IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

A.41/83

BETWEEN DAVID CLARKE and COLLEEN CLEO CLARKE

Plaintiffs

AND SCHOLES OAKLEY (PAPATOETOE) LIMITED

First Defendant

AND KENNETH MILLAR

Second Defendant

1042 236

Hearing: 1/2 March 1984

Counsel: Wackrow for Plaintiffs
Akel for Defendants

Judgment: 23 March 1984

JUDGMENT OF SINCLAIR, J.

This action was brought by the Plaintiffs against the First Defendant which had acted as the Plaintiffs' agent in relation to the sale of a property in Papatoetoe. The Second Defendant was a Director of the First Defendant and its Manager. For the purposes of this action I will simply refer to the First Defendant throughout the course of this judgment for reasons which will become, I trust, plain.

The action related to the sale by the Plaintiffs of a property situated at 13 Wentworth Avenue, Papatoetoe, which consisted of three units, one of which had been built quite some years ago while two had been added in 1969. In 1981 the Plaintiffs, who were then the owners of these three units, decided to sell. In due course through the agency of the First Defendant the property was sold to a company

Cu-bro Holdings (N.Z.) Ltd for a price of $58,000. Shortly after the sale had been arranged Cu-bro sold off each of the three units as individual units for a total price of $92,500. In consequence the Plaintiffs allege they have suffered loss and claim to recover the amount of the loss from the First Defendant as their agent and from the Second Defendant in his position as a Director of the First Defendant and because the arrangements for the First Defendant to act as the Plaintiffs' agent on the sale of the property had been made through the Second Defendant.

There were three causes of action: the first alleging that the First Defendant owed a duty to act with due care, skill and diligence and in the interests of the Plaintiffs in relation to the sale of the said property, and that by reason of the First Defendant having breached that duty it was liable to the Plaintiffs in damages. Secondly it was contended that both the First and the Second Defendants were liable to the Plaintiffs by reason of their having made through the Second Defendant false, inaccurate and misleading statements and that cause of action appears to have been based in negligence.

The third cause of action was as against both Defendants but based on certain statements which had been made by the Second Defendant which were alleged to be false, inaccurate or misleading and were made fraudulently or recklessly, not caring whether they be true or false. It is, of course, necessary in a cause such as this to consider the evidence carefully, remembering where the onus of proof lies and the degree of proof required having regard to the severity or

seriousness of the allegation or allegations made.

From the evidence of the Plaintiffs it appears that they purchased this particular property at 13 Wentworth Avenue, Papatoetoe about the middle of 1971 and that until about April, 1975 they lived in the front unit on the property which was the original house which had been erected there quite some years ago. It was a wooden dwelling with an iron roof and to it in about 1969 had been added at the rear two further units. When the Plaintiffs purchased it the property was in this particular state so far as construction was concerned and they used the property as a home to live in so far as the front unit was concerned and let the two rear units.

In 1975 Mr Clarke was promoted in his position with the Railways Department and went to live in Wanganui. From then until the earlier part of 1981 the three units were let and from the records which were produced it appears that the units were let at rentals of $50, $40 and $45 per week respectively.

Towards the end of 1980 at a point in time when Mr Clarke had retired from his employment, a decision was made by he and his wife to sell the Auckland property as they were then resident in Wanganui and did not wish to be troubled by being the owners of a property with three separate tenants which was situated some hundreds of miles from where they lived. Accordingly, at Christmas 1980, when Mr Clarke was in Auckland at a farewell function, he spoke to a friend, Mr Curtin, and asked his advice as to the name of a land agent in the Papatoetoe area who he could engage in relation to the sale of the property which the Clarkes owned. From what Mr Curtin said to

Mr Clarke it is obvious that he was recommended to the First Defendant and later on the 2nd February, 1981 Mr Clarke and his wife kept an appointment with Mr Millar, who was the Manager of the First Defendant, in relation to the proposed sale of the Wentworth Street property.

