

**IN THE HIGH COURT OF NEW ZEALAND  
HAMILTON REGISTRY**

**CIV 2008-419-001212**

BETWEEN                      ROSS KEITH  
   Plaintiff

AND                              REGENCY HOUSE LIMITED (AS  
   TRUSTEE OF THE CLARKE  
   SCRIVENER TRUST)  
   First Defendant

AND                              AUSTEN CYRIL CLARKE  
   Second Defendant

Hearing:                      27 March 2009

Appearances: W Akel for the Plaintiff  
   L Meredith and S J Chatwin for the First and Second Defendants

Judgment:                      2 April 2009 at 11:00am

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**JUDGMENT OF WYLIE J**

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This judgment was delivered by Justice Wylie  
on 2 April 2009 at 11:00am  
pursuant to r 11.5 of the High Court Rules

Registrar/Deputy Registrar  
Date:

Solicitors:

Simpson Grierson, Private Bag 92 518, Auckland  
Ellice Tanner Lawyers, P O Box 19 114, Hamilton

[1] The plaintiff – Mr Keith – is seeking judgment against the first and second defendants in the sum of \$438,750, together with interest at the rate of 14%, and costs. He has done so by way of the summary judgment procedure provided in the High Court Rules.

### **The pleadings**

[2] The plaintiff submits that the defendants have no defence in the causes of action raised in the statement of claim.

[3] The statement of claim is straightforward. The plaintiff asserts that:

- a) he entered into a written “Appointment of Representative” agreement with the defendants, which was dated 8 November 2007;
- b) pursuant to that agreement, he was to act as a consultant for the first defendant marketing apartments in a complex known as the “Quest on Ward” development;
- c) the first defendant was to pay him a referral fee of \$26,000 plus GST for each unit where a sale and purchase agreement was entered into and settled;
- d) between January and April 2008, the first defendant entered into and settled 16 sale and purchase agreements which were sourced and introduced to the development by one of the plaintiff’s consultants or distributors; and
- e) in part the plaintiff’s commission was paid, but substantial sums are outstanding.

The plaintiff claims he is entitled to a total payment of \$438,750. The agreement also provides for interest at the rate of 14% and interest at that rate is claimed as well.

[4] The plaintiff's claim against the first defendant is based in contract. So is the plaintiff's claim against the second defendant, who guaranteed that all invoices due to the plaintiff would be paid to him. As a further and alternative cause of action, the plaintiff says that if he was acting as a real estate agent (which is denied), then he is entitled to relief under s 7 of the Illegal Contracts Act 1970.

[5] The defendants have filed a notice of opposition. They argue that they have defences to the plaintiff's claim. In particular they assert that:

- a) the plaintiff is prevented by the provisions of the Real Estate Agents Act 1976 for bringing his claim, because at all material times he conducted himself as a "real estate agent" within the definition of those words provided in s 3(a) of the Act;
- b) the plaintiff was prohibited from carrying on the business of a real estate agent, because he was not the holder of a licence issued in accordance with the Act;
- c) the plaintiff is prevented by s 62 of the Act from being able to sue for or recover any commission, reward or other valuable consideration in respect of such services as he provided to the first defendant.

[6] The notice of opposition asserts that whether or not the plaintiff conducted himself as a real estate agent is a question of fact, which can only be determined at a full hearing, where all the relevant evidence is heard, and cross-examination takes place. It is further asserted that if the Court finds that the plaintiff is a licensed real estate agent, then the plaintiff is not entitled to relief pursuant to s 7 of the Illegal Contracts Act. Alternatively it is said that the grant of relief under that Act is discretionary, and that the discretion cannot be properly exercised without full consideration of all of the relevant evidence at trial.

[7] Affidavits have been filed by Mr Keith and by a Mr Nathan Scrivener and a Mr Austen Clarke for the defendants.

## **Background**

[8] Mr Keith describes himself as a property consultant. He trades under the name "Investment Property Solutions".

