IN THE HIGH COURT OF NEW ZEALAND
NEW PLYMOUTH REGISTRY

CIV 2008-443-000286

UNDER	Declaratory Judgments Act 1908
BETWEEN	GENERAL DISTRIBUTORS LIMITED Plaintiff
AND	JOHN EDMUND HAILES First Defendant
AND	WALLATH PROPERTY INVESTMENTS LIMITED Second Defendant
AND	FOODSTUFFS PROPERTIES (WELLINGTON) LIMITED Third Defendant

Hearing: 9 December 2008

Counsel: M R Crotty for plaintiff
L J Taylor for first defendant
C L Lim for second and third defendants

Judgment: 9 September 2009 at 12:30pm

JUDGMENT OF ASSOCIATE JUDGE ABBOTT

This judgment was delivered by me on 9 September 2009 at 12:30pm, pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

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[1] The plaintiff, General Distributors Limited (GDL), has applied for a declaration that it has a binding agreement to lease commercial land at the corner of Tukapa Street and Wallath Road, New Plymouth. It currently operates a Woolworths supermarket from premises on that land.

[2] The land was owned by the first defendant, Mr John Hailes, at the time of the alleged agreement to lease. Subsequent to the alleged agreement Mr Hailes sold the land to the second defendant (Wallath) which then transferred it to the third defendant (Foodstuffs). GDL seeks a declaration that the agreement for lease is binding on Foodstuffs.

[3] Mr Hailes has applied for summary judgment against GDL. He says that GDL's claim cannot succeed, essentially because the parties did not conclude a binding agreement. GDL opposes the application. It says that the parties reached a binding agreement on all essential terms, and intended that it be enforceable immediately (that is, before it was incorporated into a formal agreement to lease). It also says that these matters cannot be decided on a summary basis because there are factual disputes on key issues that will turn on credibility and expert evidence is needed on whether the essential terms of a lease have been agreed.

[4] For the reasons I will give in this judgment, I have come to the view that the plaintiff's claim cannot succeed and that the defendant should be granted summary judgment.

The original lease

[5] There has been a Woolworths supermarket on the land since GDL's predecessor Woolworths (New Zealand) Limited leased part of the property from the previous owner in 1982.

[6] Mr Hailes resides in England but is represented in New Zealand by his solicitor, Mr Peter Young of New Plymouth. He became the owner of the land, and

lessor under the lease to Woolworths, on 22 May 2003. At that time the lease was due to expire on 27 July 2003. It was subsequently extended to 27 July 2006.

[7] GDL became the lessee on 31 July 2003 when Woolworths (New Zealand) Limited amalgamated with GDL. GDL is a subsidiary of Progressive Enterprises Limited (Progressive). GDL was represented at all material times by Progressive's property managers, Mr R McNab and Mr C Brown.

The proposed development

[8] GDL was leasing only part of the land. The other part was leased to another party who used it for a garden centre business. In late 2003 GDL expressed an interest in refurbishing and extending its supermarket premises, and taking over the garden centre premises (when they became available) for that purpose. Mr Hailes saw merit in having one tenant on the site. In April 2004 he had Mr Young inform Mr McNab that he would be prepared to fund a development.

[9] As it happened, the operator of the garden centre was reviewing the future of that business. Towards the end of 2004 an early termination of that lease was negotiated. GDL agreed to lease the former garden centre premises from Mr Hailes on a monthly basis from 1 December 2004 pending agreement on the development of the site.

[10] Although GDL's representatives continued to indicate GDL's interest in the refurbishment and extension project, matters did not progress swiftly. In September 2005 GDL's Board approved the project in principle. The concept for the project was that Mr Hailes (as lessor) would meet the capital costs with those costs being reflected in the rent to be paid. On 5 October 2005 Mr McNab sent Mr Young what he described as "ballpark costs" for the development. The lessor's development costs were estimated at $3,708,300. A few days later Mr McNab advised that GDL was having detailed plans drawn up.

[11] Mr Young and Mr Hailes had a concern about the capital expenditure on the project, and the rental that would be needed to give a realistic commercial return on

that investment. Mr Young says that there was also a concern about overcapitalisation of the site. Mr Young told Mr McNab in November 2005 that the expenditure was more than Mr Hailes had anticipated, but that his financiers were prepared to consider a proposal. On 24 January 2006 Mr McNab advised Mr Young that a further $700,000 might be required to fund acquisition of additional property. He said that that he would get back to Mr Young with a detailed proposal once the development plan and costings were finalised. The finalised plan and costings did not eventuate.

