IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2009-404-004073

	BETWEEN	DONALD ROY NIGHTINGALE & CHRISTOPHER ENID NIGHTINGALE Appellants
	AND	BARFOOT & THOMPSON LIMITED Respondent

Hearing: 16 October 2009

Appearances: S H Barter for Appellants
T D Rea for Respondent

Judgment: 22 October 2009 at 3.30 p.m.

JUDGMENT OF VENNING J

This judgment was delivered by me on 22 October 2009 at 3.30 pm, pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date.....

Solicitors: Barter & Co, Auckland
Glaister Ennor, Auckland

Introduction

[1] In February 2007 the appellants sold a property at Dairy Flat. The respondent real estate firm had introduced the purchaser to the transaction. When the purchaser paid the deposit the respondent deducted its commission before accounting to the appellants. The appellants considered they had never appointed the respondent as their agent for the sale and took proceedings in the District Court to recover the commission. In a judgment delivered on 10 June 2009 Judge Sharp found for the respondent and dismissed the appellants' claim. The appellants appeal against that decision.

Background

[2] In early 2006 the appellants were interested in selling their property. They listed it for sale with two agents, The Professionals, Albany and the respondent. The property did not sell and the appellants terminated the agencies in September 2006.

[3] In February 2007 one of the respondent's agents approached Donald Nightingale. The agent had purchasers who were interested in it. Donald Nightingale, who acted on behalf of both appellants, agreed to allow the prospective purchasers through the property but on the basis that the agent was the agent for the purchasers, not the appellants.

[4] On or about 23 February 2007 Mr Godfrey, a salesman with the respondent and known to Mr Nightingale, attended the appellants' property and presented an offer for the property. The offer was in the standard form agreement for sale and purchase of real estate produced by the Real Estate Institute and the Auckland District Law Society. The price was 1.4 million dollars. Mr Nightingale rejected it out of hand.

[5] A few days later, when Mr Nightingale was in Whangarei, Mr Godfrey faxed an amended offer for the property through to him. The offer was from the same purchaser. The same form was used. The initial offer of $1.4 million was crossed out and an increased figure of $1.45 million inserted. The documents faxed to Mr

Nightingale were limited to two pages, the front page of the standard form agreement and the execution page. The front page provided the details of the parties, the property, the price, deposit and settlement. It also recorded the sale was by the respondent and noted the rates of charges to the vendor. The execution page included further terms specific to the particular transaction. The middle pages containing the general terms of the agreement were not faxed through.

[6] Mr Nightingale counter-offered at $1.52 million. He also struck out the reference on the front page to the agent's charges to the vendor. A number of further counter-offers were exchanged, all by fax. At one stage a fresh front page was used as the agreement had been redrawn so many times. It repeated that the sale was by the respondent and provided for the charges to the vendor. Mr Nightingale did not strike out the charges to vendor clause in the second form. The agreement for sale and purchase was finally concluded by an exchange of faxes on 27 February.

[7] Included on the front page of the standard form of agreement used was the following clause:

> It is agreed that the vendor sells and the purchaser purchases the above described property, and the chattels included in the sale, on the terms set out above, and the General and Further Terms of Sale.

[8] The general terms of sale included clause 11. Clause 11 provided as follows:

> 11.0 Agent
>
> 11.1 If the name of a licensed real estate agent is stated on the front page of this agreement it is acknowledged that the sale evidenced by this agreement has been made through that agent whom the vendor appoints as the vendor's agent to effect the sale. The vendor shall pay the agent's charges including GST for effecting such sale.

The respective cases in the District Court

[9] The appellants' case before the District Court was that as Mr Nightingale had told the agent who showed the purchasers through that she was to be an agent for the purchasers only, the appellants had not agreed to the respondent acting as the appellants' agent on the sale. Further, because Mr Nightingale had not initialled the

page containing cl 11.1 the appellants had not appointed the respondent as their agent and the respondent was not entitled to a commission.

