IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2008-404-001436

	BETWEEN	"THE DOCKS" LIMITED Plaintiff
	AND	CHUN HONG HAN Defendant

Hearing: 3 March 2009

Counsel: TJG Allan for plaintiff
PF Dalkie for defendant

Judgment: 18 March 2009 at 3:00pm

JUDGMENT OF ASSOCIATE JUDGE FAIRE
[on application for summary judgment]

Solicitors: Grove Darlow & Partners, PO Box 2882, Auckland for plaintiff
Loo & Koo, PO Box 99 687, Newmarket for defendant

The application

[1] The plaintiff applies for summary judgment.

The three causes of action

[2] The statement of claim seeks relief in respect of three separate contracts. Although not pleaded as three separate causes of action, that is in effect what the position is. In short, there is a separate and distinct claim made in respect of each of the contracts.

The contracts

[3] The three contracts relate to units to be built at a complex which, at the time, was in the course of construction and known as "The Docks" at corner of Quay, Tangihua and Tapora Streets, Auckland.

[4] A document was signed by the defendant in respect of Unit 207 at "The Docks". A second document was signed by the defendant in respect of Unit 228 at "The Docks". Both documents were signed by the defendant on 12 September 2006.

[5] The defendant's husband signed on the defendant's behalf, a document in respect of Unit 718 at "The Docks" on 5 December 2006.

[6] Practical completion notices were served followed by service of certificates pursuant to s 35 of the Unit Titles Act 1972 following completion of the construction.

[7] As a result, the plaintiff alleges that the three contracts were due for settlement as follows:

Unit 207 on 2 October 2007
Unit 228 on 16 October 2007, and
Unit 718 on 16 October 2007.

Defendant's alleged default

[8] The defendant did not settle. The plaintiff issued a settlement notice pursuant to clause 9 of each of the alleged agreements. Demand was made but the defendant refused to complete settlement.

[9] The plaintiff's solicitors received a letter dated 5 November 2007 from the defendant's solicitors purporting to cancel each one of the three contracts. The plaintiff's solicitors replied by letter dated 7 November 2007 asserting that the notice of cancellation amounted to a repudiation which was not accepted by the plaintiff and giving notice that unless settlement was completed by 4pm on 9 November 2007 the plaintiff would cancel each of the three agreements.

[10] Settlement did not take place. A notice was sent by the plaintiff's solicitors to the defendant's solicitors dated 9 November 2007. It recorded the defendant's failure to settle. It gave notice cancelling the agreements without prejudice to the plaintiff's right to recover losses from the defendant.

Resale of one property

[11] The plaintiff then attempted to re-sell the properties referred to in the contracts. On 11 December 2007 the plaintiff entered into an agreement for the sale of Unit 207 to Investment Directions Limited. That sale settled on or about 13 December 2007. The proceeds received by the plaintiff on sale were $539,638.46. Units 228 and 718 have not be sold as at the date of the hearing of this application.

The deposits

[12] It is appropriate that I record the position regarding payment of deposits in respect of the three contracts. The plaintiff's claim in respect of Unit 207 does not give any credit for a deposit. The settlement statement that was issued on 2 October 2007 in respect of Unit 207 records that no deposit had been received. Be that as it

may, the position is beyond doubt. The deposits on all three contracts were, in effect, guaranteed by deposit bonds provided by New Zealand Home Bonds Limited. That company protected the advances, should they be required to be given, by placing caveats on the defendant's properties. New Zealand Home Bonds Limited was asked by the solicitors acting for the defendant to remove the caveats from the defendant's title. The company advised that it would release the caveats if the defendant paid the deposits on each of the contracts into the plaintiff's solicitor's trust account, that is to Grove Darlow & Partners, solicitors of Auckland. The deposits were duly paid on 26 October 2007 and withdrawal of caveats were subsequently registered. Accordingly, it is necessary that credit be given for the deposits in relation to each of the three contracts. The document signed in respect of Unit 207 provides for a deposit of $55,400. The document signed by the defendant in respect of Unit 228 provides for a deposit of $68,700. The document signed by the defendant's husband on her behalf in respect of Unit 718 provides for a deposit of $87,500.

