IN THE COURT OF APPEAL OF NEW ZEALAND

CA837/2010
[2011] NZCA 502

BETWEEN	CYNDICATE PROPERTY GROUP LIMITED Appellant
AND	ZENG JUN First Respondent
AND	TIAN HONG WANG Second Respondent
AND	DAVID LEE ALSO KNOWN AS DAVID LI ALSO KNOWN AS JIN QING LI Third Respondent

Hearing: 26 May 2011

Court: Arnold, Ellen France and Stevens JJ

Counsel: M J Fisher and K J Muston for Appellant
D W Grove for Respondents

Judgment: 30 September 2011 at 10 am

JUDGMENT OF THE COURT

A **The appeal against the refusal to grant summary judgment is dismissed.**

B **The appellant must pay the respondents costs for a standard appeal on a band A basis and usual disbursements.**

REASONS OF THE COURT

(Given by Ellen France J)

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Introduction

[1] Cyndicate Property Group undertook a residential subdivision on the northern outskirts of Hamilton. The respondents all bought sections in the subdivision in the early stages of its development, prior to the deposit of the survey plan with the Hamilton City Council. Over three years after Cyndicate had obtained subdivision consent, the survey plan had still not yet been deposited. At that point, the respondents purported to cancel the agreements.

[2] The respondents cancelled the agreements on the basis that Cyndicate had not made reasonable progress towards lodging the survey plan. In so doing, they relied on s 225(2)(b) of the Resource Management Act 1991 (the RMA). Section 225(1) of the RMA allows for agreements to be made for the sale of land in a proposed subdivision prior to the deposit of a survey plan. Section 225(2)(b) states that such agreements are deemed to be made subject to the condition that the purchaser may, after the expiration of two years after the date of granting of the resource consent or one year after the date of the agreement (whichever is the later), rescind the contract if the vendor has not made "reasonable progress" towards submitting a survey plan to the territorial authority for its approval, or has not deposited the survey plan within a reasonable time after its approval.

[3] Cyndicate did not accept that the agreements were properly cancelled. Accordingly, after the respondents refused to settle, Cyndicate sued for specific

performance of the agreements and sought summary judgment.[1] Associate Judge Bell refused to grant summary judgment.[2] On appeal, the appellant challenges the Associate Judge's conclusion that there were factual disputes about whether or not reasonable progress had been made towards the deposit of the survey plan which ought to go to trial.

Background

[4] We largely adopt Associate Judge Bell's description of the factual background.[3]

[5] On 15 August 2006, Cyndicate obtained subdivision consent from the Hamilton City Council which permitted it to develop 209 saleable residential lots in five stages. On 25 October 2006, Cyndicate completed its purchase of the property. At that point, rather than commence the subdivision works, Cyndicate undertook more design work and applied to the Council for a change of conditions to the subdivision consent. The redesign work occupied the period from 25 October 2006 until June 2007. The goal of the redesign was essentially to improve the quality of the subdivision.

[6] Cyndicate began marketing the sections in July 2007. The relevant agreements were entered into in July 2007 (David Lee and Zeng Jun), October 2007 (David Lee), and February 2008 (Tian Hong Wang).

[7] On 14 November 2007, the Hamilton City Council approved the change of conditions to the earlier resource consent. This led to a new plan for the subdivision. As Associate Judge Bell records, the revised plan for the subdivision entailed "quite significant changes to roading layout and similar matters".[4] The preparation of detailed engineering plans followed. Cyndicate then completed the contractual documents for the subdivision work. The contract was let in early 2008 after which the contractor commenced work. Civil construction work occurred over the period

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1 Mr Fisher advised that specific performance was no longer sought in relation to Zeng Jun. That claim is now limited to judgment as to liability.

2 *Cyndicate Property Group v Jun* HC Auckland CIV-2010-404-2397, 12 November 2010.

3 At [4]–[7].

4 At [6].

from January 2008 to 3 September 2009. Cyndicate's surveyors did the field surveys necessary for the survey plan to be presented to the Council. The plan was submitted to the Council on 13 September 2009 and new titles issued in December of that year.

[8] As we have noted, before the plan was deposited, the respondents' solicitors gave notice of cancellation of the contracts on 5 August 2009. This followed after the respondents had made their own inquiries and discovered that the survey plan had not been approved.