At the meeting with Mr Millar both Mr and Mrs Clarke were adamant that there was present but the two of them and Mr Millar and no one else. Mr Clarke in his evidence stated that after having been ushered into Mr Millar's office he was informed by Mr Millar that the property had been inspected and that the Government valuation had been obtained; while Mr Millar could not locate a copy of the Government valuation at that time he mentioned the figure was $50,000. At that point Mr Clarke claimed that he said to Mr Millar that he was aware the property could be split and sold as three separate units and that he asked Mr Millar whether he should do this particular exercise. Mr Millar replied, according to Mr Clarke, that the property did not lend itself to that type of sale and that he, Mr Millar, considered that the amount of time which would be involved in splitting the property into three titles could be upwards of a period of three months. Mr Clarke was not quite sure of the length of time mentioned by Mr Millar, but felt that he was being warned that there could be a delay of up to three months. Mr Clarke went on to say that he was informed by Mr Millar that one of the disadvantages of selling the property in separate units was that it could result in one unit being sold with the Clarkes being stuck with the other two units. Therefore, in Mr Millar's opinion, the property was an ideal one to put on the market on the basis of selling one unit as a

home and the other two for an income type investment. According to Mr Clarke he considered Mr Millar to be a professional and an expert and, knowing nothing about the Auckland market, he accepted what Mr Millar said as being correct. Mr Clarke went on to say that he then asked Mr Millar what price should be asked for the property and that he was advised a figure of $55,000. Having no knowledge of Auckland values he, Mr Clarke, suggested to Mr Millar that possibly a price of $58,000 should be asked so as to allow margin for negotiation. To that it was said Mr Millar agreed.

During the course of this conversation, and at about this time, Mr Clarke claimed he was asked by Mr Millar what he intended to do with the proceeds of sale and whether it was intended to invest in a property in Wanganui. Mr Clarke replied that he was not interested in investing in Wanganui as it was a town with a nil growth and that it was intended to invest the money through the Clarkes' bank or through their solicitor, depending upon which gave the better return. Thereupon, according to Mr Clarke, another person came into the office and a form authorising the First Defendant to act as the Plaintiffs' agent was filled in and signed after there had been a discussion about the granting of a sole agency as compared with a multiple listing of the property.

According to Mr Clarke that meeting lasted about half an hour and later that day he was somewhat surprised when a salesman employed by the First Defendant, a Mr Sime, called at the property where the Clarkes were staying with an agreement for sale and purchase and advised that he had an offer to purchase the property unconditionally at the asking price of $58,000. There were but two stipulations: the first was that

the settlement date was not to be until 10th April, 1981 and that vacant possession was required. Mr Clarke claims that he expressed his surprise and was informed that sometimes things such as this just happened. After having expressed some concern for the tenants on the basis that they would probably be replaced with new ones at higher rents he was informed by Mr Sime that that was not the case, but that Cu-bro, the proposed purchaser, wished to do some alterations to the property. The settlement date of 10th April did not worry the Clarkes because, according to Mr Clarke, they had no need of the actual money and had indicated at the time the agency form was signed, which incidentally had granted a sole agency to the First Defendant, that they would be prepared to leave money in to an approved purchaser.

Accordingly the Clarkes executed the agreement for sale and purchase and shortly afterwards returned to Wanganui where Mr Clarke remained until 10th April when he returned to Papatoetoe to remove certain possessions of his which were still at the property. On returning there he found that there were people moving into two of the units. In view of what was to transpire from the cross-examination that may not have been particularly surprising; it appears that as a result of a communication from a near neighbour he had been informed that instead of being let the three units were to be sold. Mr Clarke was also informed by the neighbour of the prices at which the new purchaser was seeking to sell the individual units.

Up to the 10th April, 1981 Mr Clarke was of the view that the First Defendant was his agent and acting on behalf of the

Plaintiffs and it was not until some time after that date that he learnt that the First Defendant had acted as the agent of Cu-bro Holdings in respect of the sale by that company of the three units as individual units.

Mr Clarke was subjected to a searching cross-examination which commenced with his familiarity or otherwise with agreements for sale and purchase. It seems to me that Mr Clarke had been engaged in but few such transactions; certainly it could not be said that he had been engaged in so many transactions that he was very familiar with what was entailed in a conveyancing transaction. To my mind he had merely a passing acquaintance with property deals. He affirmed that at no stage of the discussions was he given a separate price which would relate to a sale of the units on an individual basis and, in fact, asserted that he was not aware whether there would be a difference in value were they to be sold as individual units as opposed to being sold as a total block.