Applicable High Court Rules

[13] This proceeding was filed before the commencement of the High Court Rules as introduced by s 9 of the Judicature (High Court Rules) Amendment Act 2008 on 1 February 2009. Section 9 provides that a proceeding that began prior to the commencement of that Act and is incomplete as at 1 February 2009 must be continued, completed and enforced in accordance with the new Rules.

[14] At the time of the filing of the application the applicable Rules dealing with summary judgment applications were to be found in Part 2 of the High Court Rules commencing with r 135. The primary Rule governing the plaintiff's application is that set out in the former r 136. Because the plaintiff's application in part is restricted to an application for judgment on the issue of liability, the plaintiff also relied on the former r 137.

[15] The new High Court Rules make provision for summary judgment in Part 12. The equivalent to r 136 is r 12.2. There has been a change in the wording which now is r 12.2 from that which was previously r 136. The change in wording casts doubt

on the Court's power to enter judgment for part of a claim. That position, under the previous Rule, had been endorsed by the Court of Appeal in *Australian Guarantee Corporation (New Zealand) Ltd v McBeth* [1992] 3 NZLR 54 at 61. Having regard to the conclusion I have reached, it is not necessary to resolve this question in this judgment. Rule 12.3, dealing with summary judgment on liability, however, is identical in wording to that which was the former r 137.

The notice of opposition

[16] The Rules dealing with summary judgment make specific provision for the filing of a notice of opposition and affidavit in support. The current provision is found in r 12.9. The former provision was r 141. The new Rule provides greater specificity as to what is meant by the words *in answer to* as it applies to the party intending to oppose the application. However, when one compares Form 21, which was the operative Form under the old Rules with the current Form G33, when it comes to what specificity is required by a respondent opposing a summary judgment application the notice requirements are the same. Because they are significant to the determination of this case, I set out the notice requirement which must be in the notice of opposition.

> **Form 21 Notice of opposition**
>
> **…**
>
> The grounds on which the [*respondent*] opposes the making of the orders are [*state concisely*]
>
> The [*respondent*] relies on [*refer to any particular provision of an enactment or principle of law or judicial decision relied on*]

[17] I draw attention to the requirements imposed by both the former and the current Rules on the defendant. That is necessary because more extensive grounds opposing the plaintiff's claim were set out in the defendant's solicitor's letter dated 5 November 2007 where there was a purported cancellation of the three contracts than is contained in the notice of opposition to the plaintiff's application for summary judgment.

[18] Understandably the plaintiff's application for summary judgment contained evidence addressing the matters advanced in the defendant's solicitor's letter dated 5 November 2007. The only reason that I do not traverse each one of those matters is because they are not advanced as a specific basis for opposition to summary judgment by the notice of opposition which has been filed.

[19] The notice of opposition records the defendant's opposition to all orders sought by the plaintiff. The defendant claims it has a defence. The defence is then specified in the notice of opposition as follows:

> a. the defendant entered into the contracts in reliance on conduct of and representations made by the agents of the plaintiff to the defendant at and prior to the time she entered into the contracts that were misleading and deceptive in breach of s 9 Fair Trading Act 1986; and/or alternatively
>
> b. the defendant was induced to enter into the contracts in reliance on misrepresentations made to her by the agents of the plaintiff at and prior to the time she entered into the contracts and seeks cancellation of them under s 7 of the Contractual Remedies Act 1979; and/or alternatively
>
> c. by reason of the conduct of the plaintiff's agents the defendant is entitled to cancellation of the contracts under s 23 [sic 43] of the Fair Trading Act 1986; and/or alternatively
>
> d. otherwise, and by the facts appearing and deposed to in the affidavit of the defendant and her husband Mingyu Li, filed in support of this notice of opposition.

[20] The affidavit in opposition by the defendant, in addition to dealing with evidence advanced to support the Fair Trading Act 1986 defence and Contractual Remedies Act 1979 defence, adds additional matters, namely:

a) The contract documents signed in respect of Unit 207 and 228 comprise only a single page, with typing on both sides and no other document was shown to the defendant;

b) The contract document signed in respect of Unit 718 was signed by the defendant's husband and on her behalf. She says the contract was a single page with typing on both sides and one further page, page 3, of the terms of sale;

c) The defendant says that her husband and she both signed a single page with a plan that depicted the apartment; and

d) She received a full copy of the contracts and saw them for the first time in June 2007. She notes that the default interest is four times the prevailing bank bill rate. She claims she has been told there are other terms which she considers harsh or onerous. She claims she challenged the real estate agent that she dealt with, Lili Ma, to ask why she had not been shown the further terms and conditions and claims that the agent told her she did not know what the terms were either.

