

shall immediately pay directly to the creditors such sums as are listed in the Schedule. For the sake of clarity, the parties record that:

- a. Any payments made pursuant to this clause are in addition to the purchase price;
- b. The Purchaser assumes no obligations or liabilities for the Vendor's creditors;
- c. If the Vendor does not provide the Purchaser with the acknowledgements referred to above on settlement the Purchaser shall not be liable to pay any sums to the Vendor's creditors.

[3] Settlement of the property purchase was delayed and for various reasons explained in an affidavit by Andrew Montgomerie the managing director of the defendant, the defendant paid a number of the creditors included in the schedule prior to settlement without receiving the written acknowledgments required under clause 22.2 ("the Acknowledgments"). This was advised to David Henderson the New Zealand general manager of the plaintiff in an email from Mr Montgomerie on 24 October 2017 forwarding an earlier email from Mr Montgomerie to the defendant's solicitor in which Mr Montgomerie comments:

"As per the S&P no creditors are due to be paid until settlement. However, we have paid some selected creditors early, solely at our discretion. These being Tonkin and Taylor, Hampton Jones, Burton & Co and McVeagh Fleming. There may be others, I will confirm."

[4] The plaintiff and defendant had the same financier. Arrangements for settlement were addressed in correspondence between the solicitors on 27 November 2017. In an email of that date from the defendant's solicitors legal executive Natalie Butler to Andrew Schnauer solicitor for the financiers, and copied to the other parties including the plaintiff's solicitor Ben King, Ms Butler stated:

"Attached is a copy of your settlement letter of today's date, duly executed. We are ready, willing and able to settle today on the basis that Schnauer & Co can now afford to us the sum of \$180,650.94. We note that the only outstanding component is that Aspiring Law has not forwarded to us the usual settlement undertakings requiring signing and certifying."

[5] The settlement undertaking requested was forwarded by Mr King to Ms Butler by email later that afternoon. Mr King said:

“Settlement undertakings attached. Please forward your undertakings as per my earlier email to Jane Boyce and confirm which of the creditors as per the agreement for sale and purchase have been paid and which will be paid on settlement today.”

No response to this email was received from the defendant’s solicitors.

[6] At settlement, the plaintiff did not provide the Acknowledgements from each of the remaining creditors listed on the schedule in accordance with clause 22.2, and the defendant refused to pay those creditors. In this proceeding, the plaintiff seeks payment of the amounts owing to those remaining creditors totalling \$66,263 (including GST).

Summary Judgment Principles

[7] The principles relevant to an application for summary judgment are well settled and were summarised by the Court of Appeal in *Krukzeiner v Hanover Finance Ltd*¹ as follows:

- (a) The question on a summary judgment application is whether the defendant has no defence to the claim that is, that there is no real question to be tried. The Court must be left without any doubt or uncertainty.
- (b) The onus is on the plaintiff, but where the evidence is sufficient to show there is no defence, the defendant has to respond if the application is to be defeated.
- (c) The Court will not normally resolve material conflicts of evidence or assess the credibility of deponents. But on the other hand, it need not accept uncritically evidence that is inherently lacking in credibility. The Court may take a robust and realistic approach where the facts warrant it.

¹ *Krukzeiner v Hanover Finance Ltd* (2008) 19 PRNZ 162 at [26].

Plaintiff's Claim

[8] The plaintiff asserts that the defendant waived the requirement for the provision of the Acknowledgments from creditors under clause 22.2.

[9] The requirements for a waiver are well established. In summary, the party (plaintiff) asserting the waiver must show first, that there was an unambiguous representation arising as the result of a positive and intentional act done by the other party (defendant) with knowledge of all the material circumstances and secondly, that relying on this representation it (plaintiff) carried out the new arrangement.² Importantly, waiver of a term is possible only if the term of the contract is for the sole benefit of the party giving the waiver.³

[10] The plaintiff contends that the legal requirements for waiver are met because:

- (i) The written acknowledgement from creditors required under clause 22.2 was for the benefit of the defendant only.
- (ii) At settlement, the exchange of correspondence between the parties' solicitors regarding the requirements for settlement was explicit, and it is undisputed that the Acknowledgments from creditors required by the defendant, and settlement was effected without the acknowledgements being provided by the plaintiff.
- (iii) Mr Montgomerie's intentions with regard to waiver are not determinative of the dispute: it is the defendant's conduct and representations at settlement that are relevant.
- (iv) The defendant's conduct prior to settlement (by paying Tonkin & Taylor, Hampton Jones, Burton & Co and Mc Veagh Fleming without the acknowledgements being provided by the plaintiff),

² *Watson v Healey Lands Limited* [1965] NZLR 511 at 513 (SC); *Neylon v Dickens* [1978] 2 NZLR 35 at 38 (PC); *Connor v Pukerau Store Limited* [1981] 1 NZLR 384 at 386-388 (CA).