He was pressed as to whether there was any discussion as to three possible ways of selling the property: namely, as a home and income unit; as an investment unit or as separate units. He replied very definitely that there was no such discussion. He maintained, without being shaken, that only two methods of sale were discussed, those being the first proposition put to Mr Millar by Mr Clarke, namely the sale as individual units which was advised against by Mr Millar, and a sale as a home and income unit which had Mr Millar's blessing. He re-affirmed that in relation to the disadvantages of selling by way of separate units it was Mr Millar's contention that one or two may be sold leaving the Clarkes in

a difficult position with regard to the balance. He refuted entirely any suggestion that he was in a hurry to sell and stated quite simply that he had no need of the money and had fully expected the property to take some months, even a year, to sell. In fact, he stated that he really had no idea how long it would take, but he certainly did not expect the property to be sold within one day.

A further suggestion was made to Mr Clarke that he did not want to lose any income, but to that Mr Clarke replied very simply that he never referred to that factor at all as he was aware that he would be in difficulty with his tenants once they were aware that the property was on the market and that they would make up their own minds whether they wished to move or not. He said that in any event that did not particularly worry him because at that stage rental properties were scarce and if one tenant moved out it would not take long to get another.

Mr Clarke was further questioned as to whether or not he had been informed that there had been a fall off in sales towards the end of 1980 so far as home units were concerned. He replied that that was not the case although he accepted that it was said that over the Christmas period property sales were somewhat "flat" which was only to be expected because of the Christmas period.

In relation to price it was suggested to Mr Clarke that Mr Millar thought that the property should be marketed somewhere between the mid $50,000 bracket and the early $60,000 bracket. That was emphatically refuted by Mr Clarke who maintained that Mr Millar mentioned but one price only,

namely $55,000 and that it was at his, Mr Clarke's, suggestion that the asking price was eventually fixed at $58,000 to allow room for negotiation.

It was obvious that the cross-examination of Mr Clarke was directed towards establishing that there was not a situation of Mr Clarke seeking advice and Mr Millar giving advice, but rather one where there was a general discussion with various options being discussed and eventually a consensus being arrived at. When that proposition was put to Mr Clarke he answered very simply and plainly that the questions which he asked were answered by Mr Millar whose opinion was accepted by Mr Clarke, and that there was no reason to discuss anything further. He went on to state that Mr Millar gave his advice which was accepted by the Clarkes.

There is a further piece of cross-examination which to my mind is quite illuminating. At page 13 the following questions and answers appear:

> "Do you have any knowledge of how to go about cross leasing properties as at 1981? Haven't got a clue.
>
> "Did you have any knowledge of the risk factor involved? I don't know what you mean by risk factor.
>
> "Did Mr Millar at meeting on 2 February 1981, at that meeting did he say to you that cross leasing was normally carried out by companies or entities that were experienced in this field? No mention of it.
>
> "Did he say to you that it would be difficult, or could be difficult and costly for an individual to do this? No."

Plainly it was being suggested that Mr Millar had discussed with Mr Clarke the difficulties which could be involved in selling the property as individual units, which was related to the earlier cross-examination which had been

directed to establishing that there had been a general discussion between the Clarkes and Mr Millar with the final decision as to marketing resting on the Clarkes' shoulders after they had considered all the options which had been explained to them.

In relation to the piece of cross examination which I have just referred to I record that I was impressed at the way in which Mr Clarke gave that portion of his evidence and, indeed, all of his evidence, but to my mind the matters which were included in this portion of the cross-examination were matters which had been put to him for the first time and had never been put to him by Mr Millar.

In re-examination Mr Clarke explained how he knew the property could be subdivided into three units; he said that he had learnt that from a next door neighbour who had bought the property and added on two units and then sold them as separate units, and that during the period he was living next door to that neighbour he learnt, or understood, that the same exercise could be engaged in in relation to his own property.

Mrs Clarke was also called to give evidence and she generally supported her husband although, as she was not a participant in the conversation to any great degree, and as she had not been as actively engaged in the dispute as her husband, it was somewhat natural that her memory was not as clear as that of Mr Clarke. However, she did recall that in relation to price Mr Millar suggested $55,000 with her husband countering with the suggestion of $58,000 although she was somewhat vague as to the exact discussion in relation

to the best method of disposing of the property. She recalled her husband raising the question of selling the property in three separate units and that that was advised against by Mr Millar, one of the reasons given by him being that it could result in two units being sold with one being left on their hands. She recalled a discussion as to their intentions in relation to the investment of the proceeds; they replied that they were not going to invest in property in Wanganui but would invest the proceeds through their Bank or through their solicitors, and an offer was made to leave money in on mortgage to an approved purchaser. Mrs Clarke recalled being surprised when the agent, Mr Sime, arrived with the agreement later that day, and that vacant possession was being requested as some alterations had to be done to the property.