[12] The supermarket lease was due for renewal in July 2006. In March 2006 Mr Young wrote to Mr McNab and suggested that both the existing supermarket area and the garden centre be included in a single lease from the renewal date, pending finalisation of the development proposals.

[13] Mr McNab did not respond until mid July 2006. He then wrote and advised Mr Young that it was taking longer than expected to acquire the proposed additional property and asked for an extension of time for exercising the right of renewal to allow GDL to put a new lease proposal forward covering both the existing premises and an extension. He advised that further time was needed because the lease changes had to be referred to the property committee of Woolworths Australia (which had earlier acquired Progressive).

[14] In late August 2006 (in response to a reminder by Mr Young) Mr McNab advised Mr Young by email that he had prepared a draft proposal for a new lease, both for the existing store and the extension, which he expected to have approved by his general manager within a week.

[15] Mr McNab did not write formally until 2 November 2006. Even then he did not address the proposed new lease and costings for the proposed development, but simply confirmed GDL's willingness to accept a CPI increase for the existing supermarket lease and requested a deferral of any increase in rent for the garden centre premises. Mr McNab added that GDL's proposal on rental was made on the basis that it was not to set a benchmark in respect of rental to be negotiated in due course for a new lease for the extended and refurbished store. In a further letter later the same day Mr McNab confirmed that if GDL was to renew rather than proceed

with a new lease, it would do so for a minimum of three years. After speaking with Mr Hailes, Mr Young advised Mr McNab (by letter dated 6 November 2006) that Mr Hailes agreed to a 12 month deferral of the increased rent for the garden centre premises but wished to have the new rent commence from 1 December 2006.

[16] On 6 December 2006 Mr Young wrote to Mr McNab by email trying to get some finality on a new lease. He had Mr McNab send him a copy of Woolworths' standard lease. In January 2007 Mr Young learned that Mr McNab was leaving Progressive. There was an exchange of emails to try to advance matters. There was then a lull in communications before Mr McNab's replacement (Mr Brown) contacted Mr Young in late May 2007 (by email) advising that GDL was wanting to advance matters. Mr Young and Mr Brown exchanged emails about the terms of a lease (a twelve year term was contemplated), but still without a formal proposal from GDL as to the extensions or detailed costings.

[17] On 5 July 2007, just before going away for a period, Mr Brown sent a draft plan for the site with the following comments:

> We are making progress with finalising our plans and at this point we estimate the extended Store will increase existing floor area by some 800 square metres. Please refer to attached draft plan of building outline showing the extent of the additions. We need to consider the way in which this will be handled from a capital cost contribution point of view and corresponding rental to the landlord. Not sure what Rob previously discussed with you and I note your earlier comments with respect to not writing off existing capital value. Are you able to give this some thought and come back to me. Normally we look at this in terms of rentalising the base building costs being paid for by the landlord or alternatively looking at an overall rental for the extended Store based on the increased floor area and the additional rent being capitalised to assess the landlord's contribution.
>
> I am going to be away until 16 July so if you are able to consider in the meantime along with the points below we should be in a better position to finalise the leasing arrangement and rent for the future.

The alleged agreement

[18] On 16 July 2007 Mr Young responded to Mr Brown:

> In reply to your emails of 8th June and 5th July.

Let us agree point by point on a without prejudice basis and once this is completed we can ask our respective masters to sign off the final agreement/lease.

1. I confirm that the lessor will agree to the 1.5% for turnover rental.

2. An initial term of 12 years is acceptable. The right of renewals could be 3 or even 4 or 5 years each.

3. I accept that the new lease would run from the date of Practical Completion but John Hailes would certainly be looking to capitalise the interest cost incurred during the course of construction.

4. I based the threshold on the existing rental and the 1.5%.

John Hailes would be agreeable to setting an overall rental for the extended supermarket with the additional rent being capitalised to assess his contribution. Have you considered the lessor making the capital contribution at the commencement of the work and the new rental would commence from that time. It would then become a very clean exercise and Woolworths would have complete control over the work.

Should I draft a lease based on the lease that Rob McNab set me.

[19] On 17 July 2007 Mr Brown responded:

Okay that sounds good to me.

