IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2008-404-6676

BETWEEN	NANDRO HOMES LIMITED Appellant
AND	MEENA DATT & ORS Respondents

Hearing: 3 March 2009

Appearances: PA Fuscic for Appellant
M Meyrick for Respondent

Judgment: 16 March 2009 at 3:00 pm

JUDGMENT OF ASHER J

This judgment was delivered by me on 16 March 2009 at 3:00 pm pursuant to Rule 11.5 of the High Court Rules

……
Registrar/Deputy Registrar

……
Date

Solicitors:
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Introduction

[1] This is an appeal against an oral judgment of the District Court at Manukau in which the defendants' application for summary judgment, or alternatively an order striking out the plaintiff's pleadings, was dismissed. The critical point was whether the plaintiff's proceedings could not be pursued because the issues raised in the proceedings had been settled by an earlier agreement.

Background

[2] The appellant, Nandro Homes Limited ("Nandro"), carries on the business of house development and construction. In April 2007 it owned a property at 9 Maxwell Avenue, Papatoetoe. At all material times Mr Singh was a director of Nandro, and Ms Khalil was an employee and personal assistant to Mr Singh. Nandro proposed moving an existing house at the front of the property to the rear, and then to subdivide the property into two sections. It would build a new modern two-storey house on the front part of the section ("the property").

[3] On 4 April 2007, the first respondent, Meena Datt ("Ms Datt") entered into an agreement to purchase the property from Nandro for $575,000.00. On 23 April 2007, that first agreement was substituted for a second agreement between Nandro and the Datt Family Trust ("the Datt Trust"). The agreement was on the same terms but the purchase price was reduced to $505,000.00. Ms Datt also asserts that she paid $60,000.00 in cash as a deposit for the house on 23 April 2007, but received no receipt.

[4] The deposit due and payable under the second agreement of 23 April 2007 was $5,000.00. Nandro says that on 15 October 2007 it delivered by courier to Ms Datt a notice requiring payment of that deposit. Ms Datt acknowledges receiving an envelope, but says that it was empty and contained no statement requiring payment of the deposit. Nandro says that on 19 October 2007 it sent a notice of cancellation of the agreement for non-payment of the deposit to Ms Datt. Ms Datt denies receiving any such document. She says that she was being set up by Nandro

and that it was orchestrating a contrived and unlawful cancellation. Mr Singh for Nandro in response says that the documents were sent as asserted by Nandro, and that the Datt Trust defaulted.

[5] Another agreement for sale and purchase had been signed dated 11 October 2007 between Nandro and a Harinder Kalkat ("Ms Kalkat"), described by Nandro as a back-up agreement. It was due to settle on 30 October 2007. On that day Ms Datt and Babu Datt placed a caveat against the title to the property. Shortly after this the Datt Trust commenced proceedings against Nandro seeking specific performance of the agreement for sale and purchase ("the first proceeding"). An ex parte application for interim injunction was filed in the District Court in which the Datt Trust sought an order that Nandro be required to keep the property unoccupied, insured and maintained pending settlement.

[6] Those proceedings were transferred to the High Court. The interim injunction application was called in the Duty Judge List, and then set down for a fixture on Thursday, 22 November 2007 at 10:00 am. The parties filed affidavits setting out their respective positions. When the matter was called Ms Kalkat's counsel, Mr Grant Illingworth QC, sought leave to intervene and be heard. It appears that Ms Kalkat had in the meantime settled the sale and had moved into the property. After an initial call the hearing was adjourned at the initiation of the Judge, Harrison J, to give the parties an opportunity to consider settlement. Discussions then proceeded between the parties in the Courtroom, which had been vacated by the Judge and Court staff.

[7] Neither Ms Datt, nor Mr Singh, who is the principal of Nandro, were initially present. The Datts' interests were represented by counsel, Mr Meyrick, and Nandro and Mr Singh by their counsel, Mr Andrews. Mr Illingworth and a Mr Kahn, as his junior, represented Ms Kalkat in the discussions. During the discussions Ms Datt arrived at the Courtroom and participated in the settlement negotiations herself. Mr Andrews, Nandro's counsel, communicated throughout with Mr Singh by telephone.