Mrs Clarke was more effective under cross-examination than she was under examination-in-chief. She categorically refuted any suggestion that a discussion took place that the property could be sold as a home and income, or as an investment or as separate units. She affirmed that there was no suggestion from her husband or herself that they wished to have a sale which would go through without any problems, nor was there any discussion about losing rent during the period the property was on the market. When she was asked whether Mr Millar mentioned problems arising out of cross-leasing, she somewhat significantly replied that she did not know the term "cross-lease". She also refuted any suggestion of Mr Millar proposing that the property be marketed somewhere between the mid $50,000 bracket and the early $60,000 bracket and re-asserted what she had earlier said: that it was her husband's suggestion to put

the property on the market at $58,000 so as to leave room for negotiation.

In support of the Plaintiffs' claim their solicitor, Mr Yee, confirmed that which had been disclosed by the documents which had been produced: namely that after the date of the agreement of sale and purchase between the Clarkes and Cu-bro Holdings a letter dated 10th February, 1981 from the First Defendant advised that the deposit had not been received. He went on to confirm that the deposit which was referred to in the agreement of 2nd February, 1981 of $2,000 was not, in fact, accounted for until 20th March, 1981 when a cheque for $160 was received. That was in accordance with a letter written by the First Defendant which bore the date 17th March, 1981 which showed that a deposit of $2,000 had been paid and, after deducting commission of $1,840, the balance due to the Plaintiffs was $160. Mr Yee also referred to the documents relating to the plan of subdivision of the property which had been prepared by a surveyor who had been engaged by Cu-bro Holdings Limited. The plan of subdivision was signed by the surveyor on 10th February, 1981 and was approved as to survey on 6th March, 1981 and deposited on 16th March, 1981. He affirmed that all of that had occurred without any reference to him whatever.

During the course of Mr Yee's cross-examination counsel for the Defendants suggested that an employee in Mr Yee's office, Mrs Hanna, had had some discussions with Mr Millar in relation to the deposit in March 1981. Mr Yee was not able to give any evidence at all in relation to that matter and in consequence Mrs Hanna herself was called. In relation

to this particular transaction she stated that she had never had any discussions with Mr Millar at all and that if she had had any such discussions she would either have passed a message on to Mr Yee concerning the matter or, if he had not been available, she would have recorded the message and left it on his desk for him to attend to. She did not vacillate under cross-examination in any shape or form and adhered very strongly to her evidence in examination-in-chief to the effect that she had not in any way been involved in this particular transaction.

On behalf of the Defendant Mr Millar was the first to give evidence. He deposed that he had been involved actively in real estate matters for 12 years with the Defendant company and as at 1981 had been the Manager at Papatoetoe for seven years. His role was one of an advisory nature and he was not engaged in selling properties in competition with his salesmen. However, as the result of the discussion that he had had with Mr Curtin towards the end of 1980, Mr Millar inspected the Plaintiffs' property and he stated that he was not very impressed with it. I am certain that that was his attitude throughout because he felt that the property was not one which really could be regarded as compatible with the neighbourhood and he observed that the property as a whole was in a poor sort of condition with un-mown lawns, un-cut hedges and looking very much like a commercial development rather than a home in the Papatoetoe area.

On the day when the Clarkes arrived at his office Mr Millar maintained that Mr Worsfold was in his, Mr Millar's, office throughout the time of the interview, which is in