1. Agreed

2. Agreed. 12 years lease term with 4 x 5 year ROR.

3. In principle agreed and note your comment on upfront contribution and new rent being paid from this time. We need to look at how we best do this in practice and keep it simple too – Maybe some midpoint once larger contractor claims become due under the contract?

4. Noted

5. Yes it would be good if you could draft the lease based on what was earlier sent to you by Rob McNab – hopefully it is in Word format. If not please let me know.

Mr Brown also queried whether there had been an overcharge in respect of the garden centre rent and asked that Mr Young check that.

Subsequent events

[20] There was no further communication until 13 August 2007 when Mr Brown wrote to Mr Young by email. The relevant part of the communication reads:

> Just wanting to keep in contact in regards to this project.
>
> Overall in principle we have agreement on the main terms but we need to look a little closer at the contributions and how this is funded/managed etc. The other points for consideration include the capitalised of the increased rent and we wondered if you would be happy at jointly engaging a Valuer to work on this or if you would prefer to have separate engagement. What we need to agree is a rental rate to apply and a market capitalisation rate to arrive at the lessor contribution with the new rent to be added to existing rent payable for the ongoing situation. Can you please let us know your thoughts in this regard.

[21] Mr Young replied to Mr Brown on 14 September 2007 about the overcharging of rental, and to Mr Brown's suggestion in his email of 13 August 2007 that there be a joint engagement of a valuer. Mr Young said that a separate valuer had been engaged. On 26 September 2007 Mr Brown responded on the overcharging point. He appears not to have understood Mr Young's response on the appointment of a valuer as he again invited a joint appointment of a valuer. He also advised that another person (a Mr Chalmers) had been appointed property manager for Progressive and future correspondence should be sent to him.

[22] Mr Young did not prepare a draft lease.

[23] In the meantime Mr Young had also been involved on Mr Hailes' behalf in negotiations with Wallath for a possible purchase of the land. Those negotiations were successful and on 21 November 2007 Mr Young wrote to Mr Brown to advise him of the sale, to seek written confirmation that GDL had exercised its right of renewal of the existing lease for three years from 27 July 2006 (and would enter into a deed to that effect when called upon), and to advise that any variation of the terms of the lease, extension of the term, or grant of further renewals would be a matter for negotiation with the purchaser. GDL's response was that it had already reached agreement on a new lease, including extension to the premises, and for that reason had not formally exercised its right of renewal.

[24] On 4 December 2007 GDL lodged a caveat against the title to the land. It claimed an interest in the land under an agreement to lease.

[25] Wallath settled the purchase of the land on 6 March 2008. On 22 May 2008 it transferred the land to Foodstuffs.

[26] GDL brought the present proceeding on 23 June 2008. Mr Hailes filed his application for summary judgment on 30 July 2008.

Summary judgment principles

[27] Mr Hailes brought his application under the former r 136(2) (now r 12.2(2)) of the High Court Rules:

> **12.2 Judgment when there is no defence or when no cause of action can succeed**
>
> …
>
> (2) The court may give judgment against a plaintiff if the defendant satisfies the court that none of the causes of action in the plaintiff's statement of claim can succeed.

[28] The general principles that the Court applies when determining an application for summary judgment are well settled. The principles applicable to an application by a defendant are to be found in the decision of the Court of Appeal (Elias CJ) in *Westpac Banking Corp v M M Kembla New Zealand Limite*d [2001] 2 NZLR 298 and of the Privy Council in *Jones v Attorney-General* [2004] 1 NZLR 433. Principles of particular relevance to the present application are:

a) An application for summary judgment will be inappropriate where there are disputed issues of material fact or where material facts need to ascertained by the Court and cannot confidently be concluded from affidavits.

b) Except in clear cases (such as a simple debt claim) it will not usually be appropriate to decide the sufficiency of proof of the plaintiff's claim.

c) The defendant has to satisfy the Court that none of the claims can succeed. It is not enough to show that the claims have weaknesses. If a case should proceed to trial if the assessment of whether the claims can succeed can only be arrived at on a fine balance of the available evidence.

