitors there took the position that Regalwood had not shown it was able to comply with its warranties:

> If it is not able to do so then the only way to progress matters is for the parties to be able to assess the costs of that non-compliance. We therefore suggest that you take further instructions from your client and either provide us with satisfactory evidence that your client is in a position to comply with its warranties or that it is willing to realistically discuss the costs of non-compliance.

In further correspondence on 18 May 2006 Property Ventures referred to Regalwood's refusal to release a report it had obtained from consulting engineers as to achieving compliance and advised that it was obtaining its own report to assess the loss to it, before instituting proceedings against Regalwood. Four days later Regalwood cancelled. Nearly a year later Regalwood instituted the proceedings for declaration and summary application which are the subject of the present appeal.

[7] In the High Court, the argument concentrated on the application of clause 5.4 of the agreement[11] and whether equitable compensation had been claimed before cancellation. Associate Judge Christiansen held that the correspondence did not amount to a demand for compensation in writing before settlement, as required by clause 5.4. He thought it significant that the correspondence kept alive the options of Property Ventures's own cancellation, followed by a claim for damages, or alternatively a claim for specific performance with abatement of purchase price:[12]

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9 Set out by Blanchard J at [38].
10 Described by Blanchard J at [43].
11 The text of which is set out in footnote 5.
12 At [49].

> The rights of the parties crystallised on 22 May 2006 with the issue of the notice of cancellation. Before then [Property Ventures] had not, in writing, specified a claim for compensation, much less did it make an election whether to proceed or to cancel, rather it appears it determined to take a middle road with the purpose of retaining a reduction in the price to settle.

[8] Property Ventures's appeal to the Court of Appeal was unsuccessful. The Court of Appeal considered that any breach of warranty could not be material because the terms of clause 6.5 obliged Property Ventures to settle the agreement in full without abatement of the purchase price. It held that clause 5.4 of the Agreement for Sale and Purchase did not apply to the warranty of compliance with the Building Act contained in clause 6.2 (and that *Lingens v Martin* was therefore to be distinguished) because clause 5.4 applied only to warranties in force at the date of the agreement. Under clause 6.2, by contrast, the vendor's warranties are given as at the date of the giving and taking of possession. The Court also doubted whether clause 5, which is headed "title, boundaries and requisitions" extended beyond matters of title or boundaries, questioning statements to the opposite effect in *Lingens v Martin*. It expressed further doubt about the continued applicability of the reasoning in *Lingens v Martin* given that clause 6.5 was not present in the third edition of the standard Agreement for Sale and Purchase in issue there. The Court of Appeal considered the effect of clause 6.5 was that other remedies available to the purchaser for breach of warranty were to be exercised after settlement at the full purchase price has taken place. On this basis it held that Property Ventures had no right to defer settlement until compensation had been agreed upon (as it thought had been permitted in *Lingens v Martin*). Because of its conclusions, it was not necessary for the Court of Appeal to consider whether valid demand in writing had been made by Property Ventures in accordance with clause 5.4.

Clause 6.5 does not require a purchaser to settle where the vendor is in material breach

[9] As already indicated, I am unable to read the reference to "the obligation to settle" in clause 6.5 as referring to other than the settlement provided for in the agreement. I do not agree therefore with Blanchard and Tipping JJ that clause 6.5 is not to be understood as referring to "settlement in full", if payment of the balance of the purchase price is envisaged on settlement by the contract. I consider that the

Court of Appeal was right to hold as much. I do not think any other meaning reasonably available and, as I have already suggested at [5], I think any other interpretation introduces undesirable uncertainty if any breach of warranty, however insubstantial, requires abatement on or before settlement. Clause 6.5 in my view is competent to require the purchaser to settle where there is a breach of warranty, preserving to him all remedies including under the Contractual Remedies Act, except when the breach of warranty is such as to have been material to the entry into the agreement. Then it does not compel settlement. This result follows from application of the equitable principle described in *Flight v Booth*[13] and is consistent with the principles governing cancellation of contracts more generally, now contained in s 7(4) of the Contractual Remedies Act.[14]

[10] Clause 6.5 is in its terms a type of "compensation clause". It purports to require a party to the contract to complete and seek remedies after settlement. Clause 5.4 of the agreement (confining the remedy for errors or misdescriptions of the property or title to compensation and purporting to exclude annulment of the sale) is another such "compensation clause", although in different terms and containing an explicit acknowledgement of an entitlement to compensation if claimed before settlement. Compensation clauses are not effective to compel settlement against an unwilling purchaser if the effect of the breach or error in description is such that it may reasonably be inferred that the purchaser would not have entered into the agreement had it been known.[15] This is the effect of the principle described in *Flight v Booth*. Although the principle has generally been applied to compensation clauses like clause 5.4 which address misdescription of property or title, it is one of more general application. As *Voumard* describes:[16]

> Although the actual decision in *Flight v Booth* related to the right of a purchaser to be discharged from a contract for a misdescription in the contract of the premises to be sold, the principle embodied in the case is of

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

[14] The "mystification which has been allowed to characterise contracts for the sale of land, as contrasted to other contracts" (described by Lord Wilberforce in *Johnson v Agnew* [1980] 1 AC 367 (HL) at 391) should not obscure the application of the Contractual Remedies Act and general equitable principles applicable to contracts in which specific performance is available.

[15] *Flight v Booth*; *Southland Investments Ltd v Public Trustee* [1943] NZLR 580 (CA); *Travinto Nominees Pty Ltd v Vlattas* (1973) 129 CLR 1 at 28 per Menzies J.

[16] PN Wikramanayake *Voumard, The Sale of Land* (looseleaf ed, Thomson Reuters) at [12.120] citing Charles Bruce Morison *Rescission of Contracts* (Steven and Haynes, London, 1916) at 260. (citation omitted)

> wider application, and it operates to confer on either party to a contract the right to be discharged from further performance of her or his obligations where there has been a breach by the other party of any stipulation without which the injured party might never have entered into the contract at all.

In my view the principle applies whenever a compensation clause purports to restrict the ability to cancel for material breach.

[11] The more common application of the principle in *Flight v Booth* has been in relation to compensation clauses for misdescription of property or title. At common law deficiencies in respect of errors or misdescriptions in the subject of the sale were treated as a want of title.[17] Equity modified this rigour by establishing that where the deficiency was not substantial the vendor could obtain specific performance on condition of compensation to the purchaser. In such cases the purchaser lost the right to cancel the contract or obtain damages for its breach. Specific performance was not however available to a vendor where the deficiency was substantial. When compensation clauses were adopted, purporting to secure greater freedom to the vendor to insist on settlement if compensation was given, *Flight v Booth* preserved an exception for errors and misdescriptions which substantially changed the bargain contracted for.

[12] If the vendor can give the purchaser substantially what he agreed to buy, the vendor is entitled to specific performance of the agreement, subject to compensation.[18] "Compensation" generally means an abatement in the purchase money allowed to the purchaser for some diminution or deterioration in the value of property contracted to be sold.[19]

[13] If the vendor is not able to convey in substance what was agreed to be sold, he is not entitled to insist on performance by the purchaser and cannot obtain specific performance from the court unless the purchaser is willing to consent to the decree on condition of compensation.[20] A defect of substance may be in the "quantity or the quality of the property, the extent of the vendor's interest therein or the character of

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17 Roy M Stonham *The Law of Vendor and Purchaser* (Lawbook Co, Sydney, 1964) at [363].

18 *Rutherford v Acton-Adams* [1915] AC 866 (PC).

19 *Voumard* at [7310].

20 Stonham at [393] and *Southland Investments, Ltd v Public Trustee* [1943] NZLR 580 (CA) at 608-609 per Myers CJ.

the title".[21] If the purchaser is not willing to take the defective property with compensation, he is entitled to cancel and recover damages but in the alternative he may himself seek specific performance with compensation.[22] This is the "larger right" available to a purchaser recognised by Viscount Haldane in *Rutherford v Acton-Adams*:[23]

> Subject to considerations of hardship [the purchaser] may elect to take all that he can get, and to have a proportionate abatement from the purchase money.

[14] As Casey J said about the compensation clause in issue in *Holmes v Booth* (which was in the form of clause 5.4):[24]

> It is well established that the apparently wide scope of this standard clause will not deprive the purchaser of his right to cancel, if the effect of the error or misdescription is material and substantial "so far affecting the subject matter of the contract that it may reasonably be supposed that, but for such misdescription, the purchaser might never have entered into the contract at all …" (*Flight v Booth*). All relevant matters are to be taken into account in deciding from an objective point of view whether Mr Booth might never have entered into this contract. The fact that the parties included the warranty about tenancies is obviously a cogent factor indicating materiality, as are the buyers' purposes in acquiring the property and the use to which he intended to put it. The absence of any decrease in value due to the misdescription is no more than one relevant factor.

On the facts assumed for summary judgment, Regalwood could not on this approach have obtained specific performance against Property Ventures if it was unwilling to take the property with the defect, even if Regalwood offered compensation.

[15] The Court of Appeal held that the inclusion of clause 6.5 meant that the Sale and Purchase Agreement was materially different from those in issue in *Lingens v Martin* and *Holmes v Booth.* It therefore distinguished those cases. I consider, for reasons given at [18] to [24], that the Court of Appeal was wrong to hold that clause 5.4 did not also apply to the breach of warranty in issue. More importantly, however, I think it was in error in failing to apply the principle in *Flight v Booth* to the breach of warranty in issue.

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21 *Voumard* at [7300] citing *King v Poggioli* (1923) 32 CLR 222 at 246-248.

22 *Gall v Mitchell* (1924) 35 CLR 222; see also, *Voumard* at [7310].

23 *Rutherford v Acton-Adams* [1915] AC 866 (PC) at 870. (Like Blanchard J I find it unnecessary to consider whether the enactment of s 7 of the Contractual Remedies Act means aspects of *Rutherford* will need reconsideration).