[8] Negotiations proceeded through the morning. A settlement agreement was drafted by Mr Andrews in handwriting and signed dated 22 November 2007 ("the settlement agreement"). It is that settlement agreement that is the central focus of this application. I set it out showing the handwritten corrections:

> Agreement Dated: 22 November 2007
>
> Agreement Between:
>
> Meena Datt and Babu Sangeen Datt ("Datts")
>
> And
>
> Nandro Homes Limited ("Nandro")
>
> And
>
> Harvinder Kaur Kalkat ("Mrs Kalkat") all together the "parties"
>
> Recital:
>
> A. Datts and Nandro are parties to Proceeding No. CIV 2007-092-5722 ("the Proceeding")
>
> B. The Proceeding concerns a property situated at 9 Maxwell Avenue, Papatoetoe ("the property").
>
> C. Datts have lodged Caveat No 7598331.1 against the property preventing registration of a transfer ~~and other~~ to Mrs Kalkat ~~of a tra~~ and certain other dealings.
>
> D. The parties have agreed upon terms to resolve all issues between [sic] in respect of the above matters and record the terms of this agreement herein.
>
> It is agreed that:
>
> 1. Nandro will pay the sum of $75,000.00 in cleared funds to Datts within 7 days of the date of this agreement, such payment to be made to ~~Datt~~ the trust account of Datts' solicitors, Berman and Burton.
>
> 2. Upon the payment in clause 1 being made the parties to the Proceeding will immediately execute and file a notice of discontinuance of the Proceeding.
>
> 3. The terms in clauses 1, ~~and~~ 2, and 4 (below) will be incorporated in consent orders which the parties to the proceeding will request that the Court issue ~~in~~ forthwith a disposal of the Datts' interlocutory application for an interim injunction.
>
> 4. Caveat No 7598331.1 registered against the property ~~is of~~ on Certificate of Title 365461 is discharged with effect 29 November 2007.
>
> 5. These settlement terms constitute full and final settlement of ~~all~~ the proceeding and all other claims between the Datts, Nandro, and Mrs Kalkat relating to the matters recited above and the ~~of~~ property.

6. No party to this agreement makes any admission of liability to any other party in agreeing to these terms.

7. All terms of settlement are to be kept confidential to each of the parties and their legal advisors.

Signed by: …

[9] On 29 November 2007 Nandro paid the settlement sum of $75,000.00. On 30 November 2007 the first proceeding was discontinued.

[10] Then on 19 December 2007 Meena Datt and Babu Datt as trustees of the Datt Trust commenced this second proceeding in the District Court at Manukau ("the second proceeding"). The first defendant is Nandro Homes Limited, the second defendant is its Director, Deo Sharan Singh, and the third defendant is the employee, Rohin Nisha Khalil. The statement of claim is an 18-page document and claims breach of contract and negligence against Nandro, and deceit against all three parties. The allegations relate to the defendants' actions in the sale and purchase transaction, in particular the allegations of sending of the envelope and the non-sending of the cancellation document, and the failure to settle with Ms Datt.

[11] The defendants filed a statement of defence claiming that the Datts were prevented by the settlement agreement from pursuing the claim. The defendants applied for summary judgment against the plaintiffs, or in the alternative, under r 209 of the District Court Rules, for an order striking out the pleadings.

The decision

[12] The District Court Judge considered the background facts and the wording of the settlement agreement. He referred to the submissions of the parties. He stated that the claim of breach of contract "might have been very well covered by the settlement agreement", but noted that the agreement was to discontinue the action based on breach of contract. He stated that he did not understand that to provide a bar to a subsequent revival of such a claim. He concluded that:

> … my feeling is that from the point of view of the defendants the agreement is at best ambiguous. There is room, in my view, for argument. This is not a case where the defendants have been able, as counsel put it, to deliver a 'king hit'.

The applications were therefore declined.

Approach to the appeal

[13] This appeal has been filed under s 72 of the District Courts Act 1947, and by virtue of s 75 is an appeal by way of rehearing.

[14] Section 76 governs the powers of the High Court on appeal. The High Court's powers on appeal were expanded by the District Courts Amendment Act 2002 to include "mak[ing] any decision which it thinks ought to have been made". This formulation invites the appellate court to substitute what it considers is the right answer rather than to determine only whether there was a sufficient basis for the District Court decision. In light of the recent observations of the Supreme Court in *Austin, Nichols & Co Inc v Stichting Lodestar* [2008] 2 NZLR 141, the appellate court in an appeal by way of re-hearing should carry out its own assessment of the facts and should not hesitate to substitute its own findings of fact. This is particularly so in a case such as the present, where the issues raised turn on an interpretation of a document, the existence and words of which are not in doubt. Thus the appellate Court must apply an independent judgment to the conclusions reached by the Court of first instance. Nevertheless, *Austin, Nichols & Co Inc v Stichting Lodestar* makes it clear that the onus is still on an appellant to show that the trial Judge was wrong, (at [4]).

[15] Rule 152 of the District Court Rules (r 12.2 of the High Court Rules), relating to summary judgment, states that a 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".