The alleged agreement

[29] GDL pleads that by their correspondence, culminating with Mr Young's email of 17 July 2007, the parties entered a binding agreement to lease refurbished and extended premises on the land:

> 29. By email dated 17 July 2007, Mr Young (on behalf of Mr Hailes) and GDL entered into an agreement to lease ("Agreement to Lease") on the following terms:
>
> (a) Commencement Date: date of practical completion of the Project;
>
> (b) Term: 12 years;
>
> (c) Rights of renewal 4 x 5 year terms;
>
> (d) Rental: based on a CPI adjusted rent under the Lease and incorporating the costs of completion of the Project; and
>
> (e) an increase of 1.5% per annum for Turnover Rental
>
> 30. The Agreement to Lease contains the key commercial terms necessary for a valid agreement to lease.
>
> 31. Mr Hailes and GDL intended to be bound by the Agreement to Lease.

The competing submissions and issues arising

[30] Mr Hailes says that this claim cannot succeed for several reasons. First he says that the parties did not agree to be bound until a formal lease was drawn up and signed by both. In the alternative he says that any agreement that may have been reached is void for uncertainty because the parties have not agreed all essential matters. The most significant was the rent to be paid but other important matters were the capitalisation rate required to calculate Mr Hailes' contribution to the

development cost, the commencement date and reinstatement obligations. Mr Hailes also says that Mr Young was not authorised to enter into a binding agreement, and that the formal requirements of s 2(2) Contracts Enforcement Act 1956 have not been met. He contends that these matters can properly be determined on this application because there is no dispute over the circumstances in which the negotiations took place and the negotiations were conducted entirely by correspondence (either email or letter), all of which is before the Court.

[31] GDL says that it has an arguable claim. It contends that in the course of the negotiations the parties reached agreement on all essential matters, or (in respect of rent) put in place a mechanism for reaching agreement. It claims that Mr Young had ostensible authority to bind Mr Hailes. It says that in those circumstances the parties intended to be bound before a formal lease was drawn up (claiming that this view is supported by the arrangements that were made to draw up a lease and steps that were taken to advance the project). It contends that the correspondence satisfied the requirements of s 2(2), but alternatively that its acts of leasing the garden centre premises, purchasing neighbouring land, and seeking resource consent are acts of part performance. Even more significantly for the present application, it says that these questions cannot be properly determined without evidence as to the parties' understanding of the correspondence comprising the negotiations, and the nature and extent of Mr Young's authority.

[32] The issues arise out of these competing contentions are:

a) Whether it is arguable that the parties agreed to be bound before signing a formal agreement to lease or deed of lease;

b) Whether it is arguable that the parties reached agreement on all essential terms;

c) Whether it is arguable that Mr Young had authority to bind Mr Hailes;

d) Whether it is arguable that the provisions of the Contracts Enforcement Act have been complied with; and

e) Whether these issues can be decided properly on this application.

Did the parties intend to be bound?

[33] The first question for determination is whether the parties intended to be bound at the conclusion of the email exchange of 16 and 17 July 2007. The Court may look beyond the words of the "agreement" to the background circumstances, including statements made in the course of negotiations, to determine whether the parties intend to be bound at a given point: *Fletcher Challenge Energy Limited v Electricity Corporation of New Zealand Limited* [2002] 2 NZLR 433 at [54].

[34] Where parties negotiate significant commercial agreements the law infers that they do not intend to be bound before the agreement has been drawn up and executed by both sides. This is particularly so where the transaction concerns or includes the sale and purchase of property: *Concorde Enterprises Limited v Anthony Motors (Hutt) Limited* [1981] 2 NZLR 385, 388-9*; Carruthers v Whitaker* [1975] 2 NZLR 667, 671. This natural inference can be displaced. It is a question of ascertaining the intention of the parties as to when and how they will become bound: *France v Hight* [1991] NZLR 345, 352.

[35] Counsel for Mr Hailes submitted that there was no evidence to rebut the normal inference. He submitted, to the contrary, that four factors supported "the commonsense of the presumption": the negotiators were not the ultimate decision-makers, the parties undoubtedly contemplated a formal lease, this was a significant commercial transaction for both parties, and the language used in the negotiations was not language of immediate agreement.

[36] Counsel for GDL focused most of his argument on whether or not the parties had reached agreement on essential terms, and whether Mr Young had authority to bind Mr Hailes. He submitted that those two matters were strong indicators of an intention to be bound immediately and contended that further evidence was required on all of these matters before the parties' intentions could be determined conclusively.

