IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2008-404-003767

BETWEEN	THE DOCKS LIMITED Plaintiff
AND	ANDREW JOHN NICHOLAS AND URSULA ELLA NICHOLAS Defendants

Hearing: 10 June 2009

Appearances: TJG Allan for Plaintiff
D F Dugdale for Defendants

Judgment: 2 October 2009 at 11 am

JUDGMENT OF ASSOCIATE JUDGE ROBINSON

This judgment was delivered by me
on 2 October 2009 at 11:00am,
Pursuant to Rule 11.5 of the High Court Rules

Registrar/Deputy Registrar

Date…….

Solicitors: Grove Darlow & Partners, PO Box 2882, Auckland
Mahon & Sumpter, PO Box 33142, Takapuna

[1] The plaintiff brings these proceedings for damages arising out of the defendants' failure to complete the purchase of a unit in a block of apartments known as "The Docks" located on the corner of Tapora, Quay and Tangihua Streets, Auckland. On 3 April 2006 the parties entered into an agreement to purchase the unit for $282,000. The agreement also contained provision for the defendants to purchase a carpark for $45,000. However, the defendants did not proceed with the purchase of the carpark. A deposit of $32,700 was paid. Because the defendants failed to settle the purchase on 25 October 2007 when settlement was to take place in accordance with the agreement the plaintiff issued these proceedings and sought orders initially for specific performance by way of summary judgment.

[2] On 25 March 2008 as the defendants had refused to settle the purchase of the unit, the plaintiff cancelled the agreement without prejudice to all its rights and remedies. Following the issue of these proceedings the plaintiff sold the unit for $280,000, settlement of the sale taking place on 15 August 2008.

[3] The plaintiff claims to have sustained a loss on the sale after taking into account the costs incurred in retaining ownership of the unit together with interest calculated in terms of the agreement for sale and purchase and the costs incurred in arranging a resale.

[4] When these proceedings came on for hearing before Joseph Williams J on 4 March 2009 the plaintiff calculated its loss on the resale at $86,827.28 which includes interest and costs and sought judgment for that amount. Joseph Williams J for reasons set forth in his judgment delivered on 6 March 2009 concluded the defendants to be liable to the plaintiff for breach of the agreement for sale and purchase as the defendants were unable to establish any legal justification for failing to complete the purchase. However, as the defendants had a defence to the amount claimed as damages summary judgment was entered against the defendants as to liability and a trial directed on the issue of quantum pursuant to rule 12.3 High Court Rules.

[5] The trial came on for hearing before me there being jurisdiction for an Associate Judge to deal with the matter pursuant to s 261(i)(d) Judicature Act 1908

which enables an Associate Judge to exercise all the jurisdiction powers of the High Court in relation to:

> The assessment of damages where liability has been determined.

[6] Included in the damages claimed by the plaintiff are the following:

a) Interest on the amount the defendants were required to pay on settlement namely $284,294.82 from 16 October 2007 to 12 November 2007 at 34.4% per annum being $267.93 per day for twenty-seven days.

Total: $7,234.11

b) Interest on $258,828.93 being the amount required to settle of $284,294.82 plus interest thereon pursuant to (a) above of $7,234.11 less deposit received on 12 November 2007 of $32,700 at 34.4% per annum being $243,93 per day from 13 November 2007 to 15 August 2008 namely 275 days.

Total: $67,080.75

c) Interest on $91,141.67 being the balance of interest and costs after giving credit for $280,986.49 being the amount received on the resale of the unit at 34.4% per annum being $84.89 per day from 15 August 2008 to 4 March 2009 namely 201 days.

Total: $17,263.89

TOTAL: $91,578.75

The plaintiff also claims interest at $84.89 per day from 4 March 2009 until the date of judgment.

[7] In addition the plaintiff also seeks judgment for the commission and marketing expenses incurred on the resale of the unit amounting to $42,791 and full indemnity legal costs amounting to $32,955.31 inclusive of GST. The plaintiff

claims to be entitled to costs and interest in terms of its agreement with the defendants. The defendants contend the provision for interest contained in the agreement is a penalty being a payment stipulated "in terrorem" and not liquidated damages as a genuine covenanted pre-estimate of the plaintiff's loss. They also claim the costs on the resale of the unit to be excessive.