24 *Holmes v Booth* (1993) 2 NZ ConvC 191,633 (CA) at 191,636. (citation omitted)

[16] Clause 6.5 deals with all breaches of the warranties and undertakings contained in clause 6. Some are not capable of raising the principle in *Flight v Booth*, either because they are not concerned with the property itself or because they are not significant enough in their impact to be material. Clause 6.5 is I think effective to require settlement where breach of warranty is not within the scope of the rule in *Flight v Booth*. In such cases the purchaser is left to post-settlement remedies. The position in relation to misdescription is different under the approach adopted in *Lingens v Martin.* The Court of Appeal there held that a purchaser entitled to compensation under clause 5.4 is not left to pursue remedies after settlement, but is entitled to compensation on or before settlement. It did not limit the adjustment pre-settlement to cases of defect in the property so material as to disentitle the vendor from obtaining specific performance. It is not necessary to express a concluded view in this case (where the assumed defect is material in the *Flight v Booth* sense and would preclude the vendor obtaining specific performance against an unwilling purchaser) but it seems to me that the approach in *Lingens v Martin* is sound because the obligation on the purchaser to accept a defective property or title (where the defect is not such as to disentitle the vendor from obtaining specific performance) is achieved only by agreement of the parties or through the specific performance jurisdiction of the court. Clauses 5.4 and 6.5 overlap in the case of breaches of warranty which amount to misdescriptions, but the two clauses are not coextensive. In the case of a breach of warranty which does not amount to a misdescription and which does not come within the principle in *Flight v Booth* (so that the vendor is entitled to insist on settlement), I consider that clause 6.5 is effective to enable the vendor to require settlement in accordance with the contract and leaves the purchaser to obtain his remedy after settlement.

[17] The principle in *Flight v Booth* is raised where the breach of warranty is such that it may be inferred that the purchaser would not have entered into the agreement if not assured of the vendor's performance of the warranty as to the nature and quality of the property which is the subject of the contract. In such circumstances, it seems to me that the breach of warranty equally amounts to a misdescription of the property which is the subject of the contract, so that clause 5.4 applies, as *Lingens v Martin* treated it. But even if not so characterised, I consider that the principle in *Flight v Booth* applies to such material breach of warranty despite the terms of clause

6.5 so that the purchaser is not under an obligation to settle unless willing to accept the property with the defect. That willingness will usually require abatement of the purchase price either arrived at by agreement between the parties or through the court in the exercise of its equitable jurisdiction to grant specific performance with conditions. Again, that is the outcome looked to by *Lingens v Martin.* I would apply it in the present case.

Application of clause 5.4

[18] Clause 5.4 deals with defects in the property or title. Any such defect, trivial as well as serious, at common law conferred a right of cancellation on the purchaser, who was accordingly obliged to elect between affirming the contract or cancelling it.[25] Clause 5.4 meets this strictness, to the benefit of the vendor, by providing that errors and misdescriptions in the property or title do not annul the sale.

[19] It was in respect of this clause that *Lingens v Martin* held in respect of a breach of warranty which also amounted to a misdescription that in circumstances where the contract provided for compensation, "the vendors are ... not entitled to give something less than they promised, while insisting on payment of the full price without adjustment":[26]

> It follows that a 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. This is not an injustice to the vendor, who ex hypothesi is unable to provide what he promised. His remedy is to sue for specific performance, and ask the Court to resolve any question of compensation. In the present case, instead of issuing their settlement notice, the respondents could have brought on for hearing the proceedings already commenced by Ms Lingens.

In the present case, too, the vendor "asked for more than [it was] entitled to demand".[27] The notice was invalid because the vendor was not "ready, willing and able to perform the contract according to its terms".[28]

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25 Since enactment of the Contractual Remedies Act it is convenient to use its language of cancellation, rather than the common law language of rescission.
26 At 191,946.
27 At 191,945.
28 At 191,945.

[20] I consider the present case is within the scope of clause 5.4. In agreement with Blanchard J, I consider that the Court of Appeal was wrong to suggest that clause 5.4 is restricted to misdescription of title and does not extend to defects of quality. The Court of Appeal was influenced in coming to its view by the heading to clause 5 ("Title, boundaries, and requisitions"). The heading is not determinative.[29] And clauses equivalent to clause 5.4 have long been understood to include misdescriptions in the quality of the property or its improvements.[30] Indeed, the equivalent of clause 5.4 was amended in 1987 to include reference to misdescriptions in title (perhaps in response to the view expressed in *Travinto Nominees Pty Ltd v Vlattas*[31] that the omission of any reference to title confined the relevant misdescription to matters of quality), an inclusion which would not have been necessary had the clause been thought to exclude matters of quality.

[21] Overlap between breaches of warranty and misdescription of property was recognised by the Court of Appeal in *Lingens v Martin.* It is a matter of construction of the contract whether a breach of warranty amounts to an "error, omission or misdescription of the property" within the meaning of clause 5.4.[32] The error or misdescription may be in relation to the description of the land or the improvements on it.[33] Where the subject of the agreement is a tenanted commercial building, a warranty of compliance with the Building Act is in my view a description of the quality of the property. As in *Lingens v Martin*, "breach of the warranty arises from the failure of the property to comply with the description".[34]

[22] In the High Court, Associate Judge Christiansen considered that something more than an assertion of an entitlement to compensation was necessary to invoke clause 5.4. He distinguished *Lingens v Martin* because in that case the purchaser had already instituted proceedings for specific performance before the vendor cancelled. This is not a point that can be resolved before trial of the facts. *Holmes v Booth* illustrates that a vendor otherwise able to insist on specific performance with compensation cannot do so if the purchaser has been deprived of the information on

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29 Clause 1.3(4) provides that the headings are not part of the agreement, but for information only.
30 *Voumard* at [7300].
31 *Travinto Nominees Pty Ltd v Vlattas* (1973) 129 CLR 1.
32 *Travinto Nominees* at 13 per Barwick CJ; and see *Voumard* at [7340].
33 *Travinto Nominees* at 13 per Barwick CJ.
34 At 191,945.

which reasonably to determine his course of action (whether to cancel or to proceed with compensation). It will be a matter for determination at trial whether Property Ventures had got to that point.[35] The correspondence set out by Blanchard J at [42] suggests that Property Ventures was still trying to ascertain whether Regalwood would comply with the warranty and what the costs of its achieving compliance itself (and the measure of the abatement it could claim) would be. The circumstances that Property Ventures was denied access to the reports obtained by Regalwood and was not permitted access to carry out its own assessment are likely to be important.[36]

[23] The Court of Appeal decided that clause 5.4 applied only to misdescriptions existing at the date of the agreement. In this Court, Blanchard and Tipping JJ agree with the reasoning of the Court of Appeal on the point. I do not. If right, clause 5.4 would have no application to breaches of clauses 6.2 and 6.3[37] of the agreement because they are warranties as to the quality of the property at the date of settlement. I do not accept that there is practical difficulty if it is not known until settlement whether the warranty is fulfilled and whether there is in fact a misdescription. In such circumstances, the approach adopted in *Holmes v Booth*, and approved in *Lingens v Martin*, recognises that the purchaser is not in a position to decide whether to cancel or seek compensation. The vendor may however bring matters to a head by seeking specific performance.

[24] Quite apart from practical considerations, I do not think it is sound to suggest that misdescriptions (including breaches of warranty amounting to misdescriptions) must be representations of present fact at the time of the contract. That is contrary to authorities which recognise as misdescriptions, within the scope of compensation

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[35] The question of election is one on which it is not necessary for me to expand. On the provisional facts before the Court it may be doubted however whether the purchaser had indeed come to the point of election.

[36] Although the matter was left open in the High Court I indicate for completeness that in application of *Holmes v Booth* (with which I agree) when the purchaser is not in a position to quantify a claim for compensation (as when denied information or access to the property to make such assessment) notice of claim such as is contained in the letter of 18 May 2006 well be sufficient. It is unnecessary to resolve the point here because of the view I take that the vendor was not ready able and willing to settle.

[37] Thus the vendor warrants and undertakes in clause 6.2 that at the giving and taking of possession there are no arrears of rates and chattels are delivered. And in clause 6.3, the vendor warrants and undertakes that at settlement the vendor has not given any consent or waiver which affects the property.

clauses equivalent to clause 5.4, failure to give vacant possession,[38] or waste between the date of the contract and settlement in breach of contract.[39] Questions of title are often not resolved until settlement. Given the history of provisions such as clause 5.4, which arose out of the strictness of the common law in relation to title defects, it would be strange if clause 5.4 were held ineffective to deal with any such deficiencies arising after the date of the contract. Little authority is cited in support of this rather startling proposition. The Court of Appeal referred to *Hansen v Boocock*, an unreported decision of the High Court.[40] Wylie J in that case seems to have been concerned that the vendor should not be able to "shelter behind" the clause 5.4 equivalent in respect of a warranty as to the gradient of the land in a subdivision in which the earthworks were not completed at the date of the contract. His interpretation, confining the operation of clause 5.4 to warranties as to existing fact, allowed him to hold that it did not confine the remedy of the purchaser to compensation.

[25] But the interpretation of clause 5.4 to achieve that effect was unnecessary on the view I have expressed as to application of the principle in *Flight v Booth*. If the discrepancy in the representation as to the condition of the property at settlement was material, the purchaser would not have been confined to compensation after settlement but would have been entitled to elect to cancel or to seek specific performance with abatement of the purchase price. The principle in *Flight v Booth* does not seem to have been considered. I would not treat *Hansen v Boocock* as authoritative on this point. In my view it is enough if the description (that the building would be complying) is in error at the date that matters – completion. If it is, the vendor cannot supply what he has contracted to deliver.

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38 *Curtis v French* [1929] 1 Ch 253 (Ch); see also *Topfell Ltd v Galley Properties Ltd* [1979] 1 WLR 446 (Ch) where the reasoning does not draw a distinction between the date of contract and date of settlement. Although in that case the description that the property was vacant was current at the date of the contract, I do not accept that the authority of the case is limited to that situation. The date material to the purchaser is the date of settlement.

39 Although waste has a different rationale, it is similarly a breach which entitles the purchaser to compensation for detriment to the property between the date of contract and the date of settlement. *Phillips v Silvester* (1872) LR 8 Ch App 173.

40 *Hansen v Boocock* HC Auckland CP2078/88, 13 June 1991.