[37] I do not regard the existence or otherwise of an agreement on essential terms, or Mr Young's authority to bind Mr Hailes, as determinative of whether the parties intended to be bound before preparation and execution of a formal document. Agreement on essential terms is a further pre-requisite to formation of a contract (in addition to the parties' intention to be bound immediately). Similarly, a finding that Mr Young was able to bind Mr Hailes does not determine the question of whether the parties intended to be bound before preparation and execution of a formal agreement.

[38] The starting consideration, in my view, is the nature of the transaction. This was a significant commercial transaction for both parties, that had been under discussion for over three years and had still to be finalised. Although the plans and costings were not finalised, the early "ballpark" estimate was for a lessor's capital contribution of $3,706,300 (plus a possible $700,000 for acquisition of additional property) and a lessor's fitout cost of $3,248,400. There was to be a resultant increase in rental of at least $120,000 and potentially up to $360,000 per annum (using methods of calculation mentioned by Mr Brown). The transaction required major borrowing by Mr Hailes (if not for both parties). The amount of Mr Hailes' contribution and the increase in rent payable by GDL had not been determined. The natural inference is that both parties expected the outcome of the negotiations to be formalised.

[39] This inference gains support from the repeated references in the parties' correspondence to preparation of a formal lease. There can be no doubt that the parties intended that such a document would be drawn up and signed.

[40] The second significant factor, in my view, is that Mr Young and Mr McNab or Mr Brown were not the ultimate decision-makers. This is clear from both parties' correspondence. Mr Young made it clear throughout his correspondence that he was reporting back to Mr Hailes, and that Mr Hailes was deciding matters such as the capital expenditure and what rent and lease terms would be acceptable. This is reflected in the penultimate paragraph of Mr Young's email of 16 July 2007 where Mr Young reports that Mr Hailes "would be agreeable to setting an overall rental … with the additional rent being capitalised to assess his contribution". Similarly, at

various times in his correspondence Mr McNab advised that he was referring matters to his general manager, that he was waiting for approval from a board meeting, and that lease changes had to be referred to GDL's ultimate parent, Woolworths Australia. It is noteworthy that Progressive's national property manager and general manager (property) have both given affidavits but do not assert that Mr Brown (a property manager) had authority to bind GDL.

[41] The last factor is the language that the parties themselves used in the exchange of emails which GDL contends concluded the agreement. Mr Young predicated his email of 16 July 2007 with the words:

> "Let us agree point by point on a without prejudice basis …"
>
> "… once this is completed we can ask our respective masters to sign off the final agreement/lease".

The first of these phrases indicates Mr Young's wish to get agreement between the negotiators in a non-binding way, whilst the second phrase reinforces that they are not the ultimate decision-makers.

[42] Later in the same email Mr Young uses language of negotiation rather than agreement in addressing matters still requiring consideration:

> "… John Hailes would certainly be looking to capitalise the interest cost …."
>
> "John Hailes would be agreeable to setting an overall rental …"

[43] Lastly on matters of language, Mr Brown was equally cautious in his answer to Mr Young's proposal that a new lease would run from date of practical completion and his comment that Mr Hailes wished to capitalise interest incurred during the construction period:

> "In principle agreed …."

The words "in principle" have been referred to as words of reservation used for the purpose of moving negotiations forward to an agreement*:* *BP Oil New Zealand Limited v Van Beers Motors Limited* (HC NWP CP 4/91 10 March 1992 Penlington J) at pp 50-51:

> The acceptance in principle allowed the entry into an arrangement as envisaged in the letter of 26 March and at the same time reserved the right to Van Beer Motors to withdraw or to alter its position up until the time that heads of agreement were signed and binding legal relations were created.

[44] Mr Brown's email a month later (13 August 2007) reinforces this sense of working towards agreement to take to their principals rather than confirming an agreement reached on 17 July 2007. He again uses the phrase "in principle" before going on to address other matters "for consideration", inviting agreement on engagement of a valuer and seeking Mr Young's thoughts on agreement of a rental rate and a market capitalisation rate which could be used to determine Mr Hailes' contribution.

[45] After weighing all of these factors I accept the submission of counsel for Mr Hailes that this is a case where there is nothing to rebut the inference that the parties did not intend to be bound until the terms of their agreement were recorded formally either in an agreement to lease or a deed of lease. The parties were contemplating a significant commercial transaction, with a number of variables affecting the commercial terms and potentially affecting the economic feasibility of the transaction. The negotiators were not the ultimate decision-makers. The language the negotiators used was not language of immediate obligation. The commercial reality was that the parties intended a further step or further steps to be taken.