contra-distinction to that which Mr and Mrs Clarke had deposed. However, Mr Millar maintained that at the interview Mr Clarke did raise with him the question of the property being sold as separate units, but that he remarked that he was not very impressed by the units and did not think that they were suitable to be marketed in an individual fashion. He went on to say that he explained that there were three ways of marketing the property: one was as separate units, another was as a home and income and the third form was as an investment. After some discussion Mr Millar stated that Mr Clarke accepted that it was a good idea to market the property as a home and income because that was the way he had used the property himself. On being told that by Mr Clarke, Mr Millar stated that he remarked that he felt the property would be more suitably marketed as investment units with tenants. He went on to refer to the fact that Mr Clarke had not disclosed to him that the property had been so constructed as to be able to be divided into individual units and that he got the impression that Mr Clarke was wanting to sell as quickly as possible. In furtherance of his preference Mr Millar stated that he explained that if the property was sold as individual units there were disadvantages in that one unit may be sold and the other two could hang fire for a period, or two could be sold with one being left on the vendors' hands. In addition there was always the risk of losing tenants with no guarantee that units could be sold one after the other. He maintained that he explained to the Clarkes that the market at that time in Papatoetoe was "a little flat" and that when it came to the discussion as to price the range was between the mid $50,000 bracket and the low $60,000 bracket with Mr

Millar's preference being that the property should be marketed at under $60,000. As a result of that observation Mr Millar maintained that Mr Clarke then asked whether a figure of $58,000 or $59,000 would be appropriate and that he, Mr Millar, agreed that $58,000 would be a reasonable price at which to market the property with Mr Clarke saying that he would be happy to receive $55,000 and that the difference would give him room to negotiate.

According to Mr Millar he then went on to explain the various ways the property could be listed, such as multiple listing or a general or sole agency and eventually a sole agency was agreed to.

In furtherance of his evidence in relation to the discussion as to price Mr Millar referred to a document which was available to the sales staff which indicated that a firm price should not be discussed with a vendor, but that a price range should be selected. He maintained that he followed the pattern which was referred to in that document. He also made reference to certain information which had become available through the Multiple Listing Bureau and for the quarter to the end of December, 1981 according to that Bureau the average time that a house/unit remained on the market for sale was 128 days. There was other information produced from the Bureau, but it related to other periods and included information which would not have been available to Mr Millar at the time of his discussion with the Clarkes.

I simply observe that multiple listing was not the method which was to be used in relation to the sale of this property and certainly not at the time of the discussions.

A sole agency was given so that the results of listing through the Multiple Listing Bureau are not very helpful when one has to consider a possible sale through a sole agency agreement.

In any event, according to the records of the First Defendant as produced by Mr Millar, the 1980 year showed that in January 19 properties were sold through the First Defendant's agency with the sales greatly increasing through the year until they reached a peak in September and October, somewhat naturally dropping off in November and December. However, as at the end of January, 1981 the sales for that particular month were 19 which is precisely the same as the number of sales which had occurred in January, 1980. That information would have been available to Mr Millar so that at that time, despite what had happened in November and December, there could be a reasonable anticipation that the pattern of the previous year would be repeated and history now records that it was, in fact, repeated but to a higher degree than in 1980.

In relation to the re-sales of the properties after the sale had been effected to Cu-bro Holdings Ltd, Mr Millar indicated that he was quite surprised that the sales had been arranged and it seemed to me that his main surprise resulted from the fact that the first agreement arrived on his table without the unit having been listed in the First Defendant's records. The same occurred with the second unit and it would appear that only the third unit was listed for sale. Mr Millar repeated that his surprise was related to the fact that he considered the units were unappealing and

he thought that the price was too high. However, by the end of February he was quite well aware that all three units had been sold and was aware that no deposit had been paid to the Clarkes. He acknowledged that he did write to the Clarkes' solicitors on 10th February, 1981 advising of that fact. He maintained, however, that he did speak to Mrs Hanna, who was employed by the Plaintiffs' solicitors, on the question of the deposit and arranged with her that he would obtain Cu-bro's authority to forward the deposit from monies he was holding in respect of a deposit paid on one of the units.

During cross-examination Mr Millar was at pains to explain that he had not been told by Mr Clarke that the units were subdivisible type properties and that they had been built in that way deliberately. That seemed to him to be part of the reason why Mr Millar felt that it would be better to sell the units as an investment proposition. Even when the first unit was sold by Cu-bro Mr Millar contended that as it was a conditional sale so far as he was concerned it was one which may or may not finally eventuate and at that time, in any event, there was no indication from Cu-bro Holdings Ltd that they were going to market the balance of the units individually. He had to concede, however, that from the time of receipt of the first agreement in relation to the on-sale by Cu-bro Holdings Ltd he was aware that a subdivision was possible. Despite the fact that the agreement disclosed a price of $30,000 for the unit in question, Mr Millar's view was that a possible "proper" price would have been nearer $25,000.