Conclusion

[26] In summary, I agree with the Court of Appeal that "settlement" in clause 6.5 means "settlement in full" and disagree with other members of this Court on the point of interpretation. But I consider that clause 6.5, like clause 5.4 (which in my view also applies), does not oblige a purchaser to settle where the vendor is in material breach, within the principle in *Flight v Booth*. If the vendor was in such material breach of contract (a matter that cannot be resolved on summary application) it was not "ready able and willing" to perform the contract and Property Ventures was not obliged to settle on its statement. Regalwood's cancellation was not shown on summary application to have been valid. The declaration obtained in the High Court should have been declined leaving the action between the parties to continue. In addition to defending the claim for declaratory judgment and associated relief, Property Ventures may well seek to counterclaim for cancellation itself and associated relief or may seek specific performance with abatement of purchase price (if that course is still open on an equitable basis).

Result

[27] The Court being unanimous in the result, the appeal is allowed and the orders made in the High Court on the summary judgment application set aside. The case is remitted to the High Court. The respondent is ordered to pay the appellant's costs in this Court of $15,000 and reasonable disbursements to be fixed by the Registrar. The costs order made in the Court of Appeal is reversed.

BLANCHARD, McGRATH AND WILSON JJ

(Given by Blanchard J)

Introduction

[28] On 18 October 2004 Regalwood Holdings Ltd agreed to sell a commercial building at 78 Lichfield Street, Christchurch to Property Ventures Investments Ltd for $1,500,000. It warranted in the agreement that at the giving and taking of

possession, which was to occur on settlement, all obligations imposed on it under the Building Act 1991 would be fully complied with. The case has been argued for the purposes of summary judgment on the assumption that at all relevant times the building did not have a current building warrant of fitness required under s 45 of that Act and so there was a breach of the contractual warranty.

[29] Although several issues have been argued in this Court, the principal matter which must be determined is whether Property Ventures was obliged to settle in full with Regalwood Holdings and separately pursue its claim for breach of warranty or whether it could decline to settle unless permitted to deduct an amount representing damages for that breach. If Regalwood could insist on settlement in full, there is a further question concerning the validity of its cancellation of the contract almost exactly a year after it had served a settlement notice on Property Ventures.

Facts

[30] The contract was on the Seventh Edition (2) of the form approved by the Real Estate Institute of New Zealand and the Auckland District Law Society (the REI/ADLS form). It provided for a deposit of $100,000 with the balance to be paid "when a clear and registrable title shall be given and taken", that is, on settlement. The possession date was stipulated to be 30 working days "after confirmation". That was a reference to the fact that the contract was conditional upon confirmation by Property Ventures of its satisfaction with various matters, including its ability to obtain finance "in respects satisfactory to itself to enable the due completion of the purchase" and the "compliance of the property with all relevant legislation and by-laws". That confirmation was given on 1 December 2004 and the deposit was paid. In accordance with cl 1.1(3) of the General Terms of Sale set out in the form the settlement date was to be the possession date. Allowing for the exclusion of the period 24 December to 5 January from the working days, that meant that settlement was due on 25 January 2005.

[31] Property Ventures entered into an agreement on 18 January 2005 to on-sell the property to the Christchurch City Council at a slightly enhanced price. The REI/ADLS form was used for that contract also.

[32] The solicitors for Regalwood Holdings and Property Ventures took steps to get ready for settlement but on 25 January the solicitors for Property Ventures demanded a copy of the current building warrant of fitness for 78 Lichfield Street "in terms of the requirements in cl 6.2(6)(b) of the General Terms of Sale". That clause read:

> 6.2 The vendor warrants and undertakes that at the giving and taking of possession:
>
> …
>
> (6) Where, under section 44 of the Building Act 1991 ("the Act"), any building on the property sold requires a compliance schedule ("the building"), all obligations imposed on the vendor under the Act are fully complied with. Without limiting the generality of the foregoing, the vendor further warrants and undertakes that:
>
> (a) The vendor has fully complied with any requirements specified in any compliance schedule issued by a territorial authority under section 44 of the Act in respect of the building; and
>
> (b) The building has a current building warrant of fitness supplied under section 45 of the Act; and
>
> (c) The vendor is not aware of any reason, that the vendor has not disclosed in writing to the purchaser, which would prevent a building warrant of fitness complying with section 45 of the Act from being supplied to the territorial authority when the building warrant of fitness is next due; and
>
> (d) The territorial authority has not issued any notice under section 45(4) of the Act to the vendor or to any agent of the vendor which has not been remedied by the vendor, and the vendor is not aware of any reason, that the vendor has not disclosed in writing to the purchaser, which could entitle the territorial authority to issue such a notice.

[33] In a further letter the same day Property Ventures' solicitors said that they had been advised by the Christchurch City Council that there was no current warrant of fitness. They required that situation to be rectified forthwith. It emerged that there was a complicating factor. The use of the building had been changed when in 2003 Regalwood had entered into a tenancy of part of the building. The Council advised that, as a result, Regalwood would have to obtain "appropriate engineering reports (fire, structural, etc)" for the purpose of determining whether work would

have to be carried out on the building to meet the requirements of the Building Code. The Council issued Regalwood with a notice under s 45(4) of the Building Act (a notice to rectify) on 31 January.

[34] During February Regalwood applied for a building consent to do alterations to the building but the Council took the position that earthquake strengthening of part of the building would be necessary. It seems that this might have been avoided if the tenancy in question, to a company called Battle Link Ltd, could have been terminated but that was never achieved.

[35] On 15 March the Council cancelled its agreement with Property Ventures because a condition of that agreement had not been satisfied. The Council commented:

> Unfortunately, the difficulties with regard to the Warrant of Fitness for the building are such that the Council does not wish to proceed whilst there is no significant change of position by the current owner.

[36] By 17 May Regalwood had changed solicitors. Its new solicitors, Goodman Steven Tavendale and Reid, wrote to Property Ventures' solicitors, Cousins & Associates, drawing attention to cl 6.5 of the General Terms of Sale and asserting that the alleged breach of the warranty in cl 6.2 did not defer Property Ventures' obligation to settle. Clause 6.5 reads:

> 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 or 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.

[37] On the same day Regalwood served a settlement notice on Property Ventures giving it 12 working days in which to settle. Clause 9.0 of the General Terms of Sale form provides in relevant part:

> **9.0 Notice to complete and remedies on default**
>
> 9.1 (1) If the sale is not settled on the settlement date either party may at any time thereafter serve on the other party notice ("a settlement notice") to settle in accordance with this clause; but

(2) 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.

…

9.2 Upon service of the settlement notice the party on whom the notice is served shall settle:

(i) on or before the twelfth working day after the date of service of the notice; or

…

time being of the essence, but without prejudice to any intermediate right of cancellation by either party.

…

9.4 If the purchaser does not comply with the terms of the settlement notice served by the vendor then:

(1) Without prejudice to any other rights or remedies available to the vendor at law or in equity the vendor may;

(a) sue the purchaser for specific performance; or
(b) cancel this agreement by notice and pursue either or both of the following remedies namely:

(i) forfeit and retain for the vendor's own benefit the deposit paid by the purchaser, but not exceeding in all 10% of the purchase price; and/or
(ii) sue the purchaser for damages.

…

9.6 The party serving a settlement notice may extend the term of the notice for one or more specifically stated periods of time and thereupon the term of the settlement notice shall be deemed to expire on the last day of the extended period or periods and it shall operate as though this clause stipulated the extended period(s) of notice in lieu of the period otherwise applicable; and time shall be of the essence accordingly. An extension may be given either before or after the expiry of the period of the notice.

9.7 Nothing in this clause shall preclude a party from suing for specific performance without giving a settlement notice.

…

[38] The service of the settlement notice drew the following response on 20 May from the solicitors for Property Ventures:

We refer to your letter of 17 May 2005. We note that we have also received a copy of the settlement notice served on our client.

With respect to the matters you have raised we advise as follows:

1. The fact that our client confirmed condition 14.1 does not in any way release your client from its obligations under the agreement. Indeed, our client was entitled to and did rely on the various vendor warranties in conducting its due diligence investigations.

2. Notwithstanding the provisions of clause 6.5 *Lingens v Martin* makes it clear that a warranty breach of this nature comes within the category of a mis-description under clause 5.4 and our client is entitled to claim compensation. Neither your client's settlement notice nor your letter makes any mention of compensation or suggests that your client has complied with its contractual obligations. As such, we consider your client's settlement notice is invalid.

3. We understand that the cost of bringing the property up to a condition whereby the building warrant of fitness would be issued is likely to be several hundred thousand dollars. Therefore, as an alternative to the above option, our client would be entitled to cancel the contract and sue your client for damages together with refund of the deposit.

With respect, your client has been aware of the problem with the warrant of fitness for many months now and has failed to make realistic attempts to resolve it. Without prejudice, we strongly suggest that your client enter into realistic negotiations with either our client and Battle Link with respect to the termination of its tenancy or with our client so that settlement can proceed with an appropriate deduction from the purchase price for your client's breach of warranty. In this regard we assume your client has obtained a costing of the work required to obtain a building warrant of fitness and we suggest you forward that to us for our client's consideration.

If your client is not prepared to adopt a sensible approach to resolve a problem that is entirely of its own making and for which it is fully contractually responsible then our client will be filing proceedings for specific performance seeking settlement of the agreement with a substantial reduction in the purchase which would include:

(a) the costs of attending to all the work required to obtain the building warrant of fitness

(b) estimated compensation payments require to be paid to any tenants who are disturbed as a result of those works

(c) rent from 14 March 2005

(d) costs and interest.

If we do not receive your confirmation that the settlement notice is withdrawn and that your client agrees to enter into good faith negotiations

> from 5 pm Wednesday 25 May 2005 then our client will issue such proceedings without further notice.

[39] Clause 5.4 reads:

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

[40] Regalwood did not give notice of cancellation when the 12 working days expired, nor did Property Ventures issue the proceedings for specific performance threatened in its letter of 20 May. For many months Regalwood appears to have endeavoured to reach an accommodation with the Council over the necessary building works. It does not appear that any physical work was done on the building. In the meantime Property Ventures had no access to the building.