[8] The plaintiff's claim for damages is based on clause 9.4 of the agreement. The relevant parts of that provision are as follows:

> 9.4 If the purchaser does not comply with the terms of the settlement notice served by the vendor then:
>
> (1) Without prejudice to any other rights or remedies available to the vendor at law or in equity the vendor may:
>
> (b) cancel this agreement by notice and pursue either or both of the following remedies namely:
>
> (i) forfeit and retain for the vendor's own benefit the deposit paid by the purchaser, but not exceeding in all 10% of the purchase price; and/or
>
> (ii) sue the purchaser for damages.
>
> (3) The damages claimable by the vendor under subclause 9.4(1)(b)(ii) shall include all damages claimable at common law or in equity and shall also include (but shall not be limited to) any loss incurred by the vendor on any bona fide resale contracted within one year from the date by which the purchaser should have settled in compliance with the settlement notice. The amount of that loss may include:
>
> (a) Interest on the unpaid portion of the purchase price at the interest rate for late settlement from the settlement date to the settlement of such resale; and
>
> (b) All costs and expenses reasonably incurred in any resale; and
>
> (c) All outgoings (other than interest) on or maintenance expenses in respect of the property from the settlement date to the settlement of such resale.

[9] The interest rate specified for late settlement is four times the bill rate. The bill rate is defined as the ninety day bank buy bill rate which in terms of the agreement is:

> That as advised by the vendor's solicitors bank and if more than one such rate then the highest rate during the relevant period.

[10] As it happens between 1 October 2007 to 31 March 2009 according to the evidence of Mr GR Lee, an actuary called on behalf of the plaintiff, the ninety day bank bill buy rate fluctuated to a maximum of 9.06% per annum on 25 March 2008 reducing to just on 8% per annum in September 2008, then to 3% per annum in February 2009 and thereafter at just over 3% per annum. The penalty rate of 34.4% is based on a ninety day bill rate of 8.6% and is slightly less than the maximum amount specified in the contract of 9.06%.

[11] In support of the claim for interest at four times the ninety day bank buy bill rate counsel for the plaintiff submits:

a) That the rate is specified in all the plaintiff's agreements in respect of The Docks apartments development. These agreements were prepared approximately two years before construction was completed and settlement could be called for.

b) The rate was fixed to ensure the plaintiff's losses resulting from late settlement would be covered. In this respect the plaintiff had to finance the cost of construction of the units with a construction loan from the ANZ Banking Group together with overdraft facilities both dated 27 July 2006, and loan agreements with Romulus Finance Limited and FE Loans. Interest rates for loans incurred by the plaintiff with the ANZ Banking Group from 1 November 2007 to 9 September 2008 were 20% per annum with Romulus from 9 September 2005 to 7 November 2007 30.8% with FE Loans from 11 June 2008 to 21 January 2009 39.4% with ANZ Loans from 1 July 2007 to 21 January 2009 27.1%. The FE Loan required an establishment fee of $200,000 for a $2,500,000 loan together with legal fees. The plaintiff's costs of borrowing increased because of a number of purchasers of units in the Docks apartments who defaulted. Consequently, the interest paid by the plaintiff on funds borrowed during the period following the defendants' default was 27.1% per annum. Taking into account other factors such as additional administration costs and loss of opportunity

it is submitted that 34.4% is not so extravagantly outside the range as to be "in terrorem".

c) The plaintiff relied on authorities such as *Lorjona Pty Ltd v Cape Hood Pty Ltd & Littleton Engineering Ltd* decision of Fogarty J, HC ChCh, CIV 2004-409-000683 decision dated 28 November 2005 and in particular paragraphs 137 to 139 of the decision where the following is stated:

> [137] When debts are well overdue the cost to the company is likely to be significantly greater than the overdraft interest the company pays to the bank. The loss of revenue from such overdue accounts generates head office administration costs of recording the overdue balance and efforts to obtain payment. On top of that there may also be a lost opportunity cost. The overdraft facility may be better used.
>
> [138] Against these obvious considerations I do not think that the plaintiff has proved that the contract interest rate is a penalty, rather than an arrangement of payment to be imposed to cover the costs of delay.
>
> [139] The lowest interest rate applicable for the relevant period (based on Westpac's overdraft rate to the first defendant plus 5%) is 11.55%; the highest is 13.5%. I do not think that is unconscionable for the above reasons. I think it is the range of being a fair pre-estimate of the probable damage. See *Dunlop Pneumatic Tyre Co Ltd v New Grange and Motor Co Ltd* [1915] AC 79 at page 86-87. In sum I think that the clause is closer to being a pre-estimate of damage than it is to being a penalty. It is not a stipulation *in terrorem.* These comments are to a degree discursive because, as Lord Dunedin pointed out in *Dunlop*, the test is stated in various ways. Ultimately it is a judgment made by the Court. It is a judgment of this Court that the stipulated interest rate is enforceable by the defendant.

[12] It is submitted on behalf of the defendants:

a) When the deposit of $32,700 paid by the defendants is added to the amount received by the plaintiff on resale of the unit of $280,000 the plaintiff has received $312,700 for this unit. This is more than the price the defendants agreed to pay for the unit of $282,000.00.

b) Mr Kells who is employed by the plaintiff says a factor taken into account in fixing the interest rate at four times the bank bill buy rate "was the incentive it created to purchasers to settle. If they did not, they were aware that they would be paying a reasonably substantial sum for their default". This statement according to counsel for the defendants is as precise an admission as could be hoped for an "in terrorem" intention.

c) The nominated rate for late settlement is twice the standard rate specified in the agreement being double the bill rate. It is also capricious in its effect being based on the highest rate during the relevant period which fluctuated between 9.06% and 3%. No nexus has been demonstrated between the fluctuating bank rate and the cost of finances to the plaintiff.

d) The time to consider whether the effect of the provision for interest for late settlement is penal is at the time when the agreement was executed in April 2006. Consequently, evidence of the actual cost of borrowing incurred by the plaintiff at 27% based as it is on the agreements for finance entered into by the plaintiff after April 2006 is irrelevant.

e) In assessing an appropriate rate of interest for late settlement the Court must limit its enquiry to evidence existing when the parties entered into their agreement in April 2006. There is no evidence the defendants knew of the plaintiff's financial arrangements. There is also no evidence to show that when they entered into the agreement in April 2006 the parties could contemplate that the plaintiff would incur increased costs of borrowing because an unspecified number of purchasers would have to settle the purchase of their apartment within The Docks development.

Decision on whether the interest rate is a penalty

[13] In *Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd* [1915] AC 79 Lord Dunedin at pages 86 to 87 listed a series of propositions which he considered to be authoritative relating to the recovery of interest. Those principles have been applied in New Zealand in *Lorjona Pty Ltd* and *Cape Hood Pty Ltd v Lyttelton Engineering Ltd* CIV 2004-409-683 and *Williams & Kettle Ltd* v *Duncan (no2) (1991) 3 NZBLC, 102, 405*, HC Napier, 16 September 1991, decision of Master J H Williams QC. Two of those propositions are:

> 2. The essence of a penalty is a payment of money stipulated as in terrorem of the offending party; the essence of liquidated damages is a genuine covenanted pre-estimate of damage (*Clydebank Engineering and Shipbuilding Co v Don Jose Ramos Yaquierdo y Castaneda* (1).
>
> 3 The question whether a sum stipulated is penalty or liquidated damages is a question of construction to be decided upon the terms and inherent circumstances of each particular contract, judged of as at the time of the making of the contract, not as at the time of the breach *(Public Works Commissioner v Hills* (1) and *Webster v Bosanquet* (2).

[14] The evidence in this case establishes the plaintiff was motivated by a desire to include an incentive to the purchasers to settle by making them aware they would be paying a reasonably substantial sum for their default when fixing the default interest rate. The fact that the interest rate for late settlement which is specified in further terms of sale and which is double the interest rate specified in clause 1.1(9) of the agreement adds significant weight to the argument that the provision is "in terrorem".

[15] When the parties entered into the agreement they did not anticipate the plaintiff's cost of borrowing would be increased because of the number of purchasers of apartments who would default in settlement. Mr Kells makes no mention of this consideration in his evidence. The only other factor referred to by Mr Kells which influenced his decision to fix the default interest rate at four times the ninety day commercial bill rate was a need to as he says "meet the holding costs". In this respect he states:

> To ensure that all our holding costs were met it was resolved to include a figure that was four times the bill rate. At the time I anticipated the bill rate would remain relatively static at between 6 to 9%. I certainly never contemplated that it could drop to present levels.