[9] At this point we need to say a little more about the agreements for sale and purchase. The agreements were in the standard REINZ/ADLS format, with further terms added.[5] The following special conditions are relevant:

(a) Conditions 4.1–4.3, which related to the vendor's obligation to complete the development of the subdivision, and obtain approval from LINZ and the territorial authority.

(b) Condition 4.5, which purported to contract out of s 225(2) of the RMA, in that purchaser waived the right of cancellation under subs (2)(a), and the time period under subs (2)(b) (after which the purchaser may cancel the contract) was extended to three years.

(c) Condition 8.3, which prevented a purchaser objecting to any alteration or variation to the scheme plan or subdivision as may become necessary by the direction of the territorial authority or by the practical exigencies of the subdivision.

(d) Under special condition 8.7, the vendor made no warranty as to when the subdivision plan would be deposited at LINZ, nor as to when the purchaser would be able to register a memorandum of transfer of the lot to the purchaser.[6]

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5 REINZ/ADLS standard form agreement for the sale and purchase of real estate (8th ed 2006).

6 The detail of these conditions is found at [8]–[11] of the judgment under appeal.

[10] As the Associate Judge notes, the agreements for all of the respondents were on the same terms, with one exception.[7] The difference was that the three agreements entered into before November 2007 also contained a further condition dealing with matters such as the need for Cyndicate to sell a minimum number of sections before proceeding with the subdivision.

The decision of the High Court

[11] A significant part of the judgment dealt with whether condition 4.5 was effective to displace the operation of the RMA. The Associate Judge concluded that it was not.[8]

[12] Associate Judge Bell then went on to consider whether the purchasers had an arguable defence that they were entitled to cancel the contract on the basis that Cyndicate had not made reasonable progress towards the deposit of the plan. On this aspect, the Associate Judge discussed the evidence about the progress. He said that some questions were raised by the expert evidence for the respondents on matters such as the staging of the development of the subdivision. The Associate Judge noted that Cyndicate had countered this with expert evidence as to why the work had been undertaken on a larger scale.

[13] The problem identified by the Associate Judge was how to deal with the period from August 2006 until November 2007. Associate Judge Bell continued:[9]

> ... It is quite clear that in terms of s 225(b), time was running against [Cyndicate] starting from when the initial consent was issued. During that period, [Cyndicate] did not immediately arrange for field surveys and did not immediately arrange for subdivision works to be carried out, but instead engaged in a redesign of the subdivision. At this stage, I do not have enough information to say conclusively that [Cyndicate] was making reasonable progress during that period. There is a gap for that period which remains a question mark in my mind. It is possible that [Cyndicate] may be able to explain the reasons behind the redesign during that period, and why that period cannot be brought into account in assessing whether reasonable progress has been made during the subdivision process. In particular, an argument put by [Cyndicate] which may carry a lot of weight at trial is that the [respondents] entered into their agreements once that redesign progress

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7 At [8] and [13].
8 At [32].
9 At [40].

> was well under way. They bought lots which were shown in the scheme plan approved in 2007. They did not buy lots referable to the prior scheme plan. It may seem rather odd, that purchasers who have come in partway down the track and after any delay has occurred, can complain of delay that occurred before the contract. That is a matter best assessed at trial. It is a matter that certainly weakens the defence, but it must be remembered in a summary judgment context that simply because a defence is weak, does not mean that it can be ruled out of hand completely. Mr Fisher urged on me to take a robust approach and there is certainly authority enough for that. But I have to take into account that there is conflicting evidence between experts. The Court of Appeal's decision in *MacLean v Stewart* (1997) 11 PRNZ 66 is a warning against trying to resolve conflicts between experts at the summary judgment stage.

[14] Accordingly, the Associate Judge considered that summary judgment was inappropriate.

The submissions on appeal

[15] Mr Fisher on behalf of Cyndicate submits that the Associate Judge has erred in his approach to the question of whether Cyndicate had made reasonable progress towards depositing the survey plan. Mr Fisher emphasises two points. First, he says that Associate Judge Bell placed undue weight on Cyndicate's actions in progressing towards the submission of a survey plan in the period prior to the signing of the agreements for sale and purchase. Secondly, Mr Fisher submits that the Associate Judge has erred in treating s 225 as requiring constant progress. The submission is that the correct approach should be to consider reasonableness in light of the position as at 5 August 2009, when the respondents gave notice of cancellation. If that was the position adopted, Mr Fisher says the Associate Judge would have seen substantial progress had been made, as reflected in the fact Cyndicate was only a little over a month away from depositing the plans.