[41] In affidavits on behalf of Property Ventures, which have not been contradicted, it is deposed that Property Ventures obtained its own estimate of the cost of the necessary upgrading works from a firm of quantity surveyors. These were based on actual costs for a nearby property owned by it, with an adjustment pro rata for the building area of 78 Lichfield Street. A costing in an amount of $565,000 was given to a representative of Regalwood at one of a number of meetings between the parties. Property Ventures required an abatement of the purchase price to the extent of the cost of the work unless a valid building warrant of fitness and code compliance certificate were obtained prior to settlement.

[42] Little or no progress was made between the parties. Then on 30 March 2006 Regalwood's solicitors wrote to Cousins & Associates saying that Property Ventures had failed to comply with the settlement notice served on 17 May 2005 and was in default of that notice. It referred to the remedies in cl 9.4. Claiming that a building warrant of fitness had now been obtained, the letter required settlement by 5pm on 7 April 2005 [sic],[41] saying that the solicitors had been instructed to commence proceedings for specific performance should settlement not occur by this date. The period given was five working days.

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[41] But see *Bryers v Harts Contributory Mortgages Nominee Co Ltd* [2002] 3 NZLR 343 (CA) at [18].

[43] The solicitors for Property Ventures replied on 7 April 2006 saying that they understood that a code compliance certificate for the building had not yet been issued, that there was no evidence that the s 45(4) notice had been remedied and that Property Ventures was not satisfied that the building warrant of fitness complied with the requirements of the Building Act. They advised that a new LIM Report had been requested from the Council. The letter went on:

> We understand that the major impediment to your client complying with the warranties referred to above is the obligation to undertake seismic strengthening in accordance with the Council's letter to your client of 1 June 2005. In order to progress a possible negotiated resolution of these matters, our client has advised your client of its consultant's estimate of the costs for complying with this requirement (we note this was obtained last year and will probably need to be updated). Our client advises it was discussed and agreed at an earlier meeting that the report your client was obtaining from Holmes Consulting Group would be supplied to our client. We are aware that that report is now completed but your client is now no longer willing to provide our client with a copy.
>
> In light of the above, we are not satisfied that your client is in a position to comply with all its warranties under the agreement. If it is not able to do so then the only way to progress matters is for the parties to be able to assess the costs of that non-compliance. We therefore suggest that you take further instructions from your client and either provide us with satisfactory evidence that your client is in a position to comply with its warranties or that it is willing to realistically discuss the costs of non-compliance.

[44] On 12 May the solicitors for Regalwood wrote again referring to the agreement and "the settlement notice previously issued to your client". They said that Regalwood had instructed them that "unless your client completes their settlement obligations by Friday 19 May 2006 our client will exercise their clear entitlement to cancel the agreement". They sought confirmation of Property Ventures' position.

[45] The solicitors for Property Ventures replied on 18 May saying that they did not accept that Regalwood was entitled to issue a settlement notice and therefore that it had any right of cancellation. They said that as Regalwood had refused to release the report obtained from Holmes Consulting Group their client was obtaining its own report and undertaking a detailed assessment of all losses caused by Regalwood's breach, prior to commencing action against Regalwood.

[46] On 22 May 2006 Regalwood served a notice of cancellation referring to the failure to remedy the default stipulated in the notice given on 17 May of the previous year. By a statement of claim dated 10 May 2007 Regalwood sought from the High Court in Christchurch a declaration that its settlement notice and cancellation of the agreement were valid and orders that a caveat lodged by Property Ventures be removed and the deposit forfeited. It applied for summary judgment.

High Court

[47] In the High Court[42] the argument for Property Ventures in opposition to summary judgment concentrated on whether it had been entitled to equitable compensation under cl 5.4 of the General Terms of Sale for the consequences of Regalwood's breach of warranty. Counsel for Property Ventures relied upon the decision of the Court of Appeal in *Lingens v Martin*[43] where, it was argued, a breach of warranty had been held to amount to a misdescription of the property. But Christiansen AJ said that:[44]

> ... something more than a bare claim to a right for compensation should be signalled before a vendor is without recourse to require settlement to be paid in full … even if a purchaser is presented with difficulties in calculating a compensation claim amount.

It must be demanded in writing before settlement and the purchaser must commit to settlement. The Associate Judge cited[45] from McMorland, *Sale of Land*:[46]

> If a breach of warranty or undertaking is established, the purchaser will have certain remedies and must decide which of those to exercise … There is no right to refuse to settle while threatening to cancel if the vendor will not reduce the price, a tactic sometimes employed. It is the purpose of cl 6.5 to make this situation, which is the law in any event, a clear and express term of the contract. A breach of warranty does not defer the obligation to settle on the due date as required by the contract.

[48] The Judge distinguished *Lingens* on the basis that there, before the vendors issued their settlement notice, the purchaser had issued a proceeding seeking specific

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42 *Regalwood Holdings Ltd v Property Ventures Investments Ltd* (2007) 9 NZCPR 703 (HC).
43 *Lingens v Martin* (1994) 2 NZ ConvC 191,940 (CA).
44 At [35].
45 At [36].
46 DW McMorland *Sale of Land* (2nd ed, Cathcart Trust, Auckland, 2000) at [8.22(a)].

performance subject to an allowance of compensation which had been quantified. In the present case, the Judge said, Property Ventures did not follow that process. It could not rely on "alleged informal awareness of disputes".[47] No claim for compensation had been demanded in Property Ventures' letter of 20 May 2005. In the face of the notice to settle it did not elect either to affirm the contract or to bring it to an end. At no point did it make a commitment to settle. The Judge therefore granted Regalwood's application for summary judgment.

Court of Appeal

[49] In the Court of Appeal[48] the argument again revolved around whether the breach of warranty amounted to a misdescription within cl 5.4. Glazebrook J, giving the reasons of the Court, said that such a clause applied only to misdescriptions relating to the state or quality of the property at the time the contract was made. The requirement that compensation must be demanded in writing before settlement precluded the application of the clause to a warranty not required to be performed until settlement. Until the time of its performance, there was no breach for which compensation could be demanded.[49]

[50] The Court of Appeal also doubted whether *Lingens* was correctly decided, even in relation to misrepresentations operating at the date of the agreement where they related to matters other than title or boundaries. It observed that the heading to cl 5.0 was "Title, boundaries and requisitions". The Court also considered that cl 6.5 governed the situation where a warranty or undertaking covered by cl 6.0 was in issue and required remedies including damages or compensation (assuming *Lingens* was correctly decided) to be exercised after settlement had occurred at the full purchase price. Property Ventures was therefore obliged to settle in full.[50]

[51] The Court also rejected an argument, not advanced in this Court, that Regalwood had elected to affirm the contract and for that reason could not cancel. It

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47 At [41].
48 *Property Ventures Investments Ltd v Regalwood Holdings Ltd* [2008] NZCA 422, [2009] 1 NZLR 481 per Glazebrook, Fogarty and MacKenzie JJ.
49 At [13].
50 At [14]–[20].

did accept a submission that Regalwood had waived the essentiality of time but it concluded that a new settlement date had been validly set in Regalwood's letter of 30 March 2006 and a further date in the letter of 12 May, which made it absolutely clear that cancellation would follow any failure to settle in full on the new date.[51]

[52] The Court dismissed Property Ventures' appeal.

Submissions

[53] Although Mr Forbes QC, for Property Ventures, continued to support the view that there had been a misdescription of the property falling within cl 5.4, on the basis of which equitable compensation could be deducted, in this Court he placed much greater reliance on the argument that the (assumed) breach of the warranty in cl 6.2(6) gave rise to a cross-claim by Property Ventures which it was entitled to set off against the settlement moneys. Thus, counsel submitted, because Regalwood was improperly insisting on receiving the full balance of the price on settlement, it was not entitled to issue a settlement notice. For that reason, and also because neither of the letters from its solicitors in March and May 2006 gave 12 working days' notice, he submitted that the cancellation had been invalid.

[54] For his part, Mr Davidson QC submitted for Regalwood that cl 5.4 was of no application, essentially for the reasons given by the Court of Appeal, and that cl 6.5 prevented Property Ventures from exercising any right of set-off otherwise available to it. He also submitted that adequate notice of cancellation had been given in the particular circumstances.

Equitable compensation

[55] A court will generally order a land sale contract to be performed notwithstanding some deficiency in the property as compared with the way it was described in the contract, for example when the area able to be conveyed is less than

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51 At [23]–[32].

stated in the contract.[52] That is subject to two important qualifications. First, such an order will not be made against an unwilling purchaser if the deficiency in the description of the property is so substantial that the purchaser will receive a property entirely different from that contracted for.[53] Secondly, the purchaser is entitled to be compensated by the vendor for the deficiency by way of an abatement of the price otherwise due on settlement.[54] Specific performance with compensation to the purchaser may also be ordered where the vendor has acted in breach of its duty as constructive trustee of the property for the purchaser between contract and settlement, such as by letting buildings go to ruin[55] or overgrazing a rural property[56] or by removing items which were included in the subject matter of the contract.[57]

[56] In this case there was no change in the physical condition of the property after the contract was signed but it is said that there was a misdescription of the property. If there was, Property Ventures was able on settlement to deduct equitable compensation provided its claim was sufficiently put forward prior to settlement as required by cl 5.4.

[57] A "misdescription" of the property is an incorrect statement of fact about it appearing in the contract or in documents sufficiently linked to it,[58] such as an over-statement of the area. Clause 5.4, unlike some older forms of compensation clause, also extends to questions of title. However, lack of a building warrant of fitness or non-compliance with the building code is not a title defect.[59] It is a defect in the quality of the property. A vendor usually has no duty to disclose defects of quality unless they have been concealed, nor to remedy them if it has not given a warranty about the relevant quality of the property.

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52 As in *Gall v Mitchell* (1924) 35 CLR 222.

53 This is the rule in *Flight v Booth* (1834) 1 Bing NC 370; 131 ER 1160 (CP) where the test laid down was whether, but for the misdescription, the purchaser might never have entered into the contract: see in New Zealand *Southland Investments, Ltd v Public Trustee* [1943] NZLR 580 (CA). The rule may apply even when a contract contains a compensation clause like cl 5.4.

54 An order for specific performance may not be made if it is impossible to assess compensation for the purchaser: *Rudd v Lascelles* [1900] 1 Ch 815 (Ch).

55 *Phillips v Silvester* (1872) LR 8 Ch App 173.