³ *Moreton & Craig v Montrose Limited (in liquidation)* [1986] 2 NZLR 496 at 503 (CA); *Hawker v Vickers* [1991] 1 NZLR 399 at 402 (CA).

at settlement (by paying Aspiring Law without the acknowledgment being provided by the plaintiff), and after settlement (by paying BBD without the acknowledgement being provided by the plaintiff) is completely consistent with the defendant having waived the requirement for acknowledgements under clause 22.2.

Defences Raised

[11] The defendant raises two defences:

- (i) clause 22.2 was a clause for the benefit of both parties and cannot be unilaterally waived by one party; and/or
- (ii) there was no intentional act of waiver communicated by the defendant to the plaintiff so that no waiver was in fact given.

[12] In summary, the defendant submits that clause 22.2 was not a clause inserted for the sole benefit of the defendant as contended by the plaintiff. The benefit to the plaintiff/vendor was relief from the obligation to pay the creditors included in the schedule from whom the plaintiff obtained the Acknowledgements to be provided to the defendant/purchaser on settlement. The benefit for the defendant was that having been provided with the Acknowledgment on settlement and having paid the creditor's outstanding invoice, the defendant was then entitled to receive the creditor's files and reports relating to the property being purchased, and their cooperation.

[13] The defendant further contends that the decision by the defendant to pay certain creditors prior to settlement was a voluntary act. There was no positive act (by word or conduct) that was communicated to the plaintiff at any time prior to or around settlement, that the defendant intended to dispense with the requirement for the provision of the Acknowledgements on settlement.

Discussion

[14] The plaintiff carries the onus on a summary judgment application. In this case, I am not satisfied on the evidence before the Court that clause 22.2 was inserted solely for the benefit of the plaintiff. While I am not required to make any final determination on this matter, it appears to me that it is reasonably arguable that this clause operates for the benefit of both parties for the reasons identified by the defendant, and cannot be waived unilaterally.

[15] Secondly, even if I did consider that this clause was inserted for the sole benefit of the defendant, I am of the view that the defendant has a further arguable defence as to whether the alleged waiver was given.

[16] Mr Reid, for the plaintiff, was not able to refer to any specific act of waiver. Instead, he submits that I can properly infer a waiver from the defendant's early payment of creditors' accounts without Acknowledgements being required; the correspondence around settlement; and from the defendant's subsequent actions in paying other creditors listed on the schedule. Mr Reid places considerable weight on the correspondence sent and received at the time of settlement and contends that it was evident from Ms Butler's letter to Mr Schnauer, that the only outstanding requirement for settlement was the plaintiff's undertaking as to signing and certifying. He submits that there was never any confirmation from the defendant that the Acknowledgments were still required to be provided on settlement.

[17] The defendant's position is that the early payments to creditors were made at its sole discretion as was clearly stated in the email of 24 October 2017. With regard to the correspondence around settlement, the defendant says that the email written by Ms Butler to Mr Schnauer of 27 November 2017 related solely to the E dealing requirements for settlement of the property purchase. Clause 22.2 involved a separate arrangement. The payments to be made under this arrangement were in addition to the purchase price and involved the payment of certain creditors by the defendant/purchaser. The defendant contends that the email of 27 November 2017, read on its own or in conjunction with other correspondence, does not amount to a waiver of the plaintiff's obligation under clause 22.2.

[18] Having regard to the legal requirements for waiver, I am of the view that the defendant has a reasonably arguable defence on the evidence before the Court, that these requirements have not been met. On the basis of this defence, it follows that the plaintiff breached its obligation to provide the Acknowledgments on settlement, and in these circumstances, there was no obligation on the defendant to pay those creditors.

Decision

[19] For the above reasons, I consider that the plaintiff has not met the requisite threshold for summary judgment and that the defendant has raised two reasonably arguable defences. The application for summary judgment is dismissed accordingly.

Future Events

[20] Costs on the summary application are reserved.⁴

[21] The defendant is to file and serve its statement of defence within 25 working days of the date of this judgment. Mr Reid stated that if the application was declined, a further amended statement of claim may be filed. If this is to be done, then the following timetable is to apply:

- (a) The further amended statement of claim is to be filed within 10 working days of this date of this judgment;
- (b) and the statement of defence is to be filed 25 working days after service of the amended statement of claim.

The matter is then to be set down for a first case management conference.

AA Sinclair
District Court Judge

⁴ *NZI Bank Limited v Philpott* [1990] 2 NZLR 403.