[46] I am not persuaded that the parties can give any further evidence as to the background circumstances or as to the negotiations that can provide any assistance. The essential question is whether the parties intended to be bound. This has to be determined objectively. There is no dispute as to the circumstances in which the negotiations took place. The significant negotiations (as pleaded in paragraphs 14 to 27 inclusive of the statement of claim) were conducted entirely by correspondence which speaks for itself.

Was there agreement on essential terms?

[47] If it is clear that parties intend to be bound immediately, Courts will strive to give effect to their agreement provided all essential terms are agreed or can be determined by an agreed mechanism. If essential matters are not agreed, or cannot

be determined, the agreement will be void for uncertainty: *Fletcher Challenge Energy Limited v ECNZ Limited* at [62]-[63]:

> [62] We agree with Professor McLaughlan ("Rethinking Agreement to Agree" (1998) 18 NZULR 77 at p 85) that "an agreement to agree will not be held void for uncertainty if the parties have provided a workable formula or objective standard, or a machinery (such as arbitration) for determining the matter which has been left open". We also agree with him that the Court can step in and apply the formula or standard if the parties fail to agree or can substitute other machinery if the designated machinery breaks down. This is generally the approach taken by this Court in *Attorney-General v Barker Bros Ltd*.
>
> [63] However, if essential matters (ie legally essential or regarded as essential by the parties) have not been agreed upon and are not determinable by recourse to a mechanism or to a formula or agreed standard, it may be beyond the ability of the Court to fill the gap in the express terms, even with the assistance of expert evidence.…It will be a matter of fact and degree in each case whether the gap left by the parties is simply too wide to be filled. The Court can supplement, enlarge or clarify the express terms but it cannot properly engage in an exercise of effectively making the contract for the parties by imposing terms which they have not themselves agreed to and for which there are no reliable objective criteria.

[48] The essential terms of an agreement to lease are identification of the lessor and lessee, a sufficient description of the premises to be leased, the commencement and duration of the term of the lease, and the rent or other consideration to be paid: Hinde McMorland & Sim Land Law in New Zealand para 11.047; Halsburys Laws of England Vol 27(1) 4th ed reissue 1994 para 60. There may also be other terms which the parties regard as material to reaching agreement. Whether the parties intend the term to be of that nature depends on all the circumstances of the case: *Tweddell v Henderson* [1975] 2 All ER 1096; *Fletcher Challenge Energy Limited v ECNZ Limited* at [53]; *BP Oil New Zealand Limited v Van Beers Motors Limited* (HC NWP CP 4/91 10 March 1992 Penlington J) at p 30.

[49] It is accepted that the parties had not agreed on the overall rental. GDL contends, however, that the parties had agreed on a mechanism or formula for calculating it. This mechanism had two components. The first was that overall rental was to be reached by calculating a rental for the extension (on the basis of an increase of floor area of some 800 square metres) and adding that to the rent for the existing supermarket plus the former garden centre. The second was that the parties had agreed that rent for the extension would reflect Mr Hailes' contribution to the capital cost. Counsel for GDL submitted that this provided a mechanism by which

the rental could be calculated. He referred to Mr Brown's evidence that rent could be calculated either as a percentage return on Mr Hailes' capital contribution, or by determining a market rental for the extended floor area (which rental would then be capitalised to determine Mr Hailes' capital contribution). He said that GDL intended calling expert evidence to show that this mechanism was workable (there is no such evidence before the Court at this time).

[50] I am not persuaded that all the elements of this alleged mechanism were agreed, quite apart from whether it was workable. Mr Young indicated in his email of 16 July 2007 that Mr Hailes was willing to set an overall rent for the extended supermarket, and for the additional rent to be capitalised to assess his contribution to the project, but that is only part of the process. There is nothing in the correspondence to suggest that the parties agreed to adopt either of Mr Brown's suggested methods for assessing the rental (or agreed on the related issue of a capitalisation rate).