56 *Schwamm v Flyger* (1910) 12 GLR 705 (SC).

57 *Casey v Thompson Nominees Pty Ltd* (1984) ANZ Conv R 646 (VSC).

58 *Sharplin v Henderson* [1990] 2 NZLR 134 (CA) at 136.

59 *McInnes v Edwards* [1986] VR 161 (SC) and see McMorland at [8.15(b)].

[58] In the Privy Council's decision in *Rutherford v Acton-Adams*,[60] Viscount Haldane, delivering the advice of the Board, said that a purchaser's right to an abatement from the purchase money applied only to a deficiency in the subject-matter described in the contract. It did not apply to a claim to make good a representation about that subject-matter made not in the contract but collaterally to it. It follows that a warranty made in the contract concerning the existing condition of the property is capable of being a misdescription of the property.[61] But that will very much depend upon the manner in which the warranty is expressed: whether it is implicit in what is said in the warranty that the state of affairs to which the warranty is directed does presently exist at the date of the contract.[62] Thus, a warranty that works done on the property have been carried out in compliance with a building permit may well amount to an implicit representation that, at the time of the contract, the building on the property complies with the requirements of the local authority, thereby describing a compliant building. On the other hand, a limitation on the scope or coverage of the warranty may have the consequence that it does not expressly or by implication describe the subject-matter of the contract at the date of the contract. In *Lingens v Martin*, where the Court of Appeal appears to have found a misdescription inherent in a warranty, the scope of the warranty was actually restricted to compliance of any works done or permitted *by the vendor*, so the existence of an unspoken representation concerning the state of the building generally seems problematical. The conclusion expressed in the Court of Appeal in the present case concerning *Lingens v Martin* may therefore be correct in so far as it rested on the non-existence of any misdescription.[63]

[59] The warranty in cl 6.2(6) in the present case was not confined to works done by the vendor. But there is a real difficulty for the purchaser in claiming

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60 *Rutherford v Acton-Adams* [1915] AC 866 (PC) at 870.

61 The distinction made in *Rutherford* between a representation in the contract and a pre-contractual representation may have disappeared following the enactment of s 7 of the Contractual Remedies Act 1979. But that provision does not alter the law on what constitutes a misdescription.

62 For example, *Topfell Ltd v Galley Properties Ltd* [1979] 1 WLR 446 (Ch) where the statement about vacant possession related to the present state of the property but also functioned as a warranty that this state of affairs would exist in settlement.

63 The Court of Appeal was, however, wrong to consider, in reliance on the heading to cl 5.0, that cl 5.4 was restricted to matters of title or boundaries. Headings are "for information only and do not form part of this agreement": cl 1.3(4). The clause applies to *all* errors, omissions or misdescriptions.

compensation under cl 5.4 because the warranty is directed to a future state of affairs, namely that to prevail on the future date when possession will be given and taken. It therefore cannot fairly be read as an implied statement about the condition of the property at the date of the contract.[64] Accordingly, it does not misdescribe the property. Rather, it is making a promise about what the condition of the property will be in the future, on the possession date. In pointing this out, the Court of Appeal rightly observed that cl 5.4 cannot have been intended to encompass a promise of this kind since no breach can occur until that date, yet a claim for compensation must be made before settlement, which under cl 1.1(3) of the General Terms of Sale is to be the possession date unless another date is specified.

[60] Property Ventures has therefore not shown that it had any entitlement to claim compensation by way of abatement of the price for misdescription because of the non-compliance with the Building Act.

Equitable set-off

[61] Property Ventures says that, at the time specified for settlement in Regalwood's settlement notice demanding payment of the price in full, Property Ventures had the right to claim an abatement for the outstanding breach of the warranty in cl 6.2(6), in respect of which it was entitled to an equitable set-off against the price. It says that if a party calls for performance by the other party to which it is actually not entitled, and does not then demonstrate a willingness to have matters in dispute resolved by the court or by other available means, that party cannot claim to have been willing to perform the contract according to its terms. It is therefore unable validly to issue a settlement notice under cl 9.1. It is submitted that by insisting on receiving settlement in full Regalwood was not, as required by cl 9.1(2), "at the time of service [of the notice] in all material respects ready, able and willing to proceed to settlement".

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[64] It was faintly argued for Regalwood that Property Ventures could not rely on the warranty because it must be taken to have known of the position regarding the building warranty of fitness when it entered into the contract and certainly when it confirmed that the condition concerning its satisfaction with certain matters, including compliance with relevant legislation and bylaws, had been fulfilled. But the very purpose of the warranty was to assure Property Ventures that on possession the building would be fully compliant. The warranty was not restricted to matters unknown to Property Ventures.

[62] Before any impact of cl 6.5 on this argument is considered, it is first necessary to determine whether, as Property Ventures asserts, a purchaser of land can raise a set-off in respect of unliquidated damages for a breach of a warranty in the sale contract as a means of defending a vendor's claim for the price (or when the purchaser seeks to enforce the contract by means of specific performance). We are not here concerned with a common law set-off under the Statutes of Set-off 1728 and 1734,[65] which applies only when both claims are for liquidated sums. Nor are we concerned with a form of abatement paralleling that available at common law to a purchaser of goods[66] and recognised in s 54(1)(a) of the Sale of Goods Act 1908. A vendor of land cannot simply treat the price due on settlement as a liquidated debt and sue for it as such, for the purchaser's obligation to pay it is only to be performed concurrently with the vendor's obligation to deliver a transfer of title. It does not become payable as a debt until the conveyance has taken place.[67] If wanting to receive the price the vendor must invoke the court's equitable jurisdiction and seek an order for specific performance by the purchaser[68] whereby the purchaser will be required to pay what is owing concurrently with performance by the vendor of its settlement obligations. Alternatively, the vendor may have the right to cancel and then sue for damages for the loss of its bargain. However, unless time is already essential, the vendor cannot proceed to cancel without having first called upon the purchaser to settle by a notice making time of the essence or, under the REI/ADLS form, by a settlement notice. It is to be noted also that an award of damages after cancellation will not equate the unpaid portion of the price, for the vendor, having cancelled, will retain the land and any forfeited deposit, for which credit must be given.

[63] Accordingly, while the contract remained uncancelled, Regalwood had to pursue its claim against Property Ventures, if at all, in equity. But can a purchaser against whom a demand for settlement is made, and so called upon to perform an

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[65] 2 Geo 2 c 22 and 8 Geo 2 c 24, preserved in New Zealand by the Imperial Laws Application Act 1988, s 3 and Sch 1.

[66] *Mondel v Steel* (1841) 8 M & W 858 at 870; 151 ER 1288 at 1293 (Ex).

[67] *Laird v Pim* (1841) 7 M & W 474; 151 ER 852 (Ex).

[68] The vendor need give no advance warning of doing this: cl 9.7 confirming *Hasham v Zenab* [1960] AC 316 (PC).

obligation enforceable by the vendor only in equity, assert a cross-claim for breach by the vendor and seek an abatement of the price in reliance on a right to an equitable set-off? Or putting the matter from the perspective of a purchaser seeking to hold the vendor to the contract, can such a purchaser ask the court to make an order for specific performance by the vendor when it has declined to settle without an abatement of the price?

[64] Assuming the ingredients for a set-off were otherwise present, it would be strange, even in an area of law so replete with technicalities, to deny a defence of equitable set-off to a vendor's claim which must be enforced in equity, or to refuse specific performance with an abatement to a purchaser for its cross-claim, all the more so in this country where the same court has both common law and equity jurisdictions exercisable, if necessary, in the same proceeding. It is not surprising, therefore, to find that in *BICC Plc v Burndy Corp*[69] the Court of Appeal of England and Wales has held that since the Supreme Court of Judicature Act 1873 "equitable set off can ... be pleaded as a defence where appropriate to proceedings, whether at law or in Chancery":[70]

> The essence of an equitable set off is that equity considered it unjust that a claimant should seek to enforce a claim without giving credit for a related cross-claim which the defendant had against him. The logic of the argument makes the defence of equitable set off equally applicable, under modern procedure, whatever form of relief, legal or equitable, the plaintiff is claiming, provided that that relief depends on the non-payment of the money claim to which the equitable set off is a complete defence.

The *B.I.C.C.* case was not about land. It concerned an agreement under which, if one party failed to make certain payments as a contribution to the cost of maintaining jointly owned patents, the other could call for the defaulting party to assign them to it. The defendant failed to make the necessary payments but, if sued for them, could have asserted a common law set-off in respect of other liquidated sums separately owed to it by the plaintiff. It was held, by majority, that the defendant could establish that same set-off when the plaintiff, without claiming the money, sought to

69 *BICC Plc v Burndy Corp* [1985] Ch 232 (CA)
70 At 250–251 per Dillon LJ.

have the defendant assign the patents.[71] The defendant had relied on the set-off to demonstrate that the plaintiff had had no right to call for any assignment. All the more so should a defence by way of equitable set-off be possible where the claim being faced seeks a payment of money enforceable only in equity. Furthermore, it is not a point of distinction that in the present case Property Venture's claim is for an unliquidated amount. An equitable set-off may be claimed for an unliquidated amount.[72]

[65] Leading texts from Australian authors also confirm the availability of equitable set-off against claims in equity. Spry[73] expresses the opinion that if on general principles an equitable set-off is appropriate, it does not matter that the relevant proceedings are for specific performance or some other remedy. Meagher, Gummow and Lehane says that "[i]t has now been decided that an equitable set-off can be pleaded against a non-money claim, and in particular as a defence in an action for specific performance".[74]

[66] There is no reason why set-off should be denied simply because it is asserted against a vendor of land and the payment required of the purchaser must be made concurrently or inter-dependently with a transfer of property. Derham[75] discusses set-off by a purchaser of land and, in doing so, directly addresses a High Court of Australia decision, *King v Poggioli*,[76] which might once have appeared to stand in its way. That case was on appeal from New South Wales at a time when the common law and equity jurisdictions in that State remained separate. By majority, the Court refused a purchaser specific performance with an abatement of the price on account of claimed compensation for the consequences of the vendor's delay in giving possession of the property. The purchaser alleged losses of his livestock because of

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[71] Ackner LJ agreed with Dillon LJ. Kerr LJ dissented. He accepted that in principle a defence of equitable set-off was available to a claim in equity. But he considered that the defence was available only when all requirements for an equitable set-off were met. In his view, the defendant's legal set-off did not impeach the plaintiff's equitable claim because it arose from unconnected contracts. He was prepared, however, to take it into account in the exercise of the court's discretion whether to order specific performance.