[10] The respondent's case was that its agent had not agreed to be the purchaser's agent but, that even if the agent had initially agreed to that, that agreement had been superseded when the appellant concluded the contract which included the cl 11.1. Clause 11.1 confirmed that the appellants appointed the respondent as their agent and they had agreed to pay its commission.

The District Court judgment

[11] In her judgment Judge Sharp made a number of factual findings in favour of the appellants. She found that Mr Nightingale had advised the agent that in the event she secured an agreement for sale and purchase she would be doing so as the purchaser's agent and not the vendor's agent. She also accepted that the appellant rejected the first offer presented to him by Mr Godfrey without considering it. Next, the Judge accepted that the further negotiations for the contract for the sale took place by way of offer and counter-offer through the fax machine. The Judge also found as a fact that the middle pages containing the general terms of the agreement and in particular cl 11.1 were never faxed through to Mr Nightingale nor was the particular provision ever specifically drawn to his attention.

[12] Having made those findings, the Judge recorded that while there were factual disputes between the parties, the answer to the dispute came down to a matter of law. She concluded that on the basis of his answers during the course of cross-examination Mr Nightingale knew and understood that a clause to the effect of 11.1 was included as a standard condition in the agreement for sale and purchase so that he had sufficient notice of it. The Judge concluded the respondent was entitled to rely on the Contracts (Privity) Act 1982 even though the agreement in question was between the appellants and their purchasers so that the respondent was entitled to the commission.

Preliminary point

[13] In his written material Mr Barter addressed submissions based on arguments of collateral contract and/or promissory estoppel. Mr Rea took the point that neither of those points had been raised in the District Court by way of pleading, nor even in argument. Mr Barter had also sought to raise an argument under the Fair Trading Act 1986 which had expressly not been pursued in the District Court.

[14] It is not open for an appellant to raise substantive issues on appeal which were not raised before the Court at first instance if the point raised involves more than a limited point of law: *Foodstuffs (Auckland) Limited v Commerce Commission* [2004] 1 NZLR 145 (PC). The issues of collateral contract and promissory estoppel raise more than points of law. They raise issues of fact and evidence. If they had been pleaded and been before the District Court, the respondent's counsel would have pursued other lines of cross-examination that it was not necessary to pursue on the pleadings before the District Court. The new points cannot fairly be raised now.

[15] The appellants are not prejudiced by that however. As Mr Barter acknowledged during the course of his oral submissions the appellants' case really stands or falls on whether cl 11.1 was incorporated into the contract and whether there was an appointment of the respondent as the appellants' agent.

The appellants' submissions on appeal

[16] Mr Barter submitted that cl 11.1 in this case was analogous to an exclusion clause. He argued that where a party did not know of an exclusion clause and the clause was not drawn to their attention, the party was not bound by it. He submitted the position was even stronger for the appellants in this case because they had initially expressly told the agent that the agent was to look to the purchaser for commission. Mr Barter relied upon the decision of *Nalder & Biddle (Nelson) Ltd v C & F Fishing Limited* [2007] NZLR 721 (CA) to support his general submission that cl 11.1 was not included as a term of the contract.

[17] Mr Barter accepted that Mr Nightingale may have had some general knowledge of the general terms of conditions of contract, including that they contained a clause appointing the real estate agent as the vendor's agent, but noted that Mr Nightingale was also of the understanding that to engage such a clause it was necessary to sign it. As he had not done so, Mr Barter submitted the appellants were not bound by it.

[18] The appellants' argument in short is that, even if cl 11.1 was included as a term of the agreement for sale and purchase they are not bound by it because Mr Nightingale's attention was not expressly drawn to it and he did expressly affirm it by signing or initialling that clause.

The issues on appeal

[19] The material part of s 62 of the Real Estate Agents Act 1976 provides that an agent is not entitled to recover commission unless their appointment is in writing signed by the party to be charged with the service.