When cross-examined as to the position when all three

units had been eventually on sold at a total price of $92,000, Mr Millar had to agree that with hindsight the advice he had given on the cross-leasing and in relation to the sale price was wrong. At page 44 that very question was asked and the word "advice" was used in the question. For the sake of clarity I quote a short passage from the evidence:

> "Well before that deposit had been paid or credited to Mr Clarke you knew precisely what the on sale situation was, that the properties had been on sold at a price of $92,000? Yes, I would have.
>
> "And therefore you must surely have known with that hindsight that the advice you had given on cross-leasing and the sale price was wrong? You say with hindsight, I would have to say yes."

He was then asked whether he had done anything at that time to acquaint the Clarkes or their solicitors with what had transpired and he acknowledged that he had not and that it had never entered his mind that he ought to so communicate with the Clarkes. However, he went on to repeat his earlier evidence that towards the end of February or early March he had been in touch with Mrs Hanna in relation to the non-payment of the deposit and if that was so it is rather strange that at that time he did not communicate to Mrs Hanna the fact that there had been a sale of one or more of the units, particularly when they had been made through the agency of the First Defendant's office at Papatoetoe.

Finally under cross-examination Mr Millar repeated that when the general discussion took place in relation to the marketing of the property he was not giving advice or even making a recommendation; he was merely airing his views and it became quite apparent once more that his view was that the property was one which would have but limited appeal.

Mr Worsfold also gave evidence and he maintained that he was in Mr Millar's room throughout the interview and he tended to give evidence to support Mr Millar. However, when it came to a question of price, while repeating that a range of prices was discussed, he emphasized that the price was to be in the mid to late $50,000's and not $60,000 because that was another price bracket, stating that $59,500 is acceptable to some persons but $60,000 introduces a totally different factor. He also referred to the fact that the Plaintiffs wanted to sell the property with as little "fuss" as possible and according to him when the sale of the property as individual units was discussed, figures of from $15,000 to $17,000 for each of the units was his memory of that discussion. He could not remember there ever having been discussed a figure of $55,000 which, of course, does not accord even with the evidence of Mr Millar. When asked if he could remember what the Clarkes were going to do with the proceeds of the sale he replied that he had a feeling that they were going to buy another property in Wanganui. That was despite the fact that he had taken the particulars in relation to the sale from the Clarkes and the authority form, in his own handwriting, records that finance was available for an approved purchaser. Quite frankly I have grave doubts as to whether Mr Worsfold was in the room at all except in a limited way as deposed to by the Clarkes. Even assuming that he was, his evidence is very much at variance with the other persons in the room and his recollection was very faulty. Quite frankly I am not prepared to place any reliance upon his evidence in relation to the crucial matters at all.

The last witness was Mr Sime who was, of course, responsible

for the original sale of the property to Cu-bro Holdings Ltd and for the on going sales of the three units. He agreed that when he did arrive to see the Clarkes with the agreement they were surprised that an agreement had come to hand so quickly and he acknowledged that he had communicated with Cu-bro Holdings Ltd immediately upon seeing the property as he felt it was a type of property in which they would be interested; of course, that proved to be the case.

In relation to the on going sales Mr Sime indicated that the purchaser of the first unit, Mr Hayes, was a client who had come in off the street and that after showing him a number of properties he eventually showed him these particular units at a time when, according to Mr Sime, he did not know whether Cu-bro would agree to sell. It was only after Mr Hayes had indicated very strongly that he wished to buy one of the units that eventually Mr Sime arranged the sale. When he did so, however, he had to acknowledge that Cu-bro had obviously already, before he arranged that sale, given instructions to the surveyor to prepare the plan of sub-division because the date appended to the plan, as already mentioned, was 10th February 1981, and the date of the agreement was one day before, namely 9th February, 1981.

Subsequently, of course, Mr Sime arranged the other two sales and he knew that there had been no deposit paid to the Plaintiffs. That, I consider, is a fair inference from his evidence at page 58 because he certainly knew at the time of the sale to Cu-bro Holdings that no deposit had been paid and he acknowledged that it was probably he, himself, who obtained the authority from Cu-bro to appropriate money from one of the on going sale deposits towards the deposit on this particular

property. He saw no need, according to him, to reveal the situation to Mr and Mrs Clarke and quite frankly he did not seem to know to whom he or his firm owed the primary duty in this matter as at the beginning of March and before the deposit was paid.