[72] RP Meagher, John Dyson Heydon and MJ Leeming, *Meagher, Gummow and Lehane*'s *Equity, Doctrines, and Remedies* (4th ed, Butterworths, Chatswood, NSW, 2002) at [37–065].

[73] ICF Spry *The Principles of Equitable Remedies: specific performance, injunctions, rectification and equitable damages* (8th ed, Lawbook Co, Pyrmont, NSW, 2010) at 177.

[74] Meager, Heydon and Leeming at [37– 065].

[75] SR Derham *The Law of Set-Off* (3rd ed, Oxford University Press, Oxford, 2003) at [5.71].

[76] *King v Poggioli* (1923) 32 CLR 222.

an inability to pasture them elsewhere during the delay. The majority[77] held that the claim was for unliquidated damages, not being in the nature of equitable compensation, and could not be the subject of an abatement. The purchaser was denied specific performance because he had failed to prove his readiness and willingness to perform his part of the contract since he had refused to pay the balance of the price except subject to an abatement for damages which he was not entitled to claim in an equity suit. Although damages of this kind were recoverable at law, the High Court said they could not be recovered in equity. Starke J observed that the Judicature Act had not been adopted in New South Wales, seemingly accepting that the position might have been different in England.

[67] Derham points out that equitable set-off was not considered in that case. He also refers to the decision of Tadgell J, at first instance in the Supreme Court of Victoria in *Eagle Star Nominees Ltd v Merril*,[78] who remarked that *King v Poggioli*:

> ... reflect[ed] the historical experience that circumstances giving rise to a claim for damages for breach of contract will generally not be found to provide a right to equitable relief against a vendor's right at law to receive due payment of the price. I would nevertheless take it that statements such as those would yield to a case in which a purchaser could, by reference to a claim sounding in damages, truly impeach the vendor's title to his legal right.

Derham concludes that a purchaser of land should be entitled to specific performance of the contract on terms that the purchase price is reduced to the extent of an equitable set-off available to the purchaser, just as in England it has been held to be available under the set-off section in insolvency legislation.[79] In our view that proposition is sound and it must be equally applicable when it is the vendor who is calling for performance of the contract.

[68] In theory, then, the right to assert an equitable set-off provides a basis for a purchaser of land to decline to settle unless the vendor is prepared to recognise that claim. But this certainly does not mean that whenever a purchaser has a cross-claim

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[77] Starke J with Knox CJ concurring and Higgins J dissenting.

[78] *Eagle Star Nominees Ltd v Merril* [1982] VR 557 (SC) at 560.

[79] *Re Taylor, ex parte Norvell* [1910] 1 KB 562 (CA).

of some kind against the vendor, even one arising from the sale contract itself, there is an entitlement on the part of the purchaser to make a deduction from the price when settling. Importantly, the purchaser must demonstrate the existence of "some equitable ground for being protected against his adversary's demand".[80] In *Grant v NZMC Ltd*,[81] Somers J, for the New Zealand Court of Appeal, concluded an account of equitable set-off which acknowledged Australian criticism of the approach taken in English cases since *Hanak v Green*,[82] by stating the following test:[83]

> The principle is, we think, clear. The defendant may set-off a cross-claim which so affects the plaintiff's claim that it would be unjust to allow the plaintiff to have judgment without bringing the cross-claim to account. The link must be such that the two are in effect interdependent: judgment on one cannot fairly be given without regard to the other; the defendant's claim calls into question or impeaches the plaintiff's demand. It is neither necessary, nor decisive, that claim and cross-claim arise out of the same contract.

[69] It is unnecessary in the present case to choose between the wider and narrower views of equitable set-off referred to in *Grant*. Here the cross-claim on the warranty does arise out of the same contract. That is not, as Somers J says, decisive. But for the following reasons, there can be no doubt that it does impeach the vendor's demand, made in its settlement notice and accompanying correspondence, for settlement in full. While the warranty is unfulfilled, as must for present purposes be assumed in this case, it must substantially affect the value of the property. The sale price which the vendor demanded had been agreed to by the purchaser with the inducement of the warranty that the property would comply on the possession date with all requirements and obligations under the Building Act. The unsound state of the building was likely to prejudice the purchaser in its ability to raise a mortgage against the security of the property for the purpose of meeting the price. It is a compelling circumstance that the contract actually contained a condition, expressed to be for the sole benefit of the purchaser, that it should be satisfied, inter alia, that the property complied with all relevant legislation and by-laws and that it had the ability "to obtain finance in respects satisfactory to itself to enable the due

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80 *Rawson v Samuel* (1841) Cr & Ph 161 at 178–179; 41 ER 451 at 458 per Lord Cottenham LC (Ch).

81 *Grant v NZMC Ltd* [1989] 1 NZLR 8 (CA).

82 *Hanak v Green* [1958] 2 QB 9 (CA). Further criticism, including of *Grant* itself, is to be found in Martin Van Der Walt "The Clarification of Equitable Set-off" (1998) 72 ALJ 516.

83 *Grant v NZMC Ltd* at 12–13.

completion of the purchase". It can be inferred that this ability would depend upon offering the property as a security.[84] Furthermore, it seems almost certain that until the building met earthquake requirements, insurance cover necessary to satisfy a prospective financier would not be available readily, if at all. These factors in combination provided Property Ventures with an equitable ground on which to raise a claim for set-off. They impeached Regalwood's demand for the full price. Subject to the matter to be considered in the next section of these reasons, it was not therefore ready, able and willing to settle as the contract required. It can make no difference that Property Ventures had not already issued a proceeding for specific performance. The right to assert the set-off existed.

Clause 6.5

[70] It is convenient to set out this clause again:

> 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 or 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.

[71] With respect to the contrary view of the Court of Appeal, we consider that cl 6.5 provided no barrier to the assertion of a right of abatement by way of set-off. Express words or a very clear implication are needed to remove a remedy for breach of contract arising by operation of law.[85] We do not find such words or implication in cl 6.5. Nor does Dr McMorland, who expresses the following opinion:[86]

> However, the clause does not take away from the purchaser any right or remedy the purchaser may have consistent with settlement. These include damages, a claim to compensation under cl 5.4 pursuant to the reasoning in *Lingens v Martin*, a claim to retain a fund for further work pursuant to an express term of the contract, and even a right to cancel where the settlement does not itself amount to an election to affirm. These are all remedies

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84 The purchaser's confirmation of its satisfaction cannot, in light of the existence of the contractual warranty, be taken to be more than its expression of willingness to proceed with the purchase and to rely upon the vendor's promise that on the date for settlement and possession the building would comply.

85 *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1974] AC 689 (HL) at 717 and 723; *Grant v NZMC Ltd* at 13.

86 At [8.22]. This passage immediately follows that quoted by Associate Judge Christiansen: see [46] above.

> available to the purchaser "at law or in equity" whether under the general law or under the contract itself. (footnotes omitted)

[72] The subclause is not happily drafted but both its language and certain policy considerations lead us to the view that Dr McMorland is correct and that cl 6.5 does no more than confirm the position under the general law,[87] namely that, while the contract remains on foot, the existence of a breach of warranty is not a licence for a purchaser simply to sit on its hands refusing to proceed to settlement until the breach is remedied. To adopt Tipping J's metaphor from *Holmes v Booth*,[88] a purchaser who has come to this fork in the road is faced with only two possible routes, cancellation or performance, and once the latter is chosen is bound to perform in accordance with the contract when called upon. There is no intermediate road available. Nor can the purchaser suspend an election without risking default. It risks being taken to have affirmed the contract but defaulted in performance.

[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 was 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 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

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[87] Like several other provisions of the General Terms of Sale, e.g. cls 3.5–3.7, 6.4, 8.7(2) and 9.7.

[88] *Holmes v Booth* (1993) 2 NZConvC 191,633 (CA) at 191,649–191,650.

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.

[74] There are practical arguments both ways but on balance they favour the construction of cl 6.5 which we prefer. From the perspective of a vendor, it is undesirable if a purchaser, perhaps short of funds to settle in full, has the opportunity of manufacturing or inflating a claim for breach of warranty and thereby seeking to settle on a basis which would leave the vendor as an unsecured creditor or perhaps to force the vendor to postpone the settlement pending resolution of the purchaser's claim. On the other hand, it is also undesirable that a purchaser with a valid claim to a set-off should have to pay in full and thus be left in the position of an unsecured creditor of an impecunious vendor. We have already adverted to the difficulties for a purchaser required to settle in full in circumstances like the present where its borrowing capacity and/or insurance may be affected by the vendor's breach. The balance of these considerations, coupled with the fact that the practical result in *Lingens* upholding the right to a deduction appears to be broadly supported by commentators,[89] provides support for a reading of cl 6.5 which does not remove any remedy available to the purchaser exercisable on or before settlement. That approach also avoids any inconsistency with the operation of cl 5.4 if and when a warranty under cl 6 also implicitly misdescribes the property.

[75] The potential difficulty and delay for a vendor can be mitigated if the vendor brings the matter to a head by suing for specific performance, asking the court to resolve the question of the disputed amount of the purchaser's claimed deduction. If necessary, the court should be able to give the proceeding urgency and to devise interim orders intended to protect the legitimate positions of both parties while settlement proceeds. As Lord Eldon said in *Wood v Griffith*, the court "will arrange

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[89] McMorland at [8.22] and Rod Thomas "*Lingens v Martin* and the standard form" [2008] NZLJ 389.

the equities between the parties".[90] It should also not be beyond the wit of the drafters of standard-form real estate contracts to devise a mechanism which will enable speedy resolution of bona fide and reasonable purchasers' claims for equitable compensation or set-off and protect each of the contracting parties whilst doubt about the correct position remains.