[16] In *Westpac Banking Corporation v MM Kembla New Zealand Ltd* [2001] 2 NZLR 298, it was noted at [60]-[64] that r 136(2) (the predecessor to r 12.2) permits a defendant who has a clear answer to the plaintiff which cannot be contradicted to put up the evidence which constitutes the answer, so that the proceedings can be summarily dismissed. The difference between an application to strike out on the pleadings and summary judgment is the ability of the defendant in a summary

judgment claim to adduce evidence. The defendant has the onus of proving on the balance of probabilities that the plaintiff cannot succeed. Judgment is not appropriate where there are disputed issues of material fact, or where material facts need to be ascertained by the Court which cannot be confidently inferred from the affidavits.

[17] Therefore, summary judgment will not be appropriate where it is possible for a plaintiff to amend its claim so as to remedy defects. It should only be used where there is a clear answer to the claim which cannot be contradicted: *Westpac Banking Corporation v MM Kembla New Zealand Ltd*. It is necessary for a defendant to show that the plaintiff has no chance of success: *Ferrymead Tavern Ltd v Christchurch Press Co. Ltd* (1999) 13 PRNZ 616; *Attorney General v Jones* (2001) 15 PRNZ 347; *Attorney General v Jones* (2003) 16 PRNZ 715.

[18] There is no doubt that the settlement agreement of 22 November 2007 was a contract and binding on the parties on its terms. This has not been in dispute. There was accord and satisfaction. As both counsel recognise, the real issue is whether that agreement constituted a full and final settlement of all matters arising out of the disputed transaction, or rather just the breach of contract claim against Nandro. As both counsel accepted, if it did, there is a good defence and the appeal should succeed. However, if it is arguable that it did not so settle all claims, then the appeal should be dismissed.

The settlement agreement

[19] The recitals to the settlement agreement refer in A to the "proceeding", in B to the fact that the "proceeding" concerned the property at 9 Maxwell Avenue, and in C to the fact that the Datts registered a caveat. Recital D then goes states that the parties had agreed to "resolve all issues between in respect of the above matters". The recital does not make sense as it reads, and has an obvious gap. The word "them" is missing between the words "between" and "in respect". This was the conclusion reached by the District Court Judge, and it has not been contested by counsel, although Mr Meyrick suggested that "the parties" might be the missing words.

[20] The most important clause is clause 5, which is the clause that asserts a full and final settlement. The reference is to a full and final settlement of the proceeding, and "… and all other claims between the Datts, Nandro and Ms Kalkat relating to the matters recited above and the property". The "other claims", therefore, are those relating to the matters "recited above". The matters in recitals A – C relate to the proceeding, the discontinuance of the proceeding and the discharge of the caveat.

[21] That statement of claim in the first proceeding had a single cause of action: breach of contract. It pleaded a failure on the defendants' part to settle, the lodging of the caveat by the plaintiff and the transfer to a new purchaser by the defendants. Specific performance was sought and also unspecified damages were claimed. Additional special damages were claimed for "distress and humiliation" of $50,000, and there was also a separate prayer for the "loss of enjoyment of the new house in the sum of $20,000."

[22] It is necessary to consider the meaning of the word "proceeding". The word "proceeding" is not defined. Mr Meyrick submits that the "proceeding" settled by the settlement agreement is the proceeding represented by the cause of action in the statement of claim in the first proceeding only. He submits, therefore, that the meaning of the word "proceeding" in the agreement is limited to the statement of claim and statement of defence. He submits that the reference to the settlement of issues relating to "the property" refers to the specific performance action in the first proceeding. In contrast, he submits the second proceeding concerns different matters, and in particular corrupt and dishonest practises, and those issues have not been settled.

[23] Mr Fuscic points out that in the District Court Rules "proceeding" has a very broad definition and is not defined as limited to the statement of claim and statement of defence (r 3). He submits that the affidavits filed in the first proceeding included the facts now relied on for the deceit and negligence pleadings in the second proceedings, and that those affidavits were part of "the proceeding".

[24] In considering the arguments as to what and whom the settlement agreement relates to, it is necessary to distinguish between the different causes of action and defendants.

Interpretation of the settlement agreement in relation to breach of contract and deceit claims against Nandro

The words

[25] The crucial words are those in recital D and clause 5. Recital D refers to a settlement of the "above matters". Those matters include the proceeding and the fact that the proceeding concerns a property situated at 9 Maxwell Avenue. Clause 5 states that the settlement is a "full and final" settlement. I will refer to the words that follow this phrase shortly, but the use of the phrase "full and final" is of significance in itself. Before turning to any words of qualification, those words connote a closing of the door on further actions, at least in relation to the issues that are known to exist between the parties.