[16] Mr Fisher also says there is no evidential basis for opposition to summary judgment because the respondents' expert surveyor, David Churchill, asked himself the wrong question. He erroneously drew the conclusion that if no plan was lodged once the period of time in s 225 had expired then there was a breach. Finally, Mr Fisher submits that the particular matters raised by Mr Churchill, such as the need for the work to be undertaken on a staged basis, have to be considered in light of all of the evidence. When the issues are examined on this basis, Mr Fisher says

that none of these matters support the conclusion that reasonable progress was not made.

[17] For the respondents, Mr Grove supports the approach taken by the Associate Judge. He emphasises the areas of factual dispute apparent in the respondents' affidavits.

Discussion

[18] It is helpful to put our analysis of the submissions in context by first discussing s 225 of the RMA.

Approach to s 225

[19] As we have foreshadowed, s 225 makes provision for agreements for the sale and purchase of land made before the appropriate survey plan is approved under s 223 of the Act.

[20] Section 225 is one of a group of sections, ss 223 to 228, which deal with the approval and deposit of survey plans. In terms of s 223(1), an owner of land may submit a survey plan to the consent authority for its approval. A certificate signed by the consent authority is a prerequisite for the deposit of a survey plan.[10] Section 225(1) deems agreements made before the plan is approved to be subject to a condition that the survey plan will be deposited. As Associate Judge Abbott observed in *DBCL Developments Ltd v New Season Investments Ltd*, these provisions provide a "general context" for the time frames for cancelling in s 225(2)(b).[11]

[21] Section 225(1) also makes it plain that agreements are not illegal or void by reason that they were entered into before the survey plan was deposited. In terms of s 225(2), any agreement to sell any allotment in a proposed subdivision made before

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10 RMA, s 224(c).

11 *DBCL Developments Ltd v New Season Investments Ltd* (2009) 10 NZCPR 524 at [28].

the appropriate survey plan is approved is deemed to be made subject to two conditions.[12]

[22] The first of these conditions is a "cooling off provision". In particular, s 225(2)(a) provides that the purchaser may, by notice in writing to the vendor, cancel the agreement at any time before the end of 14 days after the date of the making of the agreement.

[23] The second condition is found in s 225(2)(b). This is the condition in issue in the present case. Under subs (2)(b), the purchaser has the right to rescind the contract if the vendor has not made reasonable progress towards submitting a survey plan for approval or has not deposited the plan within a reasonable time after the date of its approval. Section 225(2)(b) provides:

> ... that the purchaser may, at any time after the expiration of 2 years after the date of granting of resource consent or 1 year after the date of the agreement, whichever is the later, by notice in writing to the vendor, rescind the contract if the vendor has not made reasonable progress towards submitting a survey plan to the territorial authority for its approval or has not deposited the survey plan within a reasonable time after the date of its approval.

[24] Finally, s 225(3) makes it clear that an agreement may be rescinded under s 225(2) even though the parties cannot be "restored to the position that they were in immediately before the agreement was made". In any such case the parties' rights and obligations, in the absence of agreement between them, shall be as determined by a court of competent jurisdiction.

[25] From these provisions, it can be seen, first, that s 225 is enabling in that it removes the possibility of an illegality argument. Tipping J put it in this way in *Steele v Serepisos* when he said:[13]

> The purpose of s 225(1) is essentially permissive, that is, it allows contracts to be entered into prior to the deposit of the plan but necessarily subject to its deposit.

[26] Tipping J referred to *Griffiths v Ellis* in which this Court had held that s 332(1)(a) of the Municipal Corporations Act 1933 made a sale of unsubdivided

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12 RMA, s 225(2).