Valuers gave evidence for both parties. By reason of the view I have come to in this matter it is unnecessary for me to traverse that evidence, but the reports furnished by the two valuers serve to illustrate that there can be differing values placed on this property depending upon the manner in which it is decided that it should be marketed. Even so, there was some disparity between the valuations with one valuer on a home unit approach adopting a gross realisation figure of $92,500, and after deducting various expenses and allowances he arrived at a figure of approximately $71,000. On the same basis the Defendant's valuer arrived at a figure of approximately $63,000. This is quite a remarkable difference having regard to the values being dealt with. Even so, the valuation served to highlight the fact that on whatever basis it was adopted the property as at February 1981 was worth more than $58,000.

On many of the essential points there is no great divergence in the evidence of Mr and Mrs Clarke on the one hand and Mr Millar on the other. Where the real difference lies in many respects is the emphasis to be placed upon what was said at the meeting on 2nd February 1981. It is plain from the evidence that the Clarkes had been away from Auckland for some considerable time and I am satisfied they were not familiar with Auckland conditions, particularly the market trends in the property field, nor were

they aware of the best method of disposing of this particular property in its Papatoetoe location. I am therefore satisfied that they went to the First Defendant for the purpose of getting advice as to the best method to be employed in the marketing of the property for sale and to get advice as to the price which should be put upon the property. I accept that the Clarkes were in no hurry to sell as they were getting an income from the property and did not require the money for investment in another property for their own occupation; it was their intention to subsequently invest the money through their solicitor which, in fact, has happened. I am satisfied also that Mr Millar understood precisely what the Clarkes were asking of him, namely that they were seeking his advice as a land agent in Papatoetoe as to how the property should be marketed and at what price. I am certain that Mr Millar realised precisely what he was doing and that his attitude was coloured to some degree by the unfavourable impression which the property had made upon him as a result of his two inspections. One would have thought that a land agent of the experience of this man, once he had been asked whether or not the property could be sold as separate units, would have at least checked the situation with the local authority - which he did not do; and that he would have suggested that the market could be tested for a period in that fashion and if the result of that test was unsatisfactory, then have considered another method of marketing.

Plainly, and as is accepted by the First Defendant, it had a duty of care in giving advice to the Plaintiffs and had a duty of care in its conduct in relation to the subsequent sale of the property. That is accepted by the First

Defendant as was acknowledged by Mr Akel during his submissions. To my mind the First Defendant has not discharged that duty which it owed to the Clarkes, firstly in relation to the advice which was given and secondly in relation to its conduct. Consequent upon it becoming aware of the re-sale of the units it ought to have acquainted the Plaintiffs with the fact that the property had been sold in three units and, in fact, I am of the view that the matter having been raised by the Plaintiffs at the initial interview, in the circumstances of this case the First Defendant ought to have advised the Plaintiffs of what had occurred after the sale of the first unit. Certainly when no deposit had been paid it ought to have advised the Plaintiffs at the end of February when the sale of the third unit had occurred that all three had been sold. The reason for this will become apparent shortly.

So far as the evidence is concerned I accept the evidence of Mr and Mrs Clarke, particularly that of Mr Clarke who I found to be a person who gave his evidence in a very reliable manner, that it was because of the advice given by Mr Millar to them that the property was put on the market in the manner in which it was and at the price of $58,000. I am satisfied that Mr Millar's advice was that the property would reach $55,000 and that he accepted Mr Clarke's suggestion that the property be put on the market at $58,000 to give room to negotiate. I reject Mr Millar's evidence insofar as it relates to a suggested price in the mid $50,000 bracket to the low $60,000 bracket. On the crucial matters of evidence where there is a conflict between Mr and Mrs Clarke on the one hand and Mr Millar on the other I prefer the evidence

that in late February or early March 1981 he rang Mrs Hanna in relation to the deposit.

On 10th February 1981 which, incidentally, was the day after the sale of the first unit to Mr Hayes, the letter was written by Mr Millar to the Plaintiffs' solicitors advising that the deposit had not been paid. On the same date Mr Millar wrote a letter to Cu-bro's solicitors concerning the sale of the unit to Mr Hayes in which it referred to the fact that the First Defendant had received a deposit of $3,000 in relation to that sale. One wonders why at that time Mr Millar did not acquaint the Clarkes' solicitors with the whole situation. There is no record of any letter having been written in relation to the deposit between 10th February, 1981 and 17th March, 1981 when the letter was written forwarding the amount of the deposit. I am satisfied that there was absolutely no communication between the First Defendant and the Plaintiffs' advisers in relation to the deposit other than for those two letters.