[26] The words that follow indicate that the settlement is of "the proceeding". They then, however, go further and state that it is a full and final settlement of "all other claims …". The words "all other claims" indicate without further qualification an intention to settle every known matter between the parties. There is then, however, a further qualification. It is "all other claims *relating to the matters recited above*" (emphasis added). Mr Meyrick argues that this phrase limits the settlement to the matters raised in the statement of claim. However, the clause goes on to state "… and the property". The reference to "and the property" has to be given some meaning. The reference is not to a settlement of the property in the sense of a conveyancing settlement. The natural meaning is that it is a settlement of all issues arising out of the property transaction. What is settled is more than just the specific issues raised in the statement of claim and statement of defence, or the specific issue of the removal of the caveat.

[27] The combination of these various phrases, "all issues", "full and final settlement", "all other claims" and "and the property" points on objective assessment to an intention to settle all known issues relating to the property.

[28] In terms of the phrase "the proceeding", obviously it is the pleadings which establish the parameters of the case and not the affidavits or briefs of evidence: *Price Waterhouse v Fortex Group Limited* CA179/98 30 November 1998 at p 17. However, the reference in recital B to the proceeding concerning a property indicates a wider meaning than just the issues raised in the statement of claim and statement of defence. The word "proceeding" in context means something more than that. This becomes clearer when regard is had to the background circumstances.

[29] Mr Meyrick also argued that there was significance in the deletion of the word "all" before the words "the proceeding" in clause 5. However, the deleted "all", added little before the phrase "the proceeding". It did, however, in its ultimate place before "other claims", add to the meaning of the clause by emphasising that all other claims were settled, subject to the later qualifications.

The background circumstances

[30] The background circumstances are now properly considered in any contractual interpretation exercise. They provide the context beyond the agreement itself from which meaning can be given the words and phrases used. To adopt the phraseology in *Investors Compensation Scheme Limited v West Brunswick Building Society* [1998] 1 WLR 896 at 913, the circumstances include "absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man."

[31] I have already set out in general terms the background facts. The first proceeding was about specific enforcement of the agreement for sale and purchase, and the statement of claim put at issue some of the circumstances that led up to the execution of that agreement. The first statement of claim did not include allegations of deceit or negligence. However, the affidavits filed in support of those proceedings did make allegations of deceitful behaviour against Mr Singh, although the word deceit was not actually used. For example in paragraph 6 of her first affidavit Meena Datt referred to the "devious way in which Mr Deosharand Singh had been conducting himself over a period of time." She recounted what was from her perspective the deliberate sending of an empty envelope and a failure to give

notice of cancellation. She made specific reference not only to Mr Singh, but also to Ms Khalil, the administration assistant whom she said she spoke to when she received the empty envelope. The whole tone of the affidavit was that Mr Singh had been deliberately trying to manoeuvre her into a position where he could cancel the contract. In her second affidavit she says of Mr Singh at paragraph 4, that it was obvious to her that he was "committed to his dishonest action and determined to proceed along the path he started to walk …".

[32] The background then was that there were proceedings relating to the agreement for sale and purchase containing allegations of dishonest behaviour by Mr Singh and his staff, and in particular their contrivance in a dishonest scheme to force the Datt Trust into a position of default which would warrant cancellation. There were no allegations of deceit in the pleadings, but deceit was effectively alleged in the affidavits.

[33] There is a further relevant background matter. Mr Andrews' evidence, which was not contested, was that at the outset of the interim injunction hearing the Judge raised the question of settlement and advised those in the Court that he was of the view that they should endeavour to settle all matters concerning the proceeding, not merely the interim injunction application, as promptly as possible. The Judge invited counsel present to use the opportunity to reach such an agreement. Negotiations then commenced. It could be expected in the light of such an invitation that any settlement subsequently negotiated would settle all matters, unless words of qualification were used. That was what the Judge had proposed.

[34] This background then, viewed objectively, indicates an intention to effect a full and final settlement of all matters arising out of the disputed property transaction. It indicates that in referring to a settlement of all matters "recited above and the property", the settlement agreement was intended to end that dispute entirely.