The raising of the set-off

[76] In relation to the part of its case directed to misdescription, Regalwood submitted that, if there had been a misdescription, nevertheless Property Ventures had not brought itself within cl 5.4 because it had not actually made a demand in writing for compensation before settlement. In a context such as the present where the breach could not occur until settlement, time was not of the essence and settlement did not happen, it seems logical that "settlement" should be given the meaning of the time when settlement was required by a validly given settlement notice. However that may be, and we express no concluded view, our purpose in referring to Regalwood's submission is because it deserves an answer and also because it has relevance to set-off.

[77] The answer to Regalwood's submission is that, if compensation had truly been claimable, a claim was made in general terms in the letter of 20 May 2005 from the solicitors for Property Ventures. It is a mere quibble to say that the statement "our client is entitled to claim compensation" did not amount to a demand for compensation, particularly when the letter went on to say that the absence of any mention of compensation by Regalwood rendered the settlement notice invalid. It could not be clearer.

[78] But then it is said that the claim needed to be for a specified sum in order to be a demand within cl 5.4. The answer to that proposition is that, in a case such as the present, a vendor who does not permit a purchaser access to the property in order to inspect it and see what works are necessary to remedy the vendor's default can

[90] *Wood v Griffith* (1818) 1 Swan 43 at 54; 36 ER 291 at 295.

hardly expect the purchaser to particularise its claim. In fact, in the same letter, Property Ventures asked to see Regalwood's costing of the required work. There is no evidence that it was ever shown any such costing, despite further requests in September 2005 and March 2006. As the letter of Property Ventures' solicitors on 7 April 2006 records, Regalwood was not prepared even at the time it was proceeding towards its notice of cancellation to provide Property Ventures with a copy of the report on the building it had received from Holmes Consulting Group.

[79] The relevance to set-off is this. Like a claim falling within cl 5.4, it must be advanced and, to the extent which is reasonably possible, particularised before settlement. If this is not done by the purchaser, the vendor will not be disabled from asking for settlement in full. However, for the reasons just given, in the present case Property Ventures had done enough to raise its claim. Its inability to quantify the claim resulted from Regalwood's unfortunate lack of co-operation. The fact that Property Ventures referred to its claim as one for compensation does not mean that it must be characterised only in that way and not as a claim to a set-off. The claim must be raised in substance; that is all that is required. Its legal character is relevant to its justification but not to whether it has been adequately made.

The settlement and cancellation notices

[80] Clause 9.1(2) provides that a settlement notice is 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.

[81] This appeal is proceeding on the basis of an assumption that the building did not have a building warrant of fitness at all relevant times. On that assumption, when Regalwood issued its settlement notice, on 17 May 2005, requiring payment of the full balance of the price, Property Ventures was entitled, as we have found, to assert a claim for a substantial deduction from the amount otherwise payable on settlement. But, on the facts before us, on 17 May no claim for any deduction had actually been made. That did not happen until 20 May when Property Ventures' solicitors responded to Regalwood's notice. Because it is incumbent upon the

purchaser to put forward its claim, it cannot in our view be said that Regalwood's demand on 17 May for the full price necessarily demonstrated an unwillingness to proceed to settle in accordance with its obligations. It was not at that time, in the absence of a claim for set-off, asking for more than it was entitled to receive in exchange for the transfer of title. Hence, the issuance of the settlement notice may well have been valid.

[82] However, the position certainly changed as from 20 May when Property Ventures did claim a deduction. When Regalwood continued to insist on payment in full, it was no longer in all material respects ready, able and willing to perform its contractual obligations. Although cl 9.1 refers only to the position when the notice is given, it is well-established that, even when time is of the essence, a party to a land sale contract may not cancel it unless that party is at the time of cancellation in all material respects ready, able and willing to perform its contractual obligations. In particular, unless there has been a waiver or dispensation by the other party, it may not cancel because of the other party's failure to settle unless it was at that time itself ready, able and willing concurrently to play its proper part in the settlement. Brennan J put the position in the following way in *Foran v Wight* in the High Court of Australia:[91]

> Where the respective obligations of parties to a contract are mutually dependent and concurrent, the primary rule is that neither party who fails to perform his obligation when the time for performance arrives can rescind for the other party's failure at that time to perform his obligation. Each party's obligation is conditional on performance by the other; neither can complain of non-performance by the other when the condition governing the other's obligation goes unfulfilled.

[83] It was submitted for Regalwood that it was never shown to be unwilling to settle in accordance with its contractual obligations because Property Ventures did not actually put it to the test by initiating a settlement process and tendering the amount properly due from it.[92] That submission fails for two reasons: Regalwood had made it sufficiently clear that it would not accept anything less than the full price, and its lack of co-operation had made it impossible for Property Ventures to

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91 *Foran v Wight* (1989) 168 CLR 385 at 417. See also Mason CJ at 396.

92 See *Bahramitash v Kumar* [2005] NZSC 39, [2006] 1 NZLR 577.

assess the consequences of the non-compliance with the Building Act and hence to make a sensible estimate of the amount it should properly tender.

[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. For the same reason, and on the same assumption, Regalwood's attempts in April and May 2006 to revive the essentiality of time under its settlement notice of 17 May 2005 would have been ineffective. It could not make time of the essence if it was itself unwilling to perform its obligations.

[85] As we also heard argument concerning whether, in any event, the period of notice eventually given to Property Ventures before the cancellation notice would have been adequate for that purpose,[93] we should say something about that issue. The notice given on each occasion allowed Property Ventures only five working days in which to settle but the contract stipulated for 12 working days.[94] Mr Davidson submitted that where it was in the circumstances reasonable to do so, the notice-giver could rely on the general law about making time of the essence and was not, in relation to the length of a notice, confined by cl 9.0, although he conceded that his argument was not assisted by the fact that it was only with respect to events after the expiry of a settlement notice that the vendor's express contractual options were stated to be without prejudice to other rights or remedies available at law or in equity.[95]

[86] The whole purpose of contracting for a settlement notice procedure as prescribed by cl 9.0 would be undermined if a notice-giver were permitted to fix its own shorter period for the purpose of establishing that the recipient's failure to settle

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93 The argument proceeded on the basis, accepted by both sides, that Regalwood's conduct in the period after the settlement notice expired waived the time for performance but had not waived any breach by Property Ventures of its obligation to settle.

94 Cancellation did not occur within 12 working days of the first notice but that could not cure a deficiency in the length of the notice. Clause 9.6 confirms that a notice may be extended but that presupposes that the period originally given was adequate, i.e. 12 working days or more.

95 Clause 9.4(1).

was of such a character as to justify cancellation. Such a notice which purports to abridge the prescribed period is not given in conformity with the contract.[96] There may be exceptional circumstances where it is inevitable that a serious breach cannot possibly be remedied by the defaulting party within 12 working days, and so the party not in breach can consequently cancel without notice. But it was not suggested for Regalwood that this was such a case. In fact it purported by its letter of 30 March 2006 to be proceeding under cl 9.0.

[87] Mr Davidson endeavoured to defend his client's position by reference to the decision of the Court of Appeal in *MacIndoe v Mainzeal Group Ltd*[97] but that case was concerned with a notice requiring payment of an instalment to which the settlement notice procedure was inapplicable. The contract made no provision for how the vendor might proceed in relation to the type of breach which had occurred in *MacIndoe*. Therefore the vendor was able to resort to s 7 of the Contractual Remedies Act. It also happened that the period of notice given in that case was more than the period stipulated for a settlement notice in the standard form contract.

Result

[88] The appeal should be allowed with the consequences appearing in the judgment of the Chief Justice.

TIPPING J

[89] Despite being in breach of warranty[98] in a way which substantially affected the value of the property it had agreed to sell, Regalwood insisted that Property Ventures, as purchaser, should pay the full purchase price. When Property Ventures

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96 *Delta Vale Properties Ltd v Mills* [1990] 1 WLR 445 (CA) at 181.
97 *MacIndoe v Mainzeal Group Ltd* [1991] 3 NZLR 273 (CA).
98 The breach was assumed for the purposes of summary judgment.

declined to do so, Regalwood purported to cancel the contract for breach on Property Ventures' part. Notwithstanding the interdependence and concurrency of the obligations to pay and convey, both the High Court[99] and the Court of Appeal[100] upheld Regalwood's right to cancel.[101] But how, it must be asked, was Regalwood ready, willing and able to settle in terms of the contract when, despite being in substantial breach, it demanded payment in full, rather than on a basis which properly reflected its breach?

[90] The Court of Appeal considered that general cl 6.5[102] entitled Regalwood to demand the full purchase price. Leaving cl 6.5 aside for the moment, I am satisfied that Property Ventures was entitled to set-off against the purchase price the amount by which the value of the property was diminished by Regalwood's breach of warranty. I am pleased to concur in Blanchard J's analysis in this respect. What should matter in today's world is not the historical source of Property Ventures' cross-claim against Regalwood but rather whether the cross-claim is sufficiently related to the claim to make it unjust to allow the one to be enforced without account being taken of the other.

[91] There is no doubt that this is so in the present case. Property Ventures' cross-claim for breach of warranty pro tanto impeached Regalwood's claim for the price. The question therefore becomes whether cl 6.5 alters the position. It reads:

> 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 or 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.

[92] The Court of Appeal read the first sentence as providing that the purchaser was obliged to settle in full. But that is not what the clause says. Had that been its purpose, the clause would surely have provided to that effect in express terms. I can

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[99] *Regalwood Holdings Ltd v Property Ventures Investments Ltd* (2007) 9 NZCPR 703 (HC).

[100] *Property Ventures Investments Ltd v Regalwood Holdings Ltd* [2008] NZCA 422, [2009] 1 NZLR 481 per Glazebrook, Fogarty and MacKenzie JJ.

[101] Reinforced by the Court of Appeal's earlier decision in *Lifestyle Group Ltd v Maxwell* [2007] NZCA 290, (2007) 8 NZCPR 648.

[102] Of the REI/ADLS Standard Form Agreement (7th ed (2), 1999).

see no basis for reading in words which are conspicuously absent. As will emerge, there cannot be any necessary implication requiring that outcome. What then is the purpose and effect of cl 6.5?