There is no doubt in my mind that until the deposit had been paid the First Defendant was still acting as the Plaintiffs' agent and, indeed, it seems to have regarded itself as acting in that capacity because it obtained Cu-bro's authority in writing to appropriate the money for the deposit from the moneys which it had received from Mr Hayes as a deposit on the sale of the first unit. It then accounted for that deposit, retaining the amount of its commission.

The law is clear that when the deposit is not paid it affords the vendor an opportunity to cancel the sale without notice. This is made plain from the decision of the High

Court in Brien v. Dwyer (1978) 141 CLR 378. During the course of his judgment at page 393 Gibbs, J., in discussing the decision in Alarm Facilities Pty Ltd v. Jackson Constructions Pty Ltd (1975)2 N.S.W. L.R. 22, had this to say:

> "I respectfully agree with the alternative view of Goulding, J. that the character and importance of the deposit indicated that the clause requiring the payment of a deposit is a fundamental term the failure to perform which goes to the root of the contract and entitles the vendor to renounce without further performance. A similar view was expressed by Woodhouse, J. in Watson v. Healy Lands Ltd (1965) N.Z.L.R. 511."

There are numerous statements to the same effect and there is no necessity to restate them.

Had the First Defendant, at the end of February 1981, acquainted the Plaintiffs, as it ought to have done, with the fact that the deposit had not been paid by Cu-bro Holdings Ltd, and had it informed them that in fact the three units had been sold individually, it would then have been open to the Plaintiffs, without further ado, to have cancelled the contract with Cu-bro Holdings and to have obtained the benefit of entering into agreements with each of the purchasers who had in fact purchased from Cu-bro.

Thus, in my view, the First Defendant has failed in its duty to the Plaintiffs in two respects: firstly it failed in the duty of care which it owed to them in giving them the advice in relation to the manner in which the property should be marketed; secondly it failed in its duty to the Plaintiffs to advise of the non-payment of the deposit after 10th February 1981 and to inform them of the three sales when they had in

fact occurred and at which point the deposit still had not been paid. There was a further lapse of 17 days from the date of the execution of the last agreement in respect of the third unit before the letter was sent forwarding the deposit and yet nothing was done in the meantime.

Accordingly I am of the view that the First Defendant is liable to the Plaintiffs in damages by reason of its failure to conduct itself in the manner in which it ought to have done. However, I entirely acquit the First Defendant and Mr Millar from having acted fraudulently in the circumstances. That they have been negligent goes without saying, but there is no evidence which justifies a finding that either has been guilty of fraud, nor is there sufficient evidence available which would in any way entitle a Court to find that Mr Sime had in any way acted in a fraudulent manner. If Mr Sime's evidence is taken at face value then he is an extremely ignorant land salesman and the sooner he finds out to whom he owes his duty as a salesman at any particular time, the better off he will be. The same comment can be made in respect of Mr Millar.

While this action has been brought against Mr Millar, to my mind he was acting but as a servant or agent of the First Defendant and I do not think that he personally should be liable for any damages. There is no cross notice as between the First and Second Defendants, but if the First Defendant fails to meet the damages which I am about to award then the Plaintiffs could have recourse as against Mr Millar. Accordingly I consider that the proper situation with regard to him is to reserve any question as to liability in respect

In relation to damages I am of the view that they are fixed at the total value of the resale of the three units. Had the Plaintiff been placed in a position where they could have obtained the benefit of those three contracts then they would have received a gross figure of $92,000 and that I consider to be the basis on which damages should be calculated. They have already received $58,000 leaving a difference of $34,000, but then they would have been liable to have paid the First Defendant's commission on those three sales which amounts to $3060. The balance is $30,940 and there will be judgment for the Plaintiffs in that sum as against the First Defendant with costs according to scale and with disbursements and witnesses' expenses to be fixed by the Registrar. I certify for a second day and allow the sum of $150 to cover all aspects of discovery.

D. P. Lang J.

SOLICITORS:

Murdoch, Ross, Price & Hall, Auckland for Plaintiffs
Simpson Grierson, Auckland for Defendants