Subsequent conduct

[35] Both parties also rely on subsequent conduct to support their interpretation. It is clear that subsequent conduct that is relevant to the question of interpretation

before the Court, that is inconsistent with the meaning that party now asserts in Court, can be considered: *Gibbons Holdings Ltd v Wholesale Distributors Ltd* [2008] 1 NZLR 277. Elias CJ at [7] accepted that how the parties subsequently treated their contractual obligations "may be helpful as to the meaning of the contract". Blanchard J reserved his position on the point: at [27]. At [53] Tipping J stated:

> … The words they have used, construed in the light of all the relevant and objective circumstances in which the parties have used them, must prima facie be the best guide to their meaning. But, if some mutual or shared post-contract conduct of the parties is objectively capable of shedding light on the meaning they themselves placed on the words in dispute, I consider more is to be gained than lost by allowing the Court to take it into account.

[36] Anderson J at [73] observed that a party seeking to rely on post-contract conduct would have to show conduct on the part of all the contracting parties in order to demonstrate a shared and not merely an individually held meaning. Thomas J at [136] noted:

> … providing that the evidence is relevant to the question of interpretation before the Court it should be sufficient that, following the completion of the contract, the party concerned has acted inconsistently with the meaning it now asserts in Court.

[37] I therefore approach the subsequent conduct from the point of view that it may be relevant if it is mutual conduct or conduct where a party has unilaterally acted inconsistently with the meaning now asserted. However, I bear in mind the observation of Tipping J at [54], that in the end it is a matter for the Court to decide on the overall balancing of the competing interests whether such evidence is to be admissible in aid of the task of interpretation.

[38] Any post-contract conduct has to unambiguously point to a particular meaning. It will be futile if Courts are obliged to weigh and interpret subsequent words and actions that themselves can support a variety of meanings. Those subsequent words and actions should not in themselves be equivocal. The further interpretation of ambiguous subsequent conduct would prolong any interpretation process, for little gain and more likely further confusion. With this in mind I turn to the subsequent conduct relied on.

[39] Mr Andrews, counsel for Nandro, wrote out the settlement agreement. At the same time Mr Meyrick, counsel for the Datt Trust, had written out a memorandum for the Judge seeking orders recording the settlement. The handwritten document stated at the outset that the parties had agreed to settle "this matter". Paragraph 4 read "These orders are in settlement of the plaintiffs' application for an interim injunction". The Judge following an appearance of the parties, recorded that the parties had struck a "compromise", but a notice of discontinuance was to be filed upon completion of the terms of settlement, and that the parties were to be complimented for reaching a compromise and avoiding the cost, expense and inconvenience of "further litigation".

[40] The wording of Mr Meyrick's handwritten memorandum is relied upon by him to support an interpretation that only the injunction claim was settled. However, obviously more was settled than just the interim injunction. That interpretation would mean that the substantive specific performance proceedings would have continued. Clearly that was not the intention, and indeed that has not been suggested by Mr Meyrick. I do not consider that Mr Meyrick's handwritten memorandum assists the task of interpretation. Further, the terms of the Judge's Minute are not subsequent conduct of the parties. While they do reflect the way in which the settlement unfolded, they do not objectively shed light on the meaning of the words.

[41] The notice of discontinuance filed by the Datt Trust recorded that the parties "having settled all matters in this proceeding", the plaintiffs discontinued. I have already commented that the proceeding included the affidavits with allegations of deceitful conduct. Therefore, the reference in the notice of discontinuance to a settlement of "all matters in this proceeding", is some indication that the allegations of misconduct and dishonesty against Nandro, Mr Singh and his associates, that are made in the affidavits, are being settled. The notice of discontinuance was signed by Mr Burton, the solicitor for the Datt Trust, as well as Mr Andrews for Nandro. The conduct was mutual.

[42] However, in the end the notice of discontinuance does no more than reflect the wording of the earlier agreement. Like the other subsequent conduct referred to,

it cannot be seen as a further pointer to meaning. I disregard the subsequent conduct both parties seek to rely on as unhelpful to the interpretation exercise.

The Ali case

[43] Mr Meyrick relied on the judgments in *Bank of Credit and Commerce International SA (In liquidation) v Ali & Ors* [2002] 1 AC 251 to support his submission that the ancillary claims could proceed. In that case a settlement agreement was interpreted as referring to all claims arising out of the matters in dispute at the time, and not claims of an altogether different character that a party becomes aware of at a later date. However, here there are no new claims that became apparent at a later date. Indeed Ms Datt specifically said in her affidavits that she was aware of the further deceit claim she wished to bring, and was planning to do so once the specific performance matters were resolved. I do not consider that the *Ali* decision assists.

Contra proferentum

[44] Mr Meyrick sought to rely on the doctrine of *contra proferentum*, pointing to the fact that Mr Andrews had drafted the handwritten settlement agreement and that therefore any ambiguity should be construed against Nandro and the other appellants.