[9] The first defendant is a trustee of the Clarke Scrivener Trust. The second defendant, Mr Clarke, is also a trustee of the Trust.

[10] Mr Keith was approached by Mr Scrivener in early October 2007. Mr Scrivener was involved in the completion of the "Quest on Ward" development, which was due for completion in December 2007. The development had been on the market for some time, but no sales had resulted. Mr Scrivener asked Mr Keith whether he would be able to assist in marketing the development.

[11] There is a dispute between the parties in relation to what was or was not said by Mr Keith. Mr Keith says he explained his limited role, and the fact that he operated through others. He says that he told Mr Scrivener that he was not a real estate agent. Mr Scrivener disagrees. He says that Mr Keith held himself out as being able to market and sell the Quest on Ward apartments, and that Mr Keith did not hold himself out as a facilitator but rather as a listing agent.

[12] It is common ground that Mr Keith advised that his fee would be \$26,000 plus GST for each unit that was sold, the first 50% of his fee to be paid when a purchaser had satisfied any purchase conditions and paid the deposit in full. The second 50% was to be paid on settlement.

[13] After discussions between the parties, it was agreed that the Trust's solicitors would draft a clause to be inserted into a template sale and purchase agreement which would be used for the sale and purchase of units in the Quest on Ward development. This occurred and the clause read as follows:

The Purchaser acknowledges:

...

- (v) and authorises the immediate release of the deposit to the agent as commission payable on this Sale.

According to Mr Clarke this clause was prepared “in consultation with Ross Keith as to the wording”.

[14] Once this matter was resolved, Mr Scrivener indicated that the developers wished to retain Mr Keith’s services. Mr Keith then prepared an agreement headed, “Appointment of Representative”, and sent it to Mr Scrivener to sign. The parties were Mr Keith (trading as Investment Property Solutions), the first defendant as trustee for the Trust, and the second defendant.

[15] The agreement was signed by all parties and it was backdated to 8 November 2007. The first defendant appointed Mr Keith “as its representative to market the unit/s”. Other clauses provided as follows:

...

**3. Purchasers**

IPS will source and introduce purchasers to the project, either directly or via its network of consultants or agencies.

All purchasers introduced either directly by IPS, or via its network of consultants or agencies, will constitute an effective introduction and entitlement to a referral fee.

**4. Referral Fee**

4.1 The Developer will pay a referral fee at the rate of \$26,000 (PLUS GST) for each unit where a Sale and Purchase Agreement is entered into ...

...

4.3 The commission shall be paid to directly to IPS and not directly to any sales agent, real estate agent or agency, any investment sales or marketing company, financial planning organisation or similar that has been introduced to the project via IPS.

...

**6. Exclusivity**

6.1 IPS is a marketing representative appointed for the purpose of marketing the nominated Properties provided by the Developer. The allocation of Properties is at the sole discretion of the Developer and is not necessarily exclusive to IPS.

[16] Mr Clarke signed a guarantee recording that all invoices due and payable to Mr Keith would be paid in accordance with the terms and conditions of the agreement.

[17] Thereafter Mr Keith liaised with Mr Scrivener. He obtained details of the development; he prepared an overview of the development and contacted various distributors. He provided Mr Scrivener with a list of the companies and entities that he had contacted. Some of those entities were licensed real estate agents. Others were not.

[18] Between January and April 2008, the first defendant entered into 16 sale and purchase agreements with purchasers, where the deposit was paid, the agreement became unconditional, and settlement was ultimately concluded. According to Mr Keith, all 16 purchasers were introduced to the development by one of the distributors. According to Mr Clarke, all agreements for sale and purchase were presented to the first defendant by Mr Keith.

[19] The role taken by Mr Keith in introducing purchasers to the first defendant is not altogether clear.