[51] I accept the submission of counsel for Mr Hailes that this was not a simple matter of determining a market rental for known premises. The nature and extent of the extension were going to be material. GDL's representatives recognised this by stating on several occasions that it would provide finalised plans and firm costings. Mr Brown referred to "a need to review and discuss the overall plans once finalised" in an email to Mr Young on 8 June 2007. In his following email of 5 July 2007 he reported that progress had been made with finalising GDL's plans (and attached a draft plan of building outline to show the extent of the proposed additions), but commented that there was still a need to consider how this was to be handled in terms of capital cost contribution and corresponding rental to Mr Hailes. Mr Brown's alleged mechanisms for calculating rent have to be assessed in that context.

[52] Mr Brown's first method (and the one that he thought was likely to be employed as it would have a better outcome for Mr Hailes) was a 10% return on Mr Hailes' capital cost. There are several difficulties with this proposition. The first is that there is no mention of this method or the figure of 10% return in any of the correspondence (and Mr Brown does not explain where the figure came from). Secondly, Mr Brown recognises that it was not agreed by saying that it was "likely"

that it would be the preferred option. Thirdly, at the point of the alleged agreement GDL had still to provide Mr Hailes with finalised plans and costings. It is unrealistic to think that Mr Hailes would commit himself to any capital contribution without that information (Mr Young mentions the need to ensure that the site was not overcapitalised).

[53] The second method appears first in Mr Brown's email of 13 August 2007 (that is, after the alleged agreement), but even then only as a proposal - he asks Mr Young if he would jointly engage a valuer "to work on" capitalisation of the increased rent and comments "we need to agree" a rental rate and a market capitalisation rate.

[54] Adopting the language of the Court of Appeal in *Fletcher Challenge Energy Ltd v ECNZ Ltd*, I find that the gap left by the parties is too wide to be filled even with the assistance of expert evidence as to how a rental might be reached. To attempt to do so in the absence of agreement on a means of fixing the rent and a market capitalisation rate (including a mechanism such as arbitration for determining differences) would be to impose terms on the parties to which they have not agreed and would deny them the right to make their own assessment of the economic viability of the project. GDL contends that it intended to proceed in any event (Mr McNab said in November 2005 that the project "will happen"). I regard that proposition with some scepticism but do not have to decide the point. The commercial reality is that the numbers had to "stack up" for both parties, and the unresolved matters of rent and capital cost were critical in that respect.

[55] I find that the parties did not have a binding agreement because they had not reached agreement on a mechanism for determining the rental to be paid. I also find that the parties regarded Mr Hailes' contribution to the project cost as essential to the project and had neither reached agreement on that contribution or on a capitalisation rate which might have provided a mechanism for establishing it.

[56] Mr Hailes also argued that the agreement was void for uncertainty because the parties had not agreed a commencement date for the lease. The parties agreed that it would commence from the date of practical completion of the work. If the parties had agreed to be bound, I consider that this is an agreed mechanism which

would have allowed the Court to fill the gap to make the parties' agreement work (one means of doing so would have been to imply a term that the parties intended the work to commence within a reasonable period). However, as my decision does not depend on this, I make no finding on the point.

[57] I also doubt whether the parties would have intended reinstatement of the lease to be a further essential term. I again make no finding on this point, as there was no evidence about it.

Did the negotiators have authority to bind the parties?

[58] Mr Hailes says that the negotiators did not have authority to commit their respective principals to a binding agreement. He says that Mr Young did not have his authority and relies on the statements made by Mr McNab in correspondence at various times that he was seeking approval of his general manager, that the matter was going to the board, and that approval was required from the property committee of Woolworths Australia.

[59] GDL says in response that Mr Young had ostensible authority to bind Mr Hailes. It relies on Mr Young's acts in the course of the negotiations. Curiously counsel for GDL did not expressly address the authority of Mr Brown, merely submitting that he had authority to bind GDL. There was no evidence to this effect even though two more senior executives in Progressive gave evidence.

[60] Ostensible (or apparent) authority for an agent to enter into a contract with a third party on behalf of the principal arises where the principal has represented that the agent has authority to act on the principal's behalf. Whether an agent has ostensible authority to bind his or her principal is determined from the point of view of a reasonable person in the position of the third party*: Contractors Bonding Limited v Snee* [1992] 2 NZLR 157, 167.

[61] Counsel for GDL argued that Mr Young was held out as having wide authority on behalf of Mr Hailes. He referred to his active involvement in the negotiations, and particularly his apparent authority to negotiate the detail of the

agreement subject only to obtaining Mr Hailes' "sign off" (referring to Mr Young's email of 16 July 2007).