[45] The doctrine of *contra proferentum* can be applied in New Zealand in appropriate cases: *HC Senior & Co. Ltd v Body Corporate 52655* CA175/90 27 September 1991 p 4. It has particular application where one party has been responsible for all the drafting and there is an ambiguity in that drafting, and arises most frequently in the context of limitation of liability clauses. I have concluded that it should not be applied in this case. Mr Meyrick, the lawyer for Ms Datt, was present in the room when the settlement agreement was written out by Mr Andrew. The parties were of equal economic power. There were inputs by both sides to the process of settlement. There is no reason why there should be a presumption that any ambiguity should be construed in favour of the Datt Trust. Indeed, it would be unfair to give the Datt Trust that advantage, given the equal bargaining power of the

parties and the mutuality of the process. The *contra proferentum* doctrine is not a rigid rule that is applied as a matter of right against a party who drafts a document. Its application is a matter of discretion. It would be unfair to apply it here.

Other evidence

[46] Both parties included evidence in the affidavits which was hearsay (for example, Ms Datt's evidence about what she was told the Judge had said), and which recounted their personal understanding of what the settlement agreement was intended to cover. Unsurprisingly the personal perspectives presented by the parties were very different, and reflected the positions taken in their submissions. Such evidence is inadmissible as an aid to an interpretation exercise such as this. The Court is not assisted by the parties' previous negotiations, or declarations by them of their subjective intent: *Investors Compensation Scheme Limited v West Brunswick Building Society* at 913, *Ali* at [8], [78].

Conclusion on interpretation

[47] I am mindful of the observation of Elias CJ in *Westpac Banking Corporation v MM Kembla New Zealand Ltd* [2001] 2 NZLR 298 at [62]:

> Although a legal point may be as well decided on summary judgment application as at trial if sufficiently clear (*Pemberton v Chappell* [1987] 1 NZLR 1), novel or developing points of law may require the context provided by trial to provide the Court with sufficient perspective.

However, I do not regard the interpretation issue that arises in this case as including a novel or developing point of law. I take the view that if the meaning of the settlement agreement can be confidently discerned, and the effect of the agreement is to settle the dispute over the property in its entirety, a defence is established and the Court is bound to dismiss the claim.

[48] I conclude that the settlement agreement settled the contract and deceit claims against Nandro. The Datt Trust cannot improve its position by inventing new heads of claim in a second proceeding not referred to in the original statement of claim.

Negligence

[49] The second proceeding alleged negligence against Nandro. As discussed, the breach of contract and deceit allegations were expressly made in the affidavits. There was, however, no express allegation of negligence.

[50] The negligence allegation in the second proceeding turns on there being a duty to settle the second contract when title was available and to respond in a timely manner to queries. In broad terms these allegations are included by implication in the affidavits and indeed the pleadings themselves, focussing as they do on the failure to settle. The facts necessary to sustain the negligence claim are all stated. Moreover, the alleged negligence is a claim relating to the property, and for that reason falls within the words of the settlement. I am satisfied that the settlement agreement precludes a claim that in relation to the sale and purchase of the property the vendor was negligent.

[51] I would further observe that it is impossible to see how a claim for negligence could in any event succeed. It is clear that there is no duty in tort to take reasonable care to perform a contract: *Rolls-Royce New Zealand Limited v Carter Holt Harvey Limited* [2005] 1 NZLR 324. There may be a duty to take reasonable care to perform obligations in a contract but that is a different concept. The allegation here is essentially one of a failure to perform the contract.

[52] Further, it is clear that a duty of care will not be implied to a fact situation governed by a detailed contract between the parties: *Sullivan v Darkin* [1986] 1 NZLR 214, 222 and 225. Nor will equity impose a duty where the contract falls short: *Hospital Products Limited v United States Surgical Corporation* (1984) 156 CLR 41 (HCA), at para 68.

[53] No case was cited by Mr Meyrick to support the availability of such a negligence claim. While there is clearly proximity between a vendor and a purchaser, it would be wrong to impose a duty of care in a commercial situation arising between parties of known competing interests, who have chosen to govern their relationship by a detailed contract.

[54] I conclude that the negligence cause of action cannot succeed. I also observe that the claim for damages under the negligence head, being the difference between the price agreed to in the second agreement and the $600,000 sale to Mrs Kalkat, is not reflective of any loss. The other claims for damages simply reflect the other claims based on breach of contract and deceit.

The position of the other defendants

Not parties to the settlement agreement

[55] Mr Singh and Ms Khalil were not parties to the first proceeding. They are sued in deceit in the second proceeding. The question arises whether the settlement agreement extends to them also.