[20] Mr Keith in his affidavit deposes as follows:

- a) he has been involved in the marketing and selling of residential investment properties for the last 15 years or so;
- b) he has acquired specialist knowledge of the apartment market; he has got to know, and become familiar with, investment companies and real estate agents in that market;
- c) his area of expertise is in bringing developers together with people and companies, whom he calls “distributors”, who specialise in marketing and/or financing developments to specific buyers in the market;

- d) his role is akin to that of an in-house sales manager and marketing representative for developers in the residential investment property market;
- e) he takes a development to distributors, and acts as a facilitator between the developer and the distributors;
- f) he had no direct contact with potential purchasers of units in the Quest on Ward development, he was not directly involved in the negotiation of any sales, and he did not introduce any prospective purchasers to the units or make any representations to them;
- g) when a real estate agent or distributor advised that a prospective purchaser wanted to inspect a unit, he advised the first defendant, and one of its employees met with the purchaser and took him or her through the unit;
- h) he was not present at any of the inspections, and he did not advise on how the units should be presented;
- i) he did not advertise the properties to the public at large; all advertising was done either by the first defendant or the distributors;
- j) it was not his role to, and he did not at any time take steps to establish the financial position of prospective purchasers;
- k) he did not prepare any of the agreements for sale and purchase and he did not present them to the purchasers;
- l) he was not involved when agreements were signed; he simply forwarded distributors the template agreement prepared by the first defendant;

- m) at no point did he receive, bank or handle any of the deposits paid by purchasers; and
- n) any real estate agents'/distributors' commission was paid by him, and that this payment was built into the fee structure under his agreement with the first defendant.

[21] Mr Clarke's and Mr Scrivener's version of events is rather different. They say that:

- a) Mr Keith held himself out as wishing to market and sell the units;
- b) Mr Keith held himself out not as a facilitator but as a listing agent;
- c) Mr Keith said that he had extensive contacts and that he could market and sell the apartments as a result of those contacts;
- d) Mr Keith advised that he might find purchasers directly as well indirectly through his contacts;
- e) Mr Keith advised that the first defendant would be dealing directly through him;
- f) no sales were affected through licensed real estate agents;
- g) in every case, the agreement for sale and purchase was either handed to one or other of them personally by Mr Keith, or sent to them directly by Mr Keith, having been signed by the purchaser;
- h) they did not deal with anybody other than Mr Keith in respect of the contracts (except in relation to a few queries direct from purchasers);



- i) Mr Keith sought a commission based on the agreements becoming unconditional and settling;
- j) Mr Keith dealt with any issues relating to the agreement for sale and purchase, and he made enquiries and suggestions on behalf of purchasers. There were occasions when they gave specific instructions regarding the form of the agreements for sale and purchase to Mr Keith, and Mr Keith implemented the same;
- k) the “Appointment of Representative” agreement the parties signed provided for Mr Keith to source and introduce purchasers directly or indirectly and this is what occurred.

### **Submissions**

[22] Both counsel referred me to s 3(1) of the Real Estate Agents Act. It reads as follows:

- (1) For the purposes of this Act, every person shall be deemed to be a real estate agent who acts, or who holds himself [or herself] out to the public as ready to act, for reward as an agent in respect of the sale or other disposal of land or of businesses (either with or without any interest in land) or the purchase or other acquisition of land or of businesses (either with or without any interest in land), or in respect of the leasing or letting of land, whether or not that person carries on any other business.

Both also referred me to a number of decisions where the section has been considered. Particular reference was made to *Previews Inc v UEB Industries Ltd* [1985] 1 NZLR 468, *Kilgour v Loeber* [1984] 2 NZLR 656; *Real Estate Institute of New Zealand Inc v Private Sale Co (Auckland Central) Limited* [1996] 2 NZLR 371, and *Howick Parklands Building Co Limited v Howick Parklands Limited* [1993] 1 NZLR 749. Ms Meredith referred me to two recent decisions which specifically deal with the sale of units in apartment-type developments – *Cooper & Co Real Estate v Volcanic Investments Limited* HC AK CIV 2004-404-4050, 21 April 2005, Courtney J, and *Cornerstone Group Limited v OPM Financial Solutions Limited* HC AK CIV

2003-404-3444, 8 December 2004, Laurenson J, and on appeal, CA11/05, 20 March 2006.