13 *Steele v Serepisos* [2006] NZSC 67, [2007] 1 NZLR 1 at [22].

land illegal.[14] The law was amended to overcome this decision by the Municipal Corporations Amendment Act 1959 which introduced the predecessor to s 225. Tipping J went on to note that s 225(1) does not create a statutory warranty by a vendor that the vendor would deposit a plan, come what may. Rather, giving the section a necessary "judicial gloss", the obligation on the vendor as regards the deposit of the plan is to "take all reasonable steps" to deposit and to take "all reasonable steps to fulfil conditions that might be imposed on the plan's approval, provided those conditions were themselves reasonable".[15]

[27] The second point that can be made about s 225 is that it creates an element of protection for a purchaser. For example, there is material in the legislative history of the counterpart to s 225 in the Local Government Act 1974 which suggests that the "mischief" to which the section was directed was situations where purchasers were left unable to obtain a title.[16]

[28] Finally, we note that in *Vahora v Tse* Paterson J said that the public policy behind s 225 is that survey plans should be deposited prior to entry into sale and purchase agreements to try and avoid the otherwise inevitable litigation which would follow from delays in completing agreements.[17]

[29] In terms of s 225(2)(b), in particular, the points which follow can also be made.

[30] First, the question is whether reasonable progress has been made in all the circumstances towards submitting a survey plan. An objective assessment is required.[18] It is important to note that the section only requires reasonable progress towards submission rather than actual deposit. There must be some flexibility to take account of the particular subdivision in issue.

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14 *Griffiths v Ellis* [1958] NZLR 840 (CA).

15 At [22] and [23].

16 (1978) 421 NZPD 4262, Mr T J Young MP during the second reading of the Local Government Amendment Bill (no. 4).

17 *Vahora v Tse* (1999) 4 NZ ConvC 192,923, [1999] DCR 31 citing DAR Williams *Environmental and Resource Management Law* (2nd ed, Butterworths, Wellington, 1997) at [4.3[9]] and see D Nolan *Environmental and Resource Management Law* (3rd ed, LexisNexis, Wellington, 2005) at [4.37] to the same effect.

18 *North Shore Demolitions Ltd v McKay* [1978] 1 NZLR 454 (SC) at 460.

[31] Secondly, the reference to the later of the two timeframes suggests that the time at which the reasonable progress assessment is to be made may vary. While it will always be no less than two years after the granting of the resource consent, where the agreement to sell is entered into during the second year of the two year period, the relevant date will be one year after the date of the agreement. This suggests that there may be different outcomes for different purchasers depending on when they entered into agreements to purchase. This is consistent with the notion that s 225(2) is intended to protect purchasers. Clifford J in *AAA Development (Ormiston) Ltd v Ormiston Group Ltd* analysed s 225(2) in a similar way.[19]

[32] Thirdly, s 225(2)(b) requires consideration of the position at the point in time when the purchaser purports to exercise the right to cancel. This may be particularly important in some cases. For example, in the present case, the developer was a little over a month away from submitting the survey plan by the time the purchasers cancelled.

[33] Finally, against the background and purpose we have discussed, consideration of the "reasonable progress" test will not be a matter of delving into the detail of a developer's activity. A robust, broad brush approach will be appropriate. This is consistent also with the concept developed in *Steele v Serepisos* that the section should be applied in a workable manner.[20]

[34] The authorities in this area suggest that there will be a range of cases: at the one end, those cases where nothing or very little has been done to progress the matter and at the other, those where the vendor has plainly made reasonable progress. We give just three examples.

[35] First, in dealing with a delay of a little over two years, Master Williams QC in *Calligarry Holdings Ltd v Perpetual Real Estate Ltd* noted there was no evidence at all of compliance with the obligation in s 307 of the Local Government Act 1974,

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19 *AAA Development (Ormiston) Ltd v Ormiston Group Ltd* HC Auckland CIV-2008-404-2616, 23 November 2010 at [92]–[97].

20 At [13] per Blanchard J and at [28] per Tipping J.

the counterpart to s 225.[21] Plainly, in that case, the vendor had not taken reasonable steps.