[21] It is most unsatisfactory for the plaintiff and the Court to be asked to ascertain what each aspect of the defence is, particularly if some reliance is placed on matters beyond the two primary defences raised in the notice of opposition, namely breach of the Fair Trading Act 1986 and breach of the Contractual Remedies Act 1979.

[22] The Court may permit an amendment to the notice of opposition in an appropriate case. Generally there are three hurdles which an applicant for an amendment must meet before an amendment is granted, namely:

a) That the amendment is in the interest of justice;

b) That it will not significantly prejudice the other party; and

c) That it will not cause significant delay: *Elders Pastoral Ltd v Marr* (1987) 2 PRNZ 383 at 385.

The Court of Appeal in *Cegami Investments Ltd v AMP Financial Corporation (NZ) Ltd* [1990] 2 NZLR 308 confirmed that amendments to the proceedings were possible in the summary judgment procedure. For reasons which appear later in this judgment, the answer to the plaintiff's application for summary judgment is the

ground contained in the notice of opposition and to which I have referred to in [19]a of this judgment. An amendment is therefore not required.

Grounds advanced in opposition to summary judgment by counsel

[23] Mr Dalkie advanced, in submissions:

a) The two defences raised in the notice of opposition: one under s 9 of the Fair Trading Act 1986 and the other under the Contractual Remedies Act 1979;

b) If there was any conduct of an untoward nature or representation made of a kind that was misleading or deceptive, or misrepresentations, then they can, and could only, occur from the agent who was involved in the negotiations with the defendant and her husband, and during the period up to, and leading to, a contract being signed;

c) That a number of documents relied upon by the plaintiff as being among the contract terms cannot justifiably be incorporated as part of the contract. In particular, it is claimed that the contractual provisions dealing with interest cannot be properly incorporated as contract terms; and

d) The interest claimed in each case, in any event, is harsh and oppressive.

[24] I will return to consider each of the matters raised as defences and, in particular, whether the matters which are, in essence, additional to that which are set out in the notice of opposition, can appropriately be dealt with.

The Court's approach to a plaintiff's summary judgment application

[25] I set out a short summary of the general approach which the Court takes in relation to a summary judgment application by a plaintiff. That general approach does not seem to have been altered by the change in wording which has been introduced with r 12.2. Rule 12.2, as did its predecessor r 136, requires that a plaintiff satisfy the Court that the defendant has no defence. The former Rule said:

> No defence to a claim in the statement of claim or to a particular part of any such claim.

The current Rule says:

> No defence to any cause of action in the statement of claim or to a particular cause of action.

[26] The no defence position and the obligations that the Rules impose on the parties have been examined in a number of authorities. In *Pemberton v Chappell* [1987] 1 NZLR 1 at 3 the Court of Appeal said as follows:

> In this context the words "no defence" have reference to the absence of any real question to be tried. That notion has been expressed in a variety of ways, as for example, no bona fide defence, no reasonable ground of defence, no fairly arguable defence.

[27] The Court added at 4:

> Satisfaction here indicates that the Court is confident, sure, convinced, is persuaded to the point of belief, is left without any real doubt or uncertainty. ...

[28] And further at 4:

> Where the only arguable defence is a question of law which is clear cut and does not require findings of disputed facts or the ascertainment of further facts, the Court should normally decide it on the application of summary judgment, just as it will do on an application to strike out a claim or defence before trial on the ground that it raises no cause of action or no defence.

[29] The Court also commented on the position where a defence is not evident on a plaintiff's pleading and said at 3:

> If a defence is not evident on the plaintiff's pleading I am of opinion that if the defendant wishes to resist summary judgment he must file an affidavit raising an issue of fact or law and give reasonable particulars of the matters which he claims ought to be put in issue. In this way a fair and just balance will be struck between a plaintiff's right to have his case proceed to judgment without tendentious delay and a defendant's right to put forward a real defence.