[23] It was common ground that at all material times, Mr Keith did not hold a license under the Real Estate Agents Act. Both counsel dealt with the issue of whether or not Mr Keith was or was not acting as a real estate agent. Both stressed various *indicia* contained in the affidavits which point the one way or the other.

[24] Mr Akel appearing on behalf of Mr Keith submitted that there was little real dispute on the core facts, and that Mr Keith was not acting in substance as a real estate agent in terms of the statutory definition. In the alternative, he submitted that if Mr Keith was acting as a real estate agent, the Court should exercise its discretion to grant relief under s 7 of the Illegal Contracts Act, validate the “Appointment of Representative” agreement, and enter judgment against the defendants.

[25] Ms Meredith for the first and second defendants submitted that Mr Keith was acting at all material times in substance as a real estate agent, and that s 62 of the Act prohibited Mr Keith from suing for or recovering the amount sought. She also argued that the Court could not exercise its discretion to validate the “Appointment of Representative” agreement in the summary judgment context, relying on the judgment of Fisher J in *Claydon v Herron* (1994) 7 PRNZ 631 at 634.

## **Analysis**

[26] It is clear from the authorities, and in particular from *Previews Inc* and *Cornerstone Group Limited*, that whether a person acts as a real estate agent in any particular case is a matter of fact and degree. A person does not come within the statutory definition unless in substance he or she can fairly be said to do so.

[27] Here there are significant factual disputes between Mr Keith and Mr Clarke in particular. I have summarised the respective contentions in [20] and [21] above. As can be seen, the way in which Mr Keith dealt with potential and actual purchasers is not altogether clear. Mr Keith says one thing. Mr Clarke says another. Clearly the “Appointment of Representative” document signed by the parties on 8 November

2007 envisaged that Mr Keith might source and introduce purchasers to the project directly. Equally clearly purchasers were introduced to the first defendant. However what involvement Mr Keith had with purchasers is not fully explained in the affidavits and a number of questions are left unanswered. Who were the potential and actual purchasers? What did the individual agreements for sale and purchase say? Was an agent nominated in any of them? Did Mr Keith have any involvement with prospective purchasers at all? To whom was the development advertised, and how? How did Mr Keith deal with his “distributors” and what arrangements did he have in place with them?

[28] There may well be other questions to be posed and the foregoing list is not intended to be exhaustive.

[29] The information before the Court at present in relation to these matters is sketchy, and the answers to all or any of these questions could well be relevant in determining whether or not Mr Keith was or was not in substance acting as a real estate agent.

[30] The affidavits leave a lot of issues unanswered or only answered in part. There is agreement on some facts but also conflict on others and it cannot be said that that conflict is plainly contrived. It has to be expected that the defendants would not have known precisely how Mr Keith operated, because they would not have been aware of that directly. Even on the limited information provided by Messrs Clarke and Scrivener, it cannot be said that the defence they have raised is simply a hypothetical possibility, in vague terms, unsupported by any corroborative documentation. Both the “Appointment of Representative” agreement, and the clause inserted into the template sale and purchase agreement arguably support their description of how sales occurred.

[31] It is appropriate to comment on the position where there are disputed issues of material fact or where material facts need to be ascertained by the Court and they cannot confidently be concluded from the affidavits. These matters were the subject of comment in *Westpac Banking Corporation v M M 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 material facts 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. ...

[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.

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

[33] In my view it would be inappropriate in the present case to proceed to enter judgment against the defendants on a summary judgment basis. The matter needs to proceed to trial, so that Mr Keith's *modus operandi* can be fully explored before any finding is made that he was or was not acting as a real estate agent.

[34] There is an additional reason why a trial is appropriate.