[36] Secondly, in *R J Hay v Laurent Construction Ltd*, Smellie J accepted the vendor had taken all reasonable steps to obtain the necessary approval.[22] Smellie J noted the steps relied on by the vendors for compliance included the following: obtaining a specified departure for the overall concept; immediately submitting a plan; persuading the Whangarei County Council to initiate a scheme change; submitting a scheme plan amended in accordance with the Council's direction; settling one appeal; filing a reply to another and taking part in that appeal; filing a default objection to the District Scheme in an endeavour to impel the Council to change its scheme to permit approval of the scheme plan; objecting to the provisions of the renewed District Scheme; and continuing up to 1977 to work on sewerage and water supply through 1978 until as late as May of 1979.[23]

[37] The final example we use is one of a number of cases which turn on the reasonableness of non-compliance with conditions imposed on the vendor. In *Robin Schwass Ltd v G R McKay Ltd,*[24] the consent authority had imposed conditions on the approval of the subdivision such as provision to be made for a certain number of car parks. The conditions did not suit the vendor who then took no action for two years. That was not sufficient to meet the obligations on the vendor.

Application of s 225(2)(b) to this case

[38] We turn then to consider the application of s 225(2)(b) to the present case. That requires an examination of the evidence before the Associate Judge and its impact in the context of an application for summary judgment.

[39] David Lee, the third respondent, provided evidence about discussions between the parties concerning time frames for the deposit of the survey plan. In

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21 *Calligarry Holdings Ltd v Perpetual Real Estate Limited* HC Wellington CP728/92, 26 January 1993.

22 *R J Hay v Laurent Construction Ltd* (1990) 1 NZ ConvC 190,387 (HC).

23 At 2324.

24 *Robin Schwass Ltd v G R McKay Ltd* CA136/88, 16 June 1989.

addition, both parties relied on evidence from expert surveyors. We deal first with the evidence from Mr Lee.

[40] Mr Lee gave evidence of representations made by Cyndicate that construction should only take 12 months. He said he understood that construction would take place over 2007 and 2008 and that the earthworks would be completed before winter 2008, with the balance of the subdivision work being completed during winter and spring of that year. There was no rejoinder to Mr Lee's evidence on the point.[25] However, there is reason to be cautious about this evidence. Mr Lee acted as agent for the other two respondents in their purchases. For all material purposes, the affidavits filed on behalf of each of the respondents are the same. That said, we cannot go so far as to say that the affidavits are so inherently improbable as to be dismissed out of hand at this point.[26]

[41] The other issue is whether the affidavits are relevant and, if so, to what? In *Steele v Serepisos* Blanchard J said in the context where the parties had not spelled out in their documentation what was reasonable, reasonableness was to be considered in light of what the parties had in contemplation.[27] There is no reason in principle why that approach should not apply to s 225(2)(b). The position here is complicated by the fact that the agreements record the parties' agreement to extend the period referred to in s 225(2)(b) to three years. However, there is no challenge on appeal to the Associate Judge's ruling that the parties could not contract out of the RMA. In those circumstances, arguably, any issue about the inter-relationship between the agreements and any oral representations is a matter for trial.

[42] It is true that if the respondents were induced to enter into the agreements on the basis of a misrepresentation, they would have other remedies. However, if ultimately it was shown that there was conduct inducing entry into the contracts, we do not see why that conduct could not be taken into account in assessing the reasonableness of the vendor's conduct. That too would be a matter for trial.

[43] We turn then to discuss the expert evidence.

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25 Other than to note Cyndicate's position that the agreements modified the RMA.

26 See *Bilbie Dymock Ltd v Patel* (1987) 1 PRNZ 84 (CA) at 86.

27 *Steele v Serepisos* [2006] NZSC 67, [2007] 1 NZLR at [13].

[44] The expert evidence for the respondents came from David Churchill. In the first of two affidavits, Mr Churchill identifies two matters he says have led to Cyndicate's "failure to meet the s 225 timeframes". The first of these is the redesign of the subdivision (15 months) and the second is the time extensions to the period of the construction contract (around six months).

[45] We agree with Mr Fisher's submission that the second of these reasons is problematic. Cyndicate's evidence was that there was no reduction in the progress of the works other than for engineer approved extensions of time but, in any event, taking a robust approach it is hard to see that this matter could affect the reasonableness assessment in this case.

[46] We turn back then to the first point, the redesign work. On this aspect, Mr Churchill and Michael Benning (Cyndicate's expert) are at odds over the relevance of the redesign work to the question of reasonable progress.