[56] The settlement agreement is not between the Datt Trust and Mr Singh or Ms Khalil. Mr Singh and Ms Khalil are not parties to that contract. The settlement agreement contains no promise which can be construed as intending to create a benefit enforceable at their suit. The contract cannot be construed as conferring a benefit on either of them in terms of s 4 of the Contracts (Privity) Act 1982. The absence of privity means that they have no contractual right to claim the benefit of the settlement.

[57] Nor can Mr Singh or Ms Khalil rely on the Court orders. The Court Minute struck out the claim for an interim injunction and made the orders sought in the memorandum, which went no further than stating that the orders were in settlement of the plaintiff's application for an interim injunction. The orders did not resolve any other issues. Therefore, the law relating to issue estoppel and privies, relied on by Mr Fuscic, *Hamed Abdul Khaliq Al Ghandi Co v New Zealand Dairy Board* (1999) 13 PRNZ 102 does not apply.

Joint tortfeasors

[58] Mr Fuscic, however, submits that Mr Singh and Ms Khalil should be regarded as joint tortfeasors. Counsel for the appellants and respondents accepted in

submissions that Mr Singh and Ms Khalil were joint tortfeasors with Nandro. Indeed, Mr Meyrick did not seek to argue that if the settlement agreement did settle the Nandro claims, it could not also settle the Singh and Khalil claims.

[59] The alleged acts of the tort of deceit by Mr Singh and Ms Khalil in forwarding the empty envelope and not forwarding the notice of cancellation are almost identical to the acts of deceit alleged against Nandro. They were the persons through whom Nandro acted, and they committed the alleged wrongful actions.

[60] It was stated in by the Court of Appeal in *Allison v KMPG Peat Marwick* [2000] 1 NZLR 50 at [111]:

> At common law, tortfeasors who are liable in respect of the same damage are either joint tortfeasors or concurrent or several tortfeasors. Joint liability arises where there is a coincidence of acts causing damage. To constitute a joint tort there must be some connection between the actions alleged. Persons are not joint tortfeasors simply because their separate and independent acts have caused the same damage. See *The Koursk* [1924] P 140. There must be concerted action towards a common end, and the concurrence must be such as to show approbation in the doing of the unlawful act. See *Eyre v New Zealand Press Association Limited* [1968] NZLR 736. Joint liability, therefore, tends to arise in three main situations; agency, vicarious liability and common action …
>
> Concurrent or several liability, on the other hand, occurs where there is a coincidence of separate acts, which by their conjoined effect cause damage.

[61] There is joint responsibility where persons commit a tort in the course of employment with an employer or in their capacity as a director acting on behalf of and within the scope of their authority from a company: *Coleman v Harvey* [1989] 1 NZLR 723 (CA); *Brooks v New Zealand Guardian Trust Co. Ltd* [1994] 2 NZLR 134 at 140. The claims against Mr Singh and Ms Khalil are based on the deceit cause of action against Nandro, although there are some wording differences. The amounts claimed are the same as the amounts claimed in the deceit claim against Nandro. I am satisfied that the allegations here are of a concerted tortious action towards a common end. There is a coincidence of the acts causing damage. That is the essence of a joint tort.

[62] It is clear that a settlement with one joint tortfeasor or multiple tortfeasor is a bar to an action against the other tortfeasors. Settlement with one of them releases

all of them: *Kelliher v Bridges* (1912) 31 NZLR 203, *Brooks v New Zealand Guardian Trust Co. Ltd* [1994] 2 NZLR 134 at 138. In *Brooks v New Zealand Guardian Trust* [1994] 2 NZLR 134, the release rule, whereby the release of one joint tortfeasor operated to release all the others, was confirmed despite the provisions of s 17(1)(b) of the Law Reform Act 1936 (at 140).

[63] The release rule does not operate if a plaintiff covenants not to sue a joint tortfeasor rather than releases the tortfeasors: *New Zealand Trainers Association Incorporated v Cranson* HC WN AP14/98 22 March 1999, Ellis and Wild JJ. Here the settlement was not expressed as a promise not to sue, or a stay. Rather it was expressed as a full and final settlement. Its effect was to release Nandro, and so therefore it also releases Mr Singh and Ms Khalil as joint tortfeasors.

Other issues

[64] Mr Fuscic also submitted that there was no representation or reliance pleaded sufficient to make up the elements of deceit. It is correct that the statement of claim refers to a process in relation to Mr Singh and Ms Khalil rather than a statement, that process being sending the empty envelope and the false claim that a letter had been sent cancelling the contract. Nevertheless, it is possible that a representation could be discerned from these allegations, namely a false representation that a notice requiring settlement and a notice cancelling the contract had been sent. I would not give the defendants summary judgment or indeed uphold a strike out application on this ground alone.