[30] That position was further reinforced in *Australian Guarantee Corporation (NZ) Ltd v McBeth* at 59 where the Court said:

> Although the onus is upon the plaintiff there is upon the defendant a need to provide some evidential foundation for the defences which are raised. If not, the plaintiff's verification stands unchallenged and ought to be accepted unless it is patently wrong
>
> > "No defence means 'no bona fide defence, no reasonable ground for defence and no fairly arguable defence'."

[31] Hypothetical possibilities in vague terms, unsupported by any positive assertion or corroborative documents advanced by defendants will not frustrate the obligation on a plaintiff to discharge the onus of proof: *SH Lock (NZ) Ltd v Oremland* HC AK CP641/86 19 August 1986.

[32] The Court of Appeal in *Tilialo v Contractors Bonding Limited* CA50/93 15 April 1994 at 7 raised a caution and said:

> The Courts must of course be alert to the possibility of injustice in cases in which some material facts to establish a defence are not capable of proof without interlocutory procedures such as discovery and interrogatories. That does not mean that defendants are to be allowed to speculate on possible defences which might emerge but for which no realistic evidential basis is put forward.

[33] A Court is not required to accept uncritically any or every disputed fact: *Eng Mee Yong v Letchumanan* [1980] AC 331 at 341. However the Court will not reject even dubious affidavit evidence, even though there must be suspicion as to the good faith of the deponent, if there is an essential core of complaint that supports a defence. In essence, the inquiry is whether or not the person's assertion passes the threshold of credibility: *Pemberton v Chappell*; *Orrell v Midas Interior Designs* (1991) 4 PRNZ 608 at 613.

[34] In *Tilialo v Contractors Bonding Limited* the Court of Appeal at 8 observed:

> Drawing the line between mere assertions of possible defences and material which sufficiently raises an arguable defence so that the defendant should not be denied the opportunity to employ interlocutory procedures and have a trial is a matter of judgment. Views may well differ.

[35] The authorities have also referred to a residual discretion as to whether judgment should be entered. Although, as expressed by Casey J in *Pemberton v Chappell* at 5 it is difficult:

> To conceive of circumstances where the Court should not give judgment for the plaintiff … It can only be a discretion of the most residual kind.

The discretion was the subject of comment in *Waipa District Council v Electricity Corporation of New Zealand* [1992] 3 NZLR 298 at 303.

[36] It is appropriate to comment on the position where there are disputed issues of material fact. The matter was the subject of comment in *Westpac Banking Corporation v MM Kembla (NZ) Ltd* [2001] 2 NZLR 298. Although that was a defendant's application for summary judgment, and a different test applies, the Court's comments in relation to disputed issues of material fact apply equally to a plaintiff's application for summary judgment. The Court said:

> [62] Application for summary judgment will be inappropriate where there are disputed issues of material fact or where material facts need to be ascertained by the Court and cannot confidently be concluded from affidavits. It may also be inappropriate where ultimate determination turns on a judgment only able to be properly arrived at after a full hearing of the evidence. Summary judgment is suitable for cases where abbreviated procedure and affidavit evidence will sufficiently expose the facts and the legal issues. 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.
>
> [63] Except in clear cases, such as a claim upon a simple debt where it is reasonable to expect proof to be immediately available, it will not be appropriate to decide by summary procedure the sufficiency of the proof of the plaintiff's claim.

[37] That statement of principle was endorsed by the Privy Council in *Jones v Attorney-General* [2004] 1 NZLR 433.

The grounds advanced in opposition analysed

[38] I now look at the defences raised generally.

[39] The foundation for the Fair Trading Act and Contractual Remedies Act defences are pleaded to be essentially as follows:

a) Conduct of and representations made by agents of the plaintiff to the defendant at the time of and prior to the contract were:

b) Misleading and deceptive; and

c) Amount to misrepresentations, and were the matters that induced the defendant to enter into the contracts.

[40] The factual matters advanced by the defendant, in summary are:

a) All the contractual documents were not provided to the defendant and brought to her attention by the plaintiff's agent at the time the contract was signed. Further, she was not told by the agent that there were additional terms and conditions of contract;

b) Settlement of the purchases would be in about April 2008 and that the agent said that the agent would sell the apartments in the meantime for the defendant and the defendant would make a profit. In addition, it did not matter that she had no money to buy the apartments because a sale was a certainty. In respect of Units 207 and 228, she could expect to make a profit of $100,000 on each apartment;

c) But for the agent's representations she would never have signed the contracts; and

d) In respect of Unit 718 its value or price on the market would increase by $10,000 per month until settlement.

[41] The defendant also relies on an allegation that when she received the full contract documents in 2007 that she approached the agent concerned. She claims the agent told her at that time that the agent had no idea about a number of the additional contract terms and documents.

[42] The defendant originally came from the People's Republic of China. Her native language is Mandarin. She has lived on a full time basis in New Zealand since 2001 with her husband. She says she has not worked in New Zealand since living here. She cannot speak any English. She cannot read any English. The discussions she had with the real estate agent concerned were in her native language, Mandarin.

[43] An affidavit has been filed in reply to the defendant's affidavit by the real estate agent concerned. That is Lili Ma. She is employed by Key2 Real Estate Limited. She says that a common approach was taken when dealing with prospective purchasers of apartments at "The Docks" complex. She says that that approach was followed when dealing with the defendant and her husband. She summarised the approach as follows:

a) The full contract (attached at the corner with a staple) was shown to the purchaser.

b) The purchaser was then shown the floor plans for the specific apartment which was part of the contract.

c) The purchaser would then sign the specific floor plan they were purchasing.

d) The purchaser was shown the entire agreement and asked to sign the first two pages. The first two pages referred to the rest of the agreement and made it clear that the contract also contained the terms as set out in the rest of the agreement. That is why we only hand them sign the first two pages.

e) We then contacted the vendor who would come and sign the contract.

f) Then a full copy (the original) of the contract was sent to the solicitors for the purchaser and the vendor.

g) If the purchaser had applied to Home Bonds then a copy of the agreement was sent to Home Bonds.

h) If the purchaser raised any issues about the contract we would not advise them on that but refer them to a lawyer to seek independent legal advice prior to signing the agreement.

[44] Ms Li then responded to the specific allegations that were made by the defendant. In summary the responses she gave are as follows:

a) At the time of the signing of the contract documents, the whole contract was available and the documents were stapled together. The defendant and her husband were given a full copy of each agreement to take away following signature;

b) No representation was made that the apartments could be sold prior to settlement. The issue of their sale prior to settlement was not raised at the time the contracts were signed. At a much later time the defendant's husband asked the agent if she could onsell the units. She advised that it was possible to do so but could give no guarantees. She claims she never had a conversation concerning resale with the defendant;

c) She was never told that the defendant had no money and could not settle;

d) The units were in fact placed on the market on April 2007 at the request of the defendant's husband; and

e) The agent recalls that the defendant rang her at about the time when settlement was due. She says she does not recall saying that she did not know about other conditions.

[45] A second real estate agent employed by Key2 Limited has also sworn an affidavit. He confirms that the defendant received a full copy of the agreement. He confirms that it was the defendant's husband who did the talking and that he spoke in very good English.

[46] It is self-evident from the summary of the defendant's evidence and the responses from the real estate agent concerned that if this case simply turned on a finding as to the truth of the matters raised by the defendant it would not be appropriate to enter summary judgment. However, what is necessary is to determine whether the matters raised are essentially disputed issues of material fact and possibly whether, in the circumstances, it is not appropriate to enter judgment because the ultimate determination of the defences that have been raised require a full hearing on the evidence.

The contract documents

[47] If this case turns solely on the question of whether the contract was restricted to the pages signed and did not include additional terms, I would reject the defendant's defence because:

a) Each signed document makes reference to a sale and purchase

> upon the particulars set out above and the further terms of sale in the general conditions of sale attached;

b) Each signed document contains a specific reference to the balance purchase price as follows:

> Payable in one sum without deduction on the settlement date (refer clause 14.36).

There is no clause 14.36 on the document that was signed;

c) Each document was signed under the heading *Car parking Nos* makes specific reference to clause 17(e). Once again there is no clause 17(e) on the page that was signed;

d) The respective references to clauses 14.36 and 17(e) are to clauses other than those which appear in the standard Auckland District Law Society and Real Estate Institute of New Zealand (7th ed) contract form. Indeed, when one considers the documents which the plaintiff says form the contract, they are under the heading *Further terms of sale;* and

e) The above matters are self-evident from the reading of the document. The document signed, itself, draws specific attention to additional terms and conditions and, indeed, highlights specific terms, being the ones to which I have made reference.

Onsale before settlement at a profit

[48] The remaining areas of factual dispute, however, pose a more difficult question. There is no doubt that there is a conflict as to what was said by the agent on the one hand, the defendant on the other hand and her husband prior to and at the time of the signing of the contracts. The defendant's allegation, put in its simplest way, is simply an allegation that the agent said that an onsale before settlement at a profit was a certainty.

[49] Mr Allan's response was that the terms of contract made it plain that the plaintiff was not responsible for the misrepresentations or misinformations passed on by the real estate agent. He referred to clause 30(a), (b) and (c) of the contract which under the heading *Entire agreement* provide:

> 30 **Entire agreement**
>
> (a) this agreement together with any approvals contain the entire agreement between the parties, despite anything contained in any brochure, illustration, report, Property Law Act notice or other documents; and

(b) he, she or it has not been induced to enter into this agreement by any representation, written, verbal or otherwise, made by or on behalf of the vendor; and

(c) neither the agent, nor any employee or representative of the vendor is authorised to make any representations or agreements which are not expressly confirmed n writing by the vendor or the vendor's solicitor. Unless such written confirmation is received by the purchaser or the purchaser's solicitor, the vendor shall not in any way be bound or otherwise contractually obliged by such unauthorised statements, nor shall any such unauthorised statements form a contract collateral with this agreement; and

[50] Mr Allan submitted that the defendant may have a cause of action against the agent personally but does not have any claim against the plaintiff who was the vendor in the transaction. He cited as authority for the proposition that the agent is liable *Goldsbro v Walker* [1993] 1 NZLR 394.

The Fair Trading Act 1986 defence

[51] I shall now look at, firstly, whether the matters raised in evidence could found a defence under the Fair Trading Act 1986 and, second, if they do, whether they are, nevertheless, excluded by the operation of clause 30 of the sale and purchase contract.

[52] The defence advanced, in reliance on s 9 of the Fair Trading Act 1986, requires a consideration of the question of whether the conduct was misleading or deceptive, or likely to mislead or deceive.

[53] There are, in essence, two aspects to the alleged representations. The first aspect is a claim that the agent would sell the apartments for the defendant, before the settlement date and at a profit.

[54] This is a representation made by the real estate agent which asserts the course of conduct which is to be followed by the real estate agent, namely, that agent will ensure that a resale would occur.

[55] Section 45(4) of the Fair Trading Act 1986 deems acts performed by the agent of the principal to have been committed by the principal if such acts were within the agent's actual or apparent authority. The first aspect of the representation, as I have mentioned, concerns actions to be taken by the agent and not the principal. It cannot, therefore, be something that is attributable to the plaintiff. It is not something which can be said to be authorised by the principal.

[56] However, the representation has a second aspect to it. Here, the agent is giving a description of the value of the property and the surrounding market. It seems to me that it is within the agent's actual authority to relay to a purchaser the fact that the property may increase in value in order to help secure a sale. As Bacon V-C in *Mullens v Miller* (1882) 22 ChD 194 at 199 said:

> A man employs an agent to let a house for him; that authority, in my opinion, contains also an authority to describe the property truly, to represent its actual situation, and, if he thinks fit, to represent its value….. I think the principal … authorizes the agent to state any fact or circumstance which may relate to the value of the property.

[57] The second aspect of the representation, if it is misleading or deceptive and is not excluded by clause 30, in my view, does provide a defence under s 9 of the Fair Trading Act 1986.

[58] A further consideration, however, is required. The representation made here was at best an opinion. In *Premium Real Estate Ltd v Stevens* [2009] 1 NZLR 148 the Court of Appeal said:

> [50] As the judge rightly said, Mr Guy's view of the value of the property was a matter of opinion. There has been some debate about whether, and if so in what circumstances, expressions of opinion can be said to constitute misleading or deceptive conduct for the purposes of s 9. The position is discussed in McGechan J's judgment in *Phillips v King Pie New Zealand Limited* HC AK CP165/98 17 September 1999 at 6-7; Brooker's Gault on Commercial Law (looseleaf) at FT9.30; and Burrows, Finn and Todd Law of Contract in New Zealand (3ed 2007) at [11.3.2(a)(ii)].
>
> [51] The orthodox or narrow view is that there must be some misrepresentation of a past or current fact to found liability. So, consistently with the common law as to misrepresentation, a person is liable as a result of the expression of an opinion which subsequently proves to be incorrect only where he or she does not honestly hold the opinion at the time it is expressed or (possibly) if

there is no reasonable basis for it. That is, an expression of opinion may be said to involve two representations of fact — one that it is honestly held and another that there is a reasonable basis for it. The wider view is that s 9 should be approached in accordance with its terms, untrammelled by concepts such as "misrepresentation" imported from the law of tort or contract. The focus should simply be on asking whether in all the circumstances the impugned conduct was misleading or deceptive.

[52] The judge adopted the orthodox view. She held that there was no liability because there was no suggestion that Mr Guy's opinion was not honestly held, and he had a reasonable basis for it (at [43]).

[53] As we have said, the wider view rejects the need for any misrepresentation as that term is traditionally understood in the law. Presumably on this view, all that is necessary to establish liability is that the requirements set out in *AMP Finance NZ Ltd v Heaven* (1998) 6 NZBLC 102,414; (1997) 8 TCLR 144 (CA) at NZBLC p 102,420; TCLR p 152 be met — ie, the plaintiff must, reasonably, be misled by conduct capable of being misleading. Mr Akel's argument was that, looking at the matter objectively, Premium's conduct misled the Stevens into thinking that the value of their house was less than it was, and they suffered loss as a consequence.

[54] While the wider view has the attraction of simplicity, there are difficulties in applying it in an unconstrained way to the expression of opinions. A person may, in trade, express an opinion that is honestly held and reasonably based at the time it is expressed or relied upon but which subsequent events show to be wrong. In this respect, an expression of opinion may be unlike a misrepresentation of fact, which will be capable of being shown to be wrong at the time it is made. It is difficult to see why an honestly held, reasonably based opinion should be actionable under s 9 simply because it is not borne out by subsequent events. The person expressing the opinion may have done all that could sensibly be done to reach an informed view but would still be liable, even if the subsequent events or circumstances were unforeseeable. As it is not possible to contract out of the operation of the FTA (at least directly — see Burrows, Finn and Todd at [7.5.7]), the implications of imposing liability on the basis of the expression of an opinion that is not demonstrably wrong at the time it is expressed or relied upon are significant. Accordingly, we consider that there is a fundamental difference between asserting a present fact and expressing an opinion, at least in the present context.

[59] The Supreme Court, in *Stevens & Ors v Premium Real Estate Ltd* SC 23/08 6 March 2009 did not refer to the Court of Appeal's comments on the above.

[60] What arises, however, from the Court of Appeal decision is that if the representation was an honestly held, reasonably based opinion, it should not be actionable under s 9 just because it has not been borne out by subsequent events. In

this case, however, there is an allegation that the representation, which relates to value, was made. The counter to that allegation is that no such statement was made. There is no suggestion in the evidence that, if it had been made, it was an honestly held opinion as to the circumstances. Accordingly, I am driven to the conclusion that there is, here, a dispute on a material fact which is, therefore, not appropriate for resolution on a summary judgment application. That conclusion, however, is subject to one further reservation. The reservation, of course, is the question of what effect clause 30 of the sale and purchase contract has on such a claimed defence.

[61] It is settled law that a party cannot contract out of the Fair Trading Act: *Smythe v Bayleys Real Estate Ltd* (1993) 5 TCLR 454 at 472.

[62] I note that the Court of Appeal in *Premium Real Estate Ltd v Stevens* at 48 drew attention to the reach of s 9 of the Fair Trading Act 1986. The Court referred to the judgment of Elias J, as she then was, in *Des Forges v Wright* [1996] 2 NZLR 758 at 764 to effect that s 9 is not to be turned into a general warranty by a vendor of the expectations of the purchaser. The Court further recorded that s 9 does not provide a mechanism to deal with every situation which the parties consider that they have suffered loss as a result of accepting, or being influenced by, the mistaken views of those acting for them. The Court of Appeal added at 49:

> the conduct as a whole should be considered rather than discrete elements of it.

That endorses my view that the defence raised under the Fair Trading Act, in this case, is one that is not appropriate for summary judgment but requires determination at trial. No doubt, at trial, clause 30 of the sale and purchase contract will be taken into account in determining whether some relieve is justified in the defendant's favour.

[63] The conclusion reached is sufficient to dispose of the summary judgment application because the plaintiff has not established that the defendant has no defence to the claim.

The Contractual Remedies Act 1979 defence

[64] It is appropriate, however, that I briefly comment on the Contractual Remedies Act position.

[65] As mentioned, the representation which may be actionable or provide a defence is about a future event. It seems to me that the representation that was made in this case did not concern the present state of the apartment that was being purchased but rather gave an opinion as to the future value of the apartment. There was no alleged statement that the apartment was undervalued. There was no alleged statement that the purchaser was purchasing at a discount. Rather, it was a representation that market forces would cause the apartment to increase in value and, as such, was a representation only about the future. Under the Contractual Remedies Act misrepresentations only cover statements of past or present facts. In cases like *Ware v Johnson* [1984] 2 NZLR 518 and *New Zealand Motor Bodies Ltd v Emslie* [1985] 2 NZLR 569 the statements about the future that were made were held to imply something about the present state of affairs and were therefore actionable under the Act. In *Ware v Johnson* a statement regarding the future production of a kiwifruit orchard was held to be a misrepresentation because it represented the present state of the orchard. In *New Zealand Motor Bodies Ltd v Emslie* a budget forecast was held to imply that the present state of the company was such that the forecast followed logically from it.

[66] Here, as I have said, the statement was no more than a statement that market forces would cause the apartment to increase in value. It was, therefore, a representation only about the future. My preliminary view, therefore, is that the defence based on the Contractual Remedies Act would not answer the application for summary judgment. I arrive at that conclusion without having to consider further the effect of s 4 of the Contractual Remedies Act 1979.

Quantum of the claim and the effect of the interest clause for late settlement

[67] Even if my conclusions on liability were wrong, I would not have entered judgment for the whole claim, or, in the alternative, made a declaration as to the appropriate method by which quantum can be fixed. I set out my reasons for that position.

[68] Under clause 9.4(1)(b)(ii) of the contract, the vendor can sue the purchaser for damages. Under clause 9.4(3) the damages shall include any loss incurred by the vendor and the amount of that loss may include interest. The effect of this clause is to allow the vendor to sue for the interest if the interest is part of the vendor's loss, but not if it is not. That is consistent with the Court's general approach to assessing damages clauses in contracts. If the damages clause is a genuine pre-estimate of loss, then the clause is enforceable. If the clause is more like a threat to ensure performance, then the clause is not enforceable. Clause 9 recognises this principle by only allowing the recovery of any loss actually incurred, which may include interest, but not necessarily will do so.

[69] Recovery by way of interest of more than the original purchase price is not possible unless the vendor can prove to the Court that the additional recovery is needed because of some actual loss suffered by it. It is common ground that in the case of Unit 207, the onsale proceeds, plus the deposit, plus the default interest produces a sum greater than the original contract price. Therefore, on the limited material that is before me, I cannot conclude that the plaintiff has proven, in respect of Unit 207, that damages have in fact occurred as a result of the alleged breach. Ultimately, whether the increased rate of interest is in the nature of a penalty or a proper estimate of loss is one of construction. It must be decided in regard to the terms and the circumstances of each particular contract, judged at the time of the making of the contract: *Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Company Ltd* [1915] AC 79 at 86-87.

Conclusions

[70] I conclude that the plaintiff's application for summary judgment must be refused. Accordingly, this proceeding must advance as a standard track proceeding. It is necessary, in terms of r 12.12 of the High Court Rules that directions are now given for the future conduct of the proceeding as are appropriate. I record that, in terms of r 12.13, a statement of defence must be filed within ten working days after the date on which this judgment is issued. These matters are taken into account in the orders that I now make.

Orders

[71] I order:

a) The plaintiff's application for summary judgment is dismissed;

b) A statement of defence to the statement of claim shall be filed and served within ten working days of the date of this judgment; and

c) A case management conference shall be held at 9.30am on 5 May 2009, by telephone. Counsel shall file and serve memoranda dealing with the matters set out in Schedule 5 to the High Court Rules two working days before the conference.

Costs

[72] I reserve costs in line with *NZI Bank Ltd v Philpott* [1990] 2 NZLR 403.

JA Faire
Associate Judge