[47] We agree with Mr Fisher that there is a good argument that the redesign work pales into insignificance because the agreements all post-date that work. Certainly, we would not have given this matter the emphasis given to it by the Associate Judge. However, the assessment of reasonableness, while made at the point in time the purchasers cancel, is nonetheless an overall one. As Mr Fisher accepts, the progress made in the period prior to the agreements is not necessarily irrelevant. Quite how it may ultimately play out at trial is another matter.

[48] In his second affidavit, Mr Churchill identifies some additional matters, namely, the developer's decision to undertake the development in one rather than three stages and further changes made as the development was ongoing. The latter do not appear to have any particular significance in the context of a project of this nature.

[49] That leaves the impact of Cyndicate's decision not to pursue a staged development on the reasonableness of progress made. Mr Churchill noted that the second revised resource consent enabled Cyndicate to carry out the subdivision in three stages which would have allowed titles to issue for each stage as it was

completed. Cyndicate chose instead to let one contract run for the subdivision works covering the entire subdivision, which meant titles could not issue until all work was complete. Mr Benning and Reghan Jones (a director of Cyndicate) respond to the criticism of Cyndicate's approach, citing practical and commercial considerations. Mr Fisher points out that the respondents had the opportunity of addressing the reply evidence from Cyndicate on this aspect but did not do so. However, the failure to respond is not a complete answer because this is an issue on which further discovery may assist.

[50] We agree this was not a case where the developer was simply sitting on its hands. But s 225(2)(b) does not turn solely on the question of whether the developer is getting on with it. The "reasonableness" element must require some, albeit broad brush, consideration of what was happening. For example, as Clifford J suggested in *AAA Development*, while a vendor may have taken steps that might amount to reasonable progress, the reasonableness test may not be met where the local council's inefficiency means that reasonable progress, overall, has not been made.[28] In this sense, as Clifford J put it, the purchaser has a "no fault" right of cancellation.[29]

[51] We accept that the present case appears on the information currently available to be much closer to the *Hay v Laurent* scenario. We also accept Mr Fisher's criticism that Mr Churchill's approach is fairly conclusory. Mr Churchill was wrong to equate the mere expiration of the time period in s 225(2)(b) with a "breach" of s 225(2)(b). Further, it may be, as the Associate Judge acknowledges, that aspects of the defence are weak. Although these qualifications are all warranted, we nonetheless consider the expert evidence does leave a question mark at this stage over one of the factors which may be relevant to an assessment of the reasonableness of the progress made. As this Court observed in *MacLean v Stewart*, a defendant cannot escape liability for summary judgment by raising a "false, hypothetical or frivolous defence" and then argue that the Court cannot be satisfied there is no defence.[30] But, where the evidence adduced makes it difficult to be satisfied there is

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28 At [95].
29 Ibid.
30 *MacLean v Stewart* (1997) 11 PRNZ 66 at 4.

not a genuine dispute between the parties and that the defendant has no defence, summary judgment should be refused. Whether or not the defence is well founded is a matter for trial. Accordingly, by a fine margin, we have concluded that the Associate Judge was right to refuse to grant summary judgment.

[52] We add that we have considered whether any different approach should be taken to any of the three respondents. The first two points, that is, the impact of the redesign work and completing all of the subdivision works together rather than adapting a staged approach, affect all three respondents. Obviously, there is less likely to be an issue about reasonableness in terms of the latest (February 2008) agreement but we leave that to be resolved at trial.

Disposition

[53] For these reasons, the appeal is dismissed. The respondents, having succeeded, are entitled to costs for a standard appeal on a band A basis. We order accordingly.

Postscript

[54] Finally, we need to record some developments in terms of the parties since the appeal was filed. In particular, we note that Mr Fisher advised that the litigation between the appellant and three of the initial respondents (Jina Ping Wang, also known as Jane Wang; Margaret Qu; and Jiajun Qu, also known as Jun Qu) had settled. Those appeals, having been abandoned, are formally dismissed. A further respondent, Sound Wellness Ltd, went into liquidation on 18 February 2011. No consent has been sought from the liquidators to continue these proceedings, so the proceedings as they relate to Sound Wellness Ltd are stayed by virtue of s 248 of the Companies Act 1993.

Solicitors:
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Foy & Halse, Auckland for Respondents