[20] Accepting Mr Barter's submission that cl 11.1 is analogous to an exclusion clause for present purposes, the issues on appeal are:

a) whether the clause was incorporated in the contract made by Mr Nightingale; and, if so

b) whether the appellants had sufficient notice of it, and, if so

c) whether the fact he signed the contract amounts to an appointment for the purposes of s 62.

Decision

[21] The start point is to identify the ambit of the contract between the appellants and their purchasers. The agreement negotiated between the appellants and their purchasers was recorded in the document signed by Mr Nightingale on 27 February

2007. The document recorded that it was agreed the terms of sale included the general and further terms of sale.

[22] Mr Nightingale accepted that although he only signed or initialled the two pages, he knew that the agreement incorporated the general terms and conditions. In evidence he accepted:

> Q. At the time did [sic] you concluded this agreement, did you honestly believe that the only terms that you were agreeing to were those provisions that were on the front page and the other pages that were faxed?
>
> A. No. I accept that the normal standard terms and conditions in the real estate form would be [sic] apply

Clause 11.1 was one of the general terms of sale.

[23] Further, the execution page completed by the appellants was headed "Further terms of sale". It commenced with clauses 14 and 15. Construed objectively the parties to the contract had notice that the pages containing the standard terms and conditions were part of the contract concluded by them.

[24] As noted Mr Barter relied on the decision of *Nalder & Biddle*. But *Nalder & Biddle* does not support the argument that Mr Barter sought to advance. Nalder and Biddle had submitted a tender proposal for carrying out refitting work on C & F's vessel. The proposal contained an exclusion clause. The tender was not accepted. Subsequently, in a contract negotiated a year later, the parties orally agreed the terms upon which Nalder & Biddle would carry out work on C & F's vessel. The oral agreement did not incorporate the exclusion clause. The majority of the job cards issued by Nalder & Biddle during the course of the work to C & F did, however, contain a reference to an exclusion clause. The Court held that the operative contract did not incorporate the terms of the proposal including the exclusion clause. The purpose of the job cards was to define the scope and price of each particular item of work to be carried out. In the absence of an express recognition or identification by the parties there was nothing to link the job cards to the earlier proposal. The job cards could not incorporate the exclusion from liability contained in the initial proposal.

[25] But in the present case, unlike *Nalder & Biddle*, cl 11.1 was part of the contract concluded between the appellants and their purchasers.

[26] It follows that the terms and conditions of the standard form, including cl 11.1, were incorporated as part of the agreement made by the appellants with their purchasers.

[27] The next issue is whether the appellants had notice of the clause. The evidence of Mr Nightingale himself confirms that he understood there were additional terms included in the agreement and that one of them was an agent's charging clause. Mr Nightingale confirmed that he was familiar with the standard form of agreement. He had even, many years earlier, acted as a real estate agent. More recently, in 1996 he had sold a property using the standard form REINZ form of contract The following exchanges took place during his cross-examination:

> Q. Did you have any familiarity from that previous dealing with standard terms and conditions in that they were explained to you?
>
> A. Yes they were explained to me and we went through each page and each page was initialled as a matter of course. In my previous real estate ... I did about two and a half, may be three years as a real estate agent with Barfoots and it was always mandatory that every page had to be initialled.
>
> ...
>
> Q. So it's your evidence then that you didn't know as at the time of these dealings with [the respondent] in 2007, that there was a standard term in the agreement for sale and purchase in the nature of clause 11.1?
>
> A. I knew that there was a clause in there, yes. I didn't know which one it was specifically, but I knew there was an agreement there that acknowledged the name of the agent on the front of the agreement, being entitled to commission. But it's my understanding that that had to be signed to be effective. And also, that part of the agreement was never presented to me.
>
> Q. So it was your understanding that none of the other standard terms that would be included in the middle pages were actually part of this particular contract?
>
> A. No. Normal standard clauses always apply.
>
> ...
>
> Q. And you've said also that you knew at that time that included within those standard terms was a term acknowledging that the agent acted

for the vendor and that the vendor would be liable to pay commission?