[65] There is a further allegation in the second proceeding that Ms Khalil made false statements in her affidavit. It is difficult to see how any damages claim could flow from that, and Mr Meyrick accepts that that portion of the claim cannot succeed. It is also difficult to see how the exemplary damages can be claimed, but it is not necessary to rule on that.

The application to strike out

[66] This matter is best considered on the basis of whether the second proceeding is an abuse of process. The issue of whether new proceedings following a settlement is an abuse of process was considered in depth by the House of Lords in *Johnson v Gore Wood & Co.* [2001] 1 All ER 481. The question there was whether the existence of a settlement agreement made it an abuse of process for further proceedings to be brought in relation to the same subject matter by a different party. The House of Lords found after interpreting the settlement agreement, that it did not preclude the claim.

[67] Lord Bingham at p 498 referred to abuse of process in the following terms:

> But *Henderson v Henderson* abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. *The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter*. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the Court is satisfied (the onus being on the party alleging abuse), that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all.
>
> (Emphasis added)

At p 525, Lord Millett stated:

> In one respect, however, the principle goes further than the strict doctrine of res judicata or the formulation adopted by Sir James Wigram V C, for I agree that it is capable of applying even where the first action concluded in a settlement. Here it is necessary *to protect the integrity of the settlement* and to prevent the defendant from being misled into believing that he was achieving a complete settlement of the matter in dispute when an unsuspected part remained outstanding.
>
> (Emphasis added)

[68] I proceed, therefore, on the basis that it may be an abuse of process to bring a second claim which covers matters which could have been raised in earlier proceedings that have been resolved, even when that earlier resolution has been by settlement agreement rather than by Court orders. Here, as I have found, the Court

orders themselves cannot be construed as imposing a final resolution on all matters. However, I have concluded that the settlement agreement did so. I note that this was the conclusion reached in *Page v BMH Ltd* [2008] DCR 359, and the Court was prepared to consider the issue of subsequent proceedings following a settlement of earlier proceedings to be an abuse of procedure.

[69] It is an abuse of process to bring proceedings which will destroy a settlement reached in earlier proceedings. To use Lord Millett's phrase, the Court will protect the integrity of the settlement. I conclude that the second proceedings damage the integrity of the settlement agreement, and are an abuse of process.

General conclusion

[70] I conclude that the settlement agreement on an objective interpretation was intended to settle all claims relating to the agreement for sale and purchase of 9 Maxwell Avenue, Papatoetoe. While deceit and negligence were not pleaded in the first proceeding, the facts relied on and the allegations of fraud were stated in the affidavits. Those claims as a matter of contractual interpretation were part of what was settled.

[71] The claims against the new parties in the second proceeding, Mr Singh and Ms Khalil, are claims based on the tort of deceit. They are allegations relating to the same transaction and cover the same body of conduct as the allegations against Nandro. The allegations therefore make them alleged joint tortfeasors with Nandro, and they have the benefit of the release given against one of the joint tortfeasors, Nandro.

[72] Here, of course, the conclusion that the earlier settlement agreement was a full and final settlement of all matters relating to the property transaction has only been reached following a consideration of not only the terms of the agreement, but also the background circumstances. Affidavit evidence has been relied on. Thus, there is no doubt that the summary judgment application was the appropriate procedure to be adopted by the defendant, and that an application to strike out alone might have been met by strong objections to the filing of affidavit evidence.

However, given the fact that this evidence is now properly before the Court I am satisfied that the bringing of the second proceeding has been an abuse of process, and is susceptible to being struck out.

[73] Therefore, I am satisfied that none of the causes of action in the plaintiffs' statement of claim can succeed against any party. I therefore propose giving judgment in favour of the defendants. For the reasons given, I would have also, had it been necessary, struck out the proceeding.

[74] I conclude that the District Court Judge erred when he concluded that the settlement agreement was ambiguous. The agreement on its words considered in the light of the background circumstances did constitute a full and final settlement of all claims relating to the agreement for sale and purchase of 9 Maxwell Avenue, Papatoetoe, and is a defence to the heads of claim in the second proceeding relating to that transaction.

Result

[75] The appeal is allowed. Summary judgment is entered for the defendants against the plaintiffs. It is not necessary to strike out the proceedings.

Costs

[76] The appellants are entitled to costs on a 2B basis. However, I have not had submissions on the topic, and I make no order at this point. Hopefully the parties can agree costs in the light of this ruling. If costs orders are sought the appellants are to file submissions within seven days from the date of this judgment, and the respondents within a further 14 days.

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Asher J