IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2009-404-3162

BETWEEN	DEVEREUX HOWE-SMITH REALTY LIMITED Appellant
AND	JAMES PIPER Respondent

Hearing: 12 November 2009

Appearances: J Waymouth for the appellant
A Holmes for the respondent

Judgment: 2 December 2009

JUDGMENT OF CLIFFORD J

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[1] Devereux Howe-Smith Realty Limited (known as Bayleys), the plaintiff, sued the respondent Mr Piper in the District Court for real estate agent's commission it alleged was owing to it.

[2] On 29 April 2009 Judge D M Wilson QC granted Mr Piper, as the defendant in those proceedings, summary judgment against Bayleys the plaintiff. Bayleys now says the Judge was wrong to enter summary judgment against it, and appeals that decision.

Background

[3] Mr Piper trading as a firm of patent attorneys (Pipers), occupied leasehold premises at 18 Byron Avenue, Takapuna, Auckland. On 16 July 2007 Pipers and Bayleys signed a standard form agency document whereby Pipers gave Bayleys a

general agency with respect to the property at 18 Byron Avenue. Being a general form document, the agency contract covered a number of alternatives. Thus, the appointment was said to be "in consideration for the agent listing for sale/lease and endeavouring to affect the sale/lease (which includes exchange or trade) of the real estate located at 18 Byron Avenue, Takapuna (described as the "property")". Similarly, clause 5, which provides for the payment of commission, opens with the words:

> If the property or any part of it is sold/leased …

[4] On its face, therefore, the standard form applies both to the sale and lease of properties. At the head of the form, by ticking boxes parties could choose whether the agency was, in the first instance, general or sole. There the parties had ticked the "general" box. Secondly, they could indicate whether the contract was to "sell real estate" or "lease real estate". The parties ticked the "lease real estate" box.

[5] In a section of the contract that dealt with the scale of charges, and under the heading "Leasing and assignments", commission was said to be due and payable at the earliest of either:

> a. Execution of agreement for lease, or memorandum of lease, or deed of assignment, or
>
> b. Entry to [sic] the tenant into possession of the premises leased, or
>
> c. Commencement of rental payments by the tenant.

[6] As matters transpired, as a result of Bayleys' agency Pipers' leasehold interest in the property was neither assigned nor subleased. What did happen, however, was that a party ("Gosling Chapman") introduced by Bayleys and, as accepted by the Judge, therefore through the instrumentality of Bayleys, entered into a new lease of the Byron Avenue property. At the same time, Pipers surrendered its lease.

[7] Bayleys subsequently invoiced Pipers for what it said was the agreed agency fee. Pipers declined to pay that invoice on the basis that the transaction which occurred was not one which fell within the agency mandate of Bayleys. Consequently Bayleys filed proceedings against Pipers in the District Court.

[8] Pipers then applied for summary judgment on the basis that Bayleys' claim could not possibly succeed as it did not have – as required by s 62 of the Real Estate Agents Act 1976 – a written contract for the work or services for which it claimed commission from Bayleys. Judge Wilson upheld that claim. Applying the summary judgment principles set out by the Court of Appeal in *Westpac Banking Corporation v M M Kembla (New Zealand) Ltd* [2001] 2 NZLR 298, as adopted by the Privy Council in *Jones v Attorney-General* [2004] 1 NZLR 433, the Judge found that, properly interpreted, the contract did not apply to the situation that had transpired, that is Bayleys surrendering its lease and a new party entering into a fresh lease with the owner. Therefore, notwithstanding the fact that Bayleys had been instrumental in bringing that transaction about, it was not entitled to any commission. There was no relevant factual dispute. On that basis the District Court Judge held it was appropriate that summary judgment be entered into, having regard to the object of s 62, and relevant authority on claims by real estate agents for commission. Further, a series of email exchanges between Pipers and Bayleys, during which Bayleys advised Pipers of progress towards achieving the new lease/surrender arrangements, did not amount to a variation of, or collateral contract to, the agency agreement.

[9] It would seem that, before the District Court Judge, Mr Waymouth (for