[16] The interest paid by the plaintiff as calculated by the actuary includes all finance costs being loan application and set up fees, interest costs and legal costs directly associated with the uplift maintenance and roll over of the respective loans.

[17] The rate of interest charged by trading banks is directly related to the ninety day commercial bank buy rate. Mr Kells' evidence is that the default interest rate was fixed by a multiple of the interest on the ninety day commercial bill bank buy rate. The agreement fixes the default interest by reference to such rate. Consequently, I conclude that when they entered into the agreement the parties contemplated an interest rate for late settlement fixed by reference to the interest on ninety day commercial bills which would provide proper compensation for losses incurred by the plaintiff.

[18] Mr Kells' evidence that when he fixed the interest to be charged for late settlement at four times the interest charged on ninety day commercial bills he was providing "an incentive to purchasers to settle" and that failure to settle would result in payment of "a substantial sum" leads me to the conclusion that such interest rate was fixed as "in terrorem" and not a genuine pre-estimate of the plaintiff's likely loss. The fact that the agreement in its general terms of sale specifies an interest rate for late settlement at double the ninety day bank bill buy rate is cogent evidence that such interest rate was a genuine pre-estimate of the plaintiff's likely loss. There is no evidence adduced linking the doubling of that interest rate to any increase in the plaintiff's anticipated costs of borrowing at the time the parties entered into their contract to justify the doubling of the interest rate.

[19] It must follow that the default interest rate fixed at four times the interest charged on ninety day bank bill buy rates is penal and therefore cannot be recovered. It also follows that interest fixed at double the ninety day bank bill buy rate specified in the general terms of sale contained in the contract can be recovered as being a genuine pre-estimate of the plaintiff's likely loss when the parties entered into the agreement.

[20] In terms of the agreement the default interest is payable on the unpaid portion of the purchase price and not on costs incurred on resale and on outgoings – see paragraph 9.4(3) of the agreement referred to in paragraph 8 of the judgment. Of the amount required to settle as at 16 October 2007 namely $284,294.82, $282,000 represented the purchase price, the balance being apportionment of rates, body corporate levies and other outgoings. Although the evidence is unclear as to when the defendants paid the deposit the deposit had been secured prior to the date of settlement and the plaintiff would have been unable to recover any interest for late payment of the deposit. Consequently, interest payable by the defendants is fixed at the rate of 18.12% per annum being double the maximum ninety day bank bill rate on $282,000 less the deposit of $32,700, namely $249,300 from 16 October 2007 until 15 August 2008 being 304 days at $123.76 per day, namely $37,623. After crediting the defendants with the deposit and the amount received from the resale of the unit the defendants have a credit of $30,700 calculated as follows:

a)	Amount of deposit forfeited	$32,700
b)	Amount received on sale of unit	$280,000
c)	Total of above amounts	$312,700
d)	Less the amount to be paid by the defendants to settle the purchase	$282,000.
e)	Balance available to defendants being the excess received after crediting the deposit and money received on resale.	$30,700

[21] When the sum of $30,700 is applied to interest of $37,623 payable on the unpaid purchase price as at 15 August 2008 there is a balance of $6,923 owing by the defendants to the plaintiff in respect of interest.

[22] As the agreement provides for interest to be paid on the balance of the purchase price and not costs of sale it would be wrong to deduct the costs of sale from the amount received on resale as to do so would be to require the defendants to

in effect pay interest on the costs of resale. As the balance of the purchase price has been satisfied from the money received on resale plus the deposit no further interest is payable by the defendants.