A. I knew there was a clause something similar to that, well I believed there was yeah, but it was my belief that that had to be signed.

Then later:

Q. I'll try and go through it sequentially. At the time of these negotiations you were aware that within the standard terms there was a clause that had the effect of the vendor confirming that the agent was their agent and that they were paying commission, you've accepted that?

A. Yes I accept that, yes.

(emphasis added)

[28] On Mr Nightingale's own evidence he knew, at the time he signed the agreement, that the standard terms of the agreement were included as part of the agreement and, further, that the standard terms included a clause appointing the respondent as the vendor's agent.

[29] While an exclusion clause must be adequately brought to the attention of the party to be bound before the contract is made, i.e. the party must have notice, it is not, however, necessary that the contracting party actually read the exclusion clause. In *Harvey v Ascot Dry Cleaning Co Limited* [1953] NZLR 549 for example the plaintiff left a suit with the defendant for cleaning. He was handed a printed document folded in two which he placed in his pocket unread. The docket had printed on it "Conditions of contract, please read carefully". It was held that the plaintiff was bound by the clause. The contract was not concluded before it was handed to him. Whether he read it or not was immaterial. The defendants had done what was reasonably sufficient to give notice of that condition.

[30] Further, in this case Mr Nightingale had the opportunity to read the clause when the agreement was first presented to him by Mr Godfrey. The fact the appellants chose not to read it, and have subsequently signed the agreement cannot assist them. In the absence of fraud or misrepresentation people are bound by writing to which they have put their signature whether they have read its contents or have chosen to leave them unread. The appellants cannot say they have been misled

by the respondents in this case. The front page signed by Mr Nightingale confirmed the sale was by the respondent and that the charges were to the vendor.

[31] The situation of the appellants in this case is no different to a party who signs a contract without reading all its clauses. Such a party is still bound by the clauses in the contract. In *Toll (FGCT) Pty Limited v Alphapharm Pty Limited* (2004) 219 CLR 165 the High Court of Australia confirmed the importance of a signature as conveying a representation that the person signing either has read and approved the contents of the document or is otherwise willing to take the chance of being bound by those contents whatever they may be.

[32] To avoid the consequences of that, Mr Barter sought to submit that the nature of the clause was such that the appellants' attention had to be expressly drawn to it and that general knowledge of it was not sufficient for notice. Mr Barter emphasised the strict obligation to obtain written authority before commission was payable to an agent.

[33] But there is nothing in the clause itself that is particularly onerous or unusual. Such clauses are relatively standard. As is apparent from this case they are regularly included in the standard form agreement for sale and purchase. In the circumstances the appellants are bound by the conditions of contract, including cl 11.1.

[34] The last issue is whether the fact Mr Nightingale signed the agreement is a sufficient appointment of the respondent as agent. Clause 11.1 taken with the reference to the respondent's name on the front page of the agreement was effective to appoint the respondent as agent: *Houlahan v Royal Oak Realty (1993) Limited* [1996] 3 NZLR 513. The respondents are entitled to rely upon cl 11.1 pursuant to s 4 of the Contracts (Privity) Act 1982. The respondents are a sufficiently designed third party. Although cl 11.1 stands within the contract between the appellants and their purchasers it is clearly for the benefit of the respondent. A benefit under the Act includes the benefit of an exclusion clause: *Law of Contract in New Zealand* 3rd ed Burrows Finn & Todd at para 15.2.3(b).

[35] The appellants' difficulty arises particularly because the appellant considered the clause was not binding unless he signed that particular clause. That however is not the law. While the appointment of the agent must be in writing, in this case, the written appointment of the respondent was incorporated into the agreement for sale and purchase signed by the appellants. It is not necessary for the particular clause to be separately acknowledged or initialled.

[36] That is sufficient to dispose of the substantive appeal but in deference to counsel's submissions I deal briefly with the various other points raised in the appellants' points on appeal in summary form:

a) *The District Court erred in interpreting the appellant's evidence.*

It follows from the above discussion that I do not accept the District Court Judge erred in interpreting the appellants' evidence. I agree with the Judge's conclusions on the evidence.

b) *The District Court erred in failing to hold the appellants were entitled to rely on the previous acceptance by the respondent's agent that the respondent would not be the vendor's agent in the transaction*

This is the estoppel/collateral contract point. It is not open to the appellant to take such a point for the first time on appeal. In any event it is answered by the evidence and by the Court of Appeal decision of *Krukziener v Hanover Finance Ltd* [2008] NZCA 187. On the evidence the operative agreement was presented by Mr Godfrey some time after the discussion Mr Nightingale had had with the first agent. Further, the issue for the appellants was the net selling price. If the price was good enough, the agent's fee would not assume the same significant. *Krukziener* confirms that where negotiations result in a contract the promises previously exchanged are no longer voluntary. The question of whether the contract will be enforced falls to be determined under the law of contract not estoppel.

c) *The District Court erred in holding pre-contractual negotiations should be excluded in determining whether the standard terms and conditions were part of the contract*

The appellants cannot pray in aid the pre-contractual negotiations when there is a written agreement. It is one thing to consider the factual matrix but the previous negotiations are not directly relevant to the contractual terms ultimately agreed. That is further evidenced in this case by Mr Nightingale crossing out the reference to the real estate agent commissions in one set of documents but not in the later documents.

d) *The District Court erred in failing to hold that the contract was partly oral, partly written and partly implied*

An allegation of implied terms was not pleaded. The only relevant oral term would be that the respondent was to be the purchaser's agent not the vendor's agent. Such a term would not be admissible as it is in direct contrast to the written terms of the contract.

e) *The District Court erred in holding the appellants had a duty to take active steps to make it plain when they signed the contract that cl 11.1 was not included within it*

There was no error in the judgment on this point. As noted there is settled authority that a party is bound by the terms of the contract signed by them whether or not they have read the terms.

f) *The District Court erred in failing to hold the respondent had a duty or obligation to give notice of the standard terms and conditions to the attention of the plaintiffs*

This argument fails for the reasons given above. The appellants had notice.

g) *The District Court erred in failing to hold the respondent had failed to discharge its duty by failing to give a copy of the standard terms and conditions to the appellants*

There is no legally enforceable obligation to give a copy. A copy was in any event made available. Mr Nightingale chose not to retain it. The appellant could at any time have requested a copy of the full terms and conditions.

[37] For those reasons the substantive appeal must be dismissed.

Costs appeal

[38] The appellant also submits that the District Court Judge erred in awarding costs on a 2B basis in the sum of $17,728 plus disbursements. The appellant submits the costs award should have been reduced because the respondent unreasonably disputed facts and raised arguments that were later withdrawn. Mr Barter noted the Judge had made factual findings in the appellants' favour.

[39] For its part the respondent appeals against the Judge's decision not to award increased costs in the District Court. The respondent sought increased costs on the basis that it had made an open offer of settlement prior to commencement of proceedings and the appellant had refused to attend a judicial settlement conference.

[40] The Judge's decision in relation to costs was a judgment in the exercise of her discretion. The Judge specifically identified that she considered the costs for the preparation of defence were incurred once counsel was instructed. While the Judge made factual findings in the appellant's favour the ultimate decision was against them. There is no basis for reducing the amount of costs to the successful respondent.

[41] While an open offer of $7,000 was made, as noted the Judge made a number of factual findings in the appellants' favour. The appellant failed on a question of law. The sum in issue was not substantial. Despite the open offer it was open to the

Judge to decline to increase costs in the exercise of her discretion. I decline to interfere with the order for costs made by the Judge in the District Court.

Costs in this Court

[42] The respondent is to have costs on a 2B basis in this Court on this appeal.

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Venning J