

## Property Ventures Investments Limited and Regalwood Holdings Limited SC85/2009 [2010] NZSC 47

The recent Supreme Court decision in *Property Ventures Investments Limited v Regalwood Holdings Limited* SC85/2009 [2010] NZSC 47 clarifies the law regarding whether a purchaser is required to settle in full or at a reduced amount in the event of a breach of a vendor warranty on settlement. The 8th edition of the Auckland District Law Society/Real Estate Institute of New Zealand form of Agreement for Sale and Purchase of Real Estate has been revised as a result of the *Regalwood* decision.

### The Facts

In April 2004, Property Ventures Limited agreed to purchase a commercial building at 78 Lichfield Street, Christchurch from Regalwood Investments Limited. The purchase price was \$1,500,000.

The sale and purchase agreement was on the seventh edition (2) Auckland District Law Society form. The agreement contained the below standard clauses:

- clause 6.2(6)(b) – a vendor warranty that on the possession date the building would have a current building warrant of fitness under the Building Act 1991.
- Clause 6.5 – the standard clause providing a “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”.

On the possession/settlement date, the building did not have a current building warrant of fitness. Council required works to be carried out to the building to allow a building warrant of fitness to issue.

Regalwood served notice on Property Ventures requiring settlement in full, notwithstanding the breach of the vendor warranty. Property Ventures responded by seeking to reduce the purchase price payable on settlement by an appropriate deduction that reflected the vendor’s breach of warranty – noting Property Ventures understood it would cost several hundred thousand dollars to complete the works required to allow a building warrant of fitness to issue. Regalwood then served a notice of cancellation and sought a declaration from the High Court that its cancellation of the agreement was valid, an order that a caveat lodged by Property Ventures be removed and the \$100,000 deposit be forfeited.

### High Court and Court of Appeal

The High Court and Court of Appeal focussed on the application of clause 5.4 (relating to compensation for “misdescription”) and the application of clause 6.5. The High Court found in favour of Regalwood. This decision was upheld in Property Ventures’ appeal to the Court of Appeal (although for different reasons). This meant Regalwood’s cancellation of the agreement was valid on the Court of Appeal’s interpretation of clause 5.4 and 6.5. This meant Property Ventures was obligated to settle in full on settlement (notwithstanding the breach of the vendor warranty in clause 6.5) and exercise its rights against the vendor post settlement.

Property Ventures appealed to the Supreme Court. The main submission for Property Ventures in the Supreme Court was that the breach of the vendor warranty under clause 6.5 of the agreement gave rise to a counter claim by Property Ventures to “set off” against the settlement amount. Accordingly,

Regalwood could not validly serve a settlement notice requiring the full settlement amount and Regalwood's cancellation of the agreement was invalid.

The main submission for Regalwood in the Supreme Court was that clause 6.5 of the agreement prevented Property Ventures from exercising any right of set off against the settlement amount.

### Supreme Court

The Supreme Court overturned the Court of Appeal's decision requiring Property Ventures to settle in full. The matter has been remitted back to the High Court for a finding as to Property Ventures' compensation for Regalwood's invalid cancellation of the agreement.

Justices Blanchard, McGrath and Wilson found that the first sentence of clause 6.5 of the agreement did not require Property Ventures to settle in full and the second sentence allowed Property Ventures to exercise an equitable right to raise a claim for set-off and a corresponding reduction in the purchase price on settlement. This was on the basis the vendor was in breach of a material warranty on settlement that affected the value of the property.

Tipping J found that *"a vendor who is in breach of a vendor warranty cannot insist that the non-cancelling purchaser settle by paying the full purchase price"* and *"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"*.

Accordingly:

- clause 6.5 of the agreement allowed Property Ventures to seek to claim a reduction in the purchase price as a result of Regalwood being in breach of a material warranty on settlement; and
- Regalwood could not then validly cancel the agreement when the full payment was not made.

Chief Justice Elias also found Regalwood could not validly cancel the agreement. This was on the basis that Regalwood was in such material breach of the agreement that Regalwood was not *"in all material respects ready able and willing to proceed to settle in accordance with its obligations"*. Interestingly, Chief Justice viewed clause 6.5 of the agreement as requiring settlement in full (contrary to the other Justices).

In addition to the above, the Supreme Court also considered the application of clause 5.4 in the agreement relating to defects or misdescriptions in the property or title.

The Chief Justice held that the breach of the vendor warranty in clause 6.5 of the agreement amounted to a misdescription of the property notwithstanding that the breach of warranty did not exist at the date of the agreement. In contrast, the other Justices agreed with the Court of Appeal and held that misdescriptions for the purposes of clause 5.4 of the agreement have to exist prior to settlement and that the breach of the clause 6.5 warranty on settlement could not amount to a misdescription under clause 5.4.

### Practice points

As a result of the Supreme Court's decision, we note the following practice points:

- a purchaser cannot "sit on its hands" in relation to a breach of a vendor warranty on settlement. If the vendor's breach is sufficient to cancel a contract, but the purchaser does not cancel the contract, then the contract remains on foot and the purchaser is contractually bound to settle;
- a purchaser could look to rely on the *Regalwood* decision and make a specific claim under clause 6.5 of the agreement to complete settlement but on the basis of a reduction in the purchase price caused by the vendor's breach of warranty. As per Tipping J's comments, 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....When the exact loss occasioned by that breach is established, a final accounting between the parties can take place”*

- when acting for a vendor, it is important to consider all vendor warranties provided in any sale and purchase agreement – preferably when the sale and purchase agreement is prepared. This is particularly important as a purchaser could seek to complete settlement at a markedly reduced purchase price depending on the nature of the breach. This in turn could prevent the vendor discharging its mortgage and providing clear title on settlement;
- when acting for a purchaser, it is important to review all vendor warranties and ensure the purchaser is aware of all warranties and investigate any potential breach as early as possible and prior to settlement. This is to ensure the purchaser is provided with enough time to formulate a genuine and robust pre-estimate of the loss the purchaser will suffer on account of the vendor’s breach and give notice of such claim prior to settlement;
- the 8th edition of the Auckland District Law Society/Real Estate Institute of New Zealand form of Agreement for Sale and Purchase of Real Estate has been revised as a result of the *Regalwood* decision. The revised agreement provides for a new clause 7 to address a purchaser’s claims for compensation as a result of a misdescription of the property or title or for an equitable set-off for a breach of a vendor warranty. Practitioners will need to become familiar with this new clause and the practical issues it presents.



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