[23] In addition to the purchase price the defendants had to make the following payments:

a)	Purchaser's share of Body Corporate levies from 17 October 2007 to 1 October 2008	$2,208.02.
b)	Apportionment of city rates from 17 October 2007 to 30 June 2008	$69.91.
c)	Apportionment of Auckland Regional Council levy from 17 October 2007 to 30 June 2008	$16.88.
d)	Auckland City Rates from 16 October 2007 to 15 August 2008	$122.25.
e)	Auckland Regional Council levy to 15 August 2008 - $17.63.	
	Total:	$2,434.69

Plaintiff's claim for costs of sale

[24] The plaintiff claims $42,791 being the costs the plaintiff claims to have incurred in connection with the sale of the unit. Those costs are made up as follows:

a)	Payment to IF Property Pty Ltd being commission on unit 147	$25,000
b)	GST thereon	$ 3,125
c)	Marketing fee paid to Andy Liang	$ 6,666
d)	Sales bonus paid to Andy Laing	$ 8,000
Total		$42,791

[25] The plaintiff claims that by late 2007 it had become increasingly difficult to sell apartments. Consequently, the plaintiff claims extra amounts had to be spent marketing the property and providing an incentive to the agents.

[26] The plaintiff maintains Mr Andy Liang managed to sell unit 147 by including that unit in units available for sale through seminars he conducted. Those seminars were a type of direct marketing mostly to Asians interested in investing in property in New Zealand.

[27] Although Mr Kells claimed there was a written agreement with Mr Liang and his company for the sale of the units he was unable to produce a copy of the agreement. No such agreement has been discovered. According to Mr Minty who gave evidence on behalf of the plaintiff as an expert in development, marketing and sale of apartments, although commission fees charged differ between agencies, based on his experience a standard commission rate for a project marketing group would be between 3-5% plus GST and marketing costs.

[28] He acknowledges that there have been seminar sellers operating in Auckland who promote and sell units through seminars. He says these sellers' fees are significantly more than those of a conventional agent. For a straightforward sale he says the best fee he was able to negotiate was $20,000 plus GST plus marketing costs per sale. The standard base fee offered by such groups was he says $25,000 to $30,000. He claims these fees are usually set as a fixed fee not a percentage of the sale price. In addition he suggests a bonus fee could be offered as an inducement to the agent. Bonuses he says take the form of an increase in commission or a travel or give away package. He says these incentives have been up to 30% increase in commissions on sale.

[29] The total fee being claimed in this case is over 15% of the sale price. The only evidence from the real estate agent involved in the sale of the unit are invoices claimed to have been rendered by the agent on his behalf and on behalf of his company IF Property Pty Ltd. According to the evidence of Mr Kells those invoices are self explanatory. The invoice claiming the commission is from the agent's company IF Property Pty Ltd. The commission refers to a contract price of $250,000

with a fee of $25,000. Although the invoice refers to unit 147 the contract price for that unit was $280,000. The claim for a marketing fee is in respect of an invoice issued by the agent Mr Andy Liang. The typed part of the invoice refers to a marketing fee of $30,000 for The Docks Ltd. Someone has written on that invoice a list of units and noted a fee of $6,666 against unit 147. No evidence has been adduced as to the author of the additions to the invoice.

[30] There is a further invoice relating to a sales bonus payable to Mr Andy Liang which notes that a bonus of $8,000 including GST is payable in respect of unit 147.

[31] In terms of the agreement between the parties, the defendants are liable for all costs and expenses reasonably incurred in any resale or attempted resale. I find the evidence as to liability for payment of the fees claimed on the resale of the unit to be most unreliable. There must be considerable doubt as to whether an agreement in writing exists for the payment of these expenses. I certainly will not accept in the circumstances of this case a charge for marketing on the basis of the notation on an invoice by an unidentified person. Consequently there is insufficient evidence to establish liability for fees and expenses totalling $42,791.00. This amount is certainly considerably more than the normal commission which is between 3 and 5% of the sale price. Furthermore there is no evidence of any money spent by the agent in marketing such as evidence of costs of advertising. In the circumstances I consider a reasonable commission which includes all costs of sale to be 5% of the purchase price namely $14,000.

Summary

[32] In summary therefore the plaintiff is entitled to judgment for the following:

a)	Commission on resale	$14,000
b)	Interest	$6,923
c)	Outgoings	$2,434.69
Total		$23,357.69

Costs

[33] In the circumstances I will hear from counsel on the issue of costs. The registrar should arrange a fixture for one hour to enable counsel to be heard. The plaintiff is to file a memorandum in support of the its claim for costs listing appropriate authorities five days prior to the fixture. The defendants are to file a memorandum three days prior to the fixture.

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Associate Judge Robinson