[93] The key word in the first sentence is the word "defer". The point of cl 6.5 is to make it clear that despite any breach of cl 6 by the vendor, the purchaser must still settle. The breach does not give the purchaser any right to delay settlement for any purpose. If the breach gives rise to a right to cancel but that course is not taken, the purchaser cannot simply sit on its hands. As the contract remains on foot the purchaser must observe its contractual duty to settle. That, however, says nothing of what the purchaser's rights and obligations are on settlement in the light of the vendor's breach.

[94] It is clear from the second sentence of cl 6.5 that the settlement envisaged by the first sentence is to be without prejudice to the purchaser's rights as comprehensively stated. The use of the word "settlement" at the start of the second sentence is not particularly apt because it suggests that the reserved rights are exercisable only after the settlement process has taken place. But what those drafting this subclause must have had in mind was that the "obligation to settle" confirmed by the first sentence was to be without prejudice to the purchaser's rights. The word "settlement" at the start of the second sentence is really shorthand for obligation to settle. That reading makes it clear that while obliged to settle, Property Ventures still had the right to set-off or abatement available to it under the general law. The reference to cancellation as being a right still vested in the purchaser despite the settlement, reinforces the need to construe the word "settlement" as meaning obligation to settle. Cancellation after settlement is extremely rare, not least because settlement almost always amounts to affirmation by means of an election to keep the contract on foot.[103] For these reasons there can be no implication that the obligation to settle created by the first sentence of cl 6.5 is an obligation to settle in full. The Court of Appeal was in error in that respect.

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[103] See DW McMorland *Sale of Land* (2nd ed, Cathcart Trust, Auckland, 2000) at [8.22(e)].

[95] That seems to me to be the proper reading of the purpose and effect of cl 6.5 in its contractual context. I add that it seems probable that cl 6.5 was introduced into the 1999 edition of the REI/ADLS Standard Form Agreement (seventh edition (2)) as a consequence of the decision of the majority of the Court of Appeal in *Holmes v Booth*.[104] In that case the Court held that a purchaser faced with an apparent defect in the vendor's title (in the form of what was claimed to be a three year tenancy agreement) could defer settling until the vendor had clarified the matter. The vendor appeared to be in breach of warranty as regards tenancies, he having warranted that all the tenancies were on a month to month basis. The purchaser did not cancel on that account, electing to keep the contract on foot. Two members of the Court held that the purchaser was not in breach when he declined to settle, either with compensation for the breach of warranty or reserving his right to claim compensation or damages for the breach.[105]

[96] I was the third member of the Court and took the view that having elected to keep the contract on foot, the purchaser was obliged to settle or at least to tender settlement, but on a basis which recognised the breach of warranty.[106] What the purchaser could not do was simply defer settlement on an indefinite basis.[107] When the time for settlement arrived, the purchaser was faced with the fork in the road, to which Blanchard J has referred. He could choose either the cancellation route or the performance route. But there was no third route available to him. With respect, it seems that the inclusion of cl 6.5 in the seventh edition of the standard form of contract was designed to adopt that approach as an express contractual obligation. There was, of course, no cl 6.5 in the contract at issue in *Holmes v Booth*. Clause 6.5 must also have been designed to endorse the proposition inherent in the reasoning of the Court of Appeal in *Lingens v Martin*[108] that, subject always to the terms of the particular contract, vendors cannot demand more on settlement than their ultimate contractual entitlement.

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[104] *Holmes v Booth* (1993) 2 NZ ConvC 191,633 (CA) per Casey, Gault and Tipping JJ.
[105] At 191,637 per Casey J and at 191,642–191,643 per Gault J.
[106] At 191,647–191,650.
[107] See *Fercometal SARL v Mediterranean Shipping Co SA* [1989] 1 AC 788 (HL) at 805 per Lord Ackner.
[108] *Lingens v Martin* (1994) 2 NZ ConvC 191,940 (CA) per Casey, Gault and McKay JJ,

[97] In his *Sale of Land* Dr McMorland discusses cl 6.5, observing:[109]

> It is sometimes thought by a purchaser faced with a breach by a vendor of a warranty or undertaking in cl 6.0 that the purchaser has the "right" not to settle until the matter is "sorted" or until the vendor has agreed to a variation of the contract by a reduction of the purchase price. That is not so. There is never a "right" to a variation of a contract; by definition, a variation is a bilateral agreement. If a breach of a warranty or undertaking is established, the purchaser will have certain remedies and must decide which of those to exercise. If cancellation is one of those, the purchaser must elect *on or before* the settlement date whether or not to cancel. There is no right to refuse to settle while threatening to cancel if the vendor will not reduce the price, a tactic sometimes employed. It is the purpose of cl 6.5 to make this situation, *which is the law in any event*, a clear and express term of the contract. A breach of any warranty does not defer the obligation to settle on the due date as required by the contract.
>
> However, the clause does not take away from the purchaser any right or remedy the purchaser may have consistent with settlement. [emphasis added]

[98] I respectfully agree with that analysis. The purchaser is exercising a right consistent with settlement if he deducts from the purchase price a genuine pre-estimate of the amount by which the value of the property has been depreciated by reason of the vendor's breach of warranty, and tenders settlement on that basis. A vendor who is in breach of warranty cannot insist that the non-cancelling purchaser settle by paying the full purchase price. The vendor will be in further breach by declining to accept a tender based on a deduction by the purchaser of a genuine pre-estimate of the loss caused by the breach of warranty.

[99] Remedies consistent with settlement were once thought not to include damages in a liquidated sum.[110] But that is not, in my opinion, the right view to take of the purpose and effect of a clause like 6.5 or indeed the general law, at least when the liquidated damages are of a kind that a court of equity would award or recognise by way of abatement as an ancillary remedy in a specific performance suit. I do not consider it logical to confine the compensation that is available in a specific performance suit to cases of misdescription. I can see no reason why a modern application of the equitable principle should not also encompass an ability to award a sum for breach of warranty in a specific performance suit. As McMorland says,[111]

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109 At [8.22(a)].
110 See McMorland at [8.22(b)].
111 At [8.09(c)(iv)].

specific performance with compensation is equivalent to an action for breach of warranty.

[100] When discussing permissible deductions from the settlement money, McMorland starts by saying that deductions which a purchaser may properly make from the purchase price when tendering settlement are strictly limited.[112] However, one type of deduction which is permitted is where the purchaser has a claim in equity for compensation such as would be allowed on a purchaser's suit for specific performance as an ancillary part of that equitable relief. This is sometimes called specific performance with abatement.[113] This is exactly the position when a purchaser elects to affirm rather than cancel on account of a breach of warranty.

[101] In *Lingens v Martin* the Court of Appeal said that in such a situation the parties must agree on some sensible arrangement to protect their respective interests so that settlement can proceed.[114] The parties may, of course, reach some arrangement as the Court of Appeal indicated, but in the absence of such an arrangement I consider the legal position, which is reinforced by cl 6.5, is as I have earlier described it. The purchaser should tender an amount representing the full purchase price less a genuine pre-estimate of the loss the purchaser will suffer on account of the vendor's breach of warranty. By that means the purchaser demonstrates unequivocally that he is ready, willing and able to perform the contract on a basis which makes appropriate allowance for the vendor's breach. When the exact loss occasioned by that breach is established, a final accounting between the parties can take place. If the vendor declines to accept a valid tender by the purchaser on this basis, the purchaser may cancel, subject to taking whatever procedural steps may be necessary to establish that right. Alternatively, the purchaser may sue for specific performance of the contract, with the issue of loss for breach of warranty being addressed as an ancillary part of that proceeding.

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[112] At [11.13].

[113] See McMorland at [8.09(c)(ii)] and the cases cited in footnote 26.

[114] At 191,946.

[102] I turn now to consider whether the assumed breach of warranty was also a misdescription. A misdescription for the purposes of cl 5.4 is to be distinguished from a breach of warranty under cl 6; albeit a breach of warranty may also amount to a misdescription. The fundamental point is that a misdescription is an erroneous statement of existing fact. The description has no future or promissory connotation beyond being a representation that at the time it is made it is an accurate statement about the subject matter. In this case the warranty in cl 6 that on settlement (a future date) the premises would have a current building warrant of fitness could not therefore, on account of its futurity, amount to a misdescription.

[103] Furthermore the notion expressed in cl 5.4 of demanding compensation before settlement cannot apply to an attribute that the premises are required to have only on settlement. There can then be no breach before settlement. Misdescriptions for the purposes of cl 5.4 are a form of breach which must exist prior to settlement (ordinarily on formation of the contract) otherwise the provision for compensation to be demanded before settlement would become, at least in practical terms, impossible to perform.

[104] For these reasons I agree with the Court of Appeal that the (assumed) breach of warranty regarding the building warrant of fitness could not also amount to a misdescription within the meaning of cl 5.4.

[105] Finally I mention the rule in *Flight v Booth*.[115] This rule was a judicially imposed restriction on the literal effect of contractual clauses like cl 5.4. The stipulation that "no" misdescription shall annul the sale is not to be taken literally. The effect of the rule is that if the misdescription affects the subject matter of the contract to such an extent that the purchaser might well not have entered into the contract if aware of the true position, the purchaser may elect to cancel, despite the no annulment provision. There is little or no difference between this basis for cancellation and the ordinary breach ground for cancellation under s 7 of the Contractual Remedies Act 1979 which is entirely consistent with the rule. The only point which may need attention in a case in which it is raised is whether a no

[115] *Flight v Booth* (1834) 1 Bing NC 370; 131 ER 1160 (CP).

annulment provision like cl 5.4 might prevail over the rule in *Flight v Booth* as an expressly agreed remedy which ousts cancellation pursuant to s 5 of the Act. The answer to that may be that a variance in the subject matter of the extent necessary to attract the rule goes beyond the concept of misdescription.

[106] For present purposes, however, the rule cannot affect the interpretation and application of cl 6.5. If there is a breach of warranty under cl 6 (or for that matter a misdescription) which justifies cancellation, the purchaser may cancel. If he elects not to do so the purchaser's obligation to settle remains and must be observed, as discussed earlier in these reasons. The rule in *Flight v Booth* does not give any right to "defer" settlement. It does not provide another road open to purchasers in addition to the cancellation and performance roads. Nor does it entitle the vendor to demand the full price despite being in substantial breach of warranty.

[107] For these reasons, in addition to those given by Blanchard J, I would allow the appeal on the terms proposed by the Chief Justice.

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