[62] There is no evidence that Mr Hailes made any representation to GDL as to Mr Young's authority to enter into a binding agreement. Nor can it be said that Mr Young, who had authority to negotiate, represented that his authority extended to entering into a binding agreement (a circumstance which the Court of Appeal in *Cromwell Corporation Limited v Sofrana Immobilier (NZ) Limited* (1992) 6 NZCLC 67997 at 68009 said could give rise to ostensible authority). To the contrary, throughout his correspondence Mr Young made it known to GDL that the ultimate decision-making lay with Mr Hailes.

[63] Counsel for GDL argued that the issue should not be determined on this application. He said that GDL should be entitled to investigate the extent of Mr Young's authority under his power of attorney, and whether the "sign off" to which Mr Young referred in his email of 16 July 2007 was a mere formality.

[64] I do not consider that there is a credible issue over this. Mr Hailes has given evidence that Mr Young looks after his affairs on a day to day basis, and uses the power of attorney to execute documents on his behalf, but adds:

> I would like to stress that the purpose of the power of attorney is to allow Peter to sign formal documents in my place so that I don't have to; it is not and never has been for the purpose of allowing Peter to control my business affairs in New Zealand. In terms of overall management of my business affairs in New Zealand and the Pacific, Peter is my advisor and I am the decision maker.

This evidence is consistent with the references in Mr Young's correspondence to regular reporting back to Mr Hailes, the positions and decisions taken by Mr Hailes through the course of the negotiations, and the unequivocal statement by Mr Young in his email of 16 July 2007:

> Let us agree point by point on a without prejudice basis and once this is completed we can ask our respective masters to sign off the final agreement/lease.

[65] When coupled with the absence of evidence as to any representation by Mr Hailes, this evidence negates any possibility of ostensible authority.

[66] Although I do not now have to make any finding on point, I also doubt that Mr Brown had actual authority (as counsel for GDL submitted) given the evidence that his predecessor (Mr McNab) did not and the absence of any evidence from Mr Brown or his superiors as to Mr Brown's authority.

Was there compliance with the Contracts Enforcement Act?

[67] Section 2(2) of this Act requires that there be a memorandum or note in writing of all material terms for the agreement to be enforceable. Although the exchange of emails could constitute the requisite written record, I have already found that they do not include agreement on all material terms. For that reason the agreement is also unenforceable in terms of s 2(2) of the Contracts Enforcement Act 1956.

Suitability for summary judgment

[68] Counsel for GDL's principal submission was that this matter was not suitable for determination by summary judgment. He argued that there were no "king hits" available to Mr Hailes, and that the Court needed to go beyond the written communications between the parties because there were genuine conflicts of material fact over key issues, raising issues of credibility, and there was need for expert evidence.

[69] I have already found that there is no dispute of fact over the circumstances out of which the agreement is alleged to have arisen or in respect of what was stated in the negotiations (because they were conducted entirely in writing). I consider that the correspondence speaks for itself. Counsel could not point me to any ambiguity which could be resolved by further evidence. He endeavoured to argue that Mr Young's reference to "sign off" required further investigation. I have already rejected that both on a reading of the phrase in the context of the email and by reference to the prior correspondence from Mr Young. There was no suggestion that there was any prior history which might point the other way.

[70] Counsel for GDL also submitted that summary judgment was inappropriate as it claims that expert evidence is needed to establish whether the need for the mechanism for determining rental is workable. I have found that there was no agreement on crucial elements of the alleged mechanism so the issue of expert evidence (as to how the mechanism can be made to work) does not arise.

[71] In summary, therefore, I find that the matter is suitable for summary judgment. There are no disputes of material fact to determine, and no issues which require further investigation either by way of discovery or in the usual way at trial.

Decision

[72] I am satisfied that the plaintiff's claim cannot succeed. I enter summary judgment for the defendant against the plaintiff on the claim.

[73] As the successful party, the defendant is entitled to costs. On the evidence before the Court I see no reason to order costs other than on a 2B basis. I reserve leave for the defendant to apply for costs on a different basis if there are any matters not before the Court which would justify a different award. Any such memorandum is to be filed and served within ten working days, failing which there is to be an order that the plaintiff pay the defendant costs on a 2B basis together with disbursements as fixed by the Registrar.

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Associate Judge Abbott