[35] If it is ultimately concluded that Mr Keith was acting a real estate agent, then *prima facie* it would seem that his claim to the judgment he seeks must be barred by s 62 of the Act. It provides as follows:

No person shall be entitled to sue for or recover any commission, reward, or other valuable consideration in respect of any service or work performed by him [or her] as a real estate agent, unless—

- (a) He [or she] was the holder of a licence as a real estate agent under this Act or the holder, or the partner of a holder, of a licence as a real estate agent under the Real Estate Agents Act 1963 at the time of the performing of the service or work; and
- (b) His [or her] appointment to act as agent or perform that service or work is in writing signed either before or after the performance of that service or work by the person to be charged with the commission, reward, or consideration or by some person on his [or her] behalf lawfully authorised to sign the appointment.

[36] As noted it is not in dispute that Mr Keith was not a licensed real estate agent.

[37] Mr Keith as an alternative seeks relief and validation of the “Appointment of Representative” agreement under s 7 of the Illegal Contracts Act. It provides as follows:

(1) Notwithstanding the provisions of section 6 of this Act, but subject to the express provisions of any other enactment, the Court may in the course of any proceedings, or on application made for the purpose, grant to—

(a) Any party to an illegal contract; or

(b) Any party to a contract who is disqualified from enforcing it by reason of the commission of an illegal act in the course of its performance; or

(c) Any person claiming through or under any such party—

such relief by way of restitution, compensation, variation of the contract, validation of the contract in whole or part or for any particular purpose, or otherwise howsoever as the Court in its discretion thinks just.

(2) ...

(3) In considering whether to grant relief under subsection (1) of this section[, and the nature and extent of any relief to be granted,] the Court shall have regard to—

(a) The conduct of the parties; and

(b) In the case of a breach of an enactment, the object of the enactment and the gravity of the penalty expressly provided for any breach thereof; and

(c) Such other matters as it thinks proper,—

but shall not grant relief if it considers that to do so would not be in the public interest.

(4) The Court may make an order under subsection (1) of this section notwithstanding that the person granted relief entered into the contract or committed an unlawful act or unlawfully omitted to do an act with knowledge of the facts or law giving rise to the illegality, but the Court shall take such knowledge into account in exercising its discretion under that subsection.

...

[38] Clearly this section confers a wide ranging discretion on the Court. It is possible for relief under s 7 of the Illegal Contracts Act to be given by way of summary judgment – see Cooke P in *Phillips v Foster* [1991] 3 NZLR 263 at p 265. See also Somers J in *Australian Guarantee Corporation (NZ) Limited v Wyness* [1987] 2 NZLR 326 at p 330; cf *Clayton v Herron* at p 634.

[39] While jurisdiction exists, as was noted in *Phillips*, it should be exercised guardedly in summary judgment proceedings. In my view it would be inappropriate to exercise the direction under s 7 in the present circumstances. There are factual disputes in the affidavits as to what representations Mr Keith made at the outset. The conduct of the parties is relevant in determining whether or not relief is appropriate. Similarly, whether or not any purchaser has been affected by any illegality, or has complained about anything Mr Keith has done, may be relevant matters. The Court will be required to consider the public interest. There is nothing in the affidavits as to that issue.

[40] Accordingly, I decline to award summary judgment in favour of Mr Keith. I direct that the proceedings should go to trial in the normal way.

[41] To advance matters, I make the following directions:

- a) the defendants are to file statements of defence within 10 working days of the date of this judgment;
- b) all parties are to make affidavits listing the documents that are or have been in their control and which relate to a matter in question in the proceeding, and file and serve the same, within a further 10 working day period;
- c) inspection is to take place within a further 5 working day period thereafter;
- d) any further interlocutory applications are to be filed within a further 5 working day period thereafter.

[42] The proceedings are to be scheduled for a case management telephone conference on the first available date thereafter before an Associate Judge to make such further directions as are necessary to ensure that they are ready for trial, and to allocate a hearing date.

[43] Notwithstanding submissions I received to the contrary, costs are reserved in accordance with the principles discussed in *NZI Bank Ltd v Philpott* [1990] 2 NZLR 403. They can be dealt with in the context of the substantive hearing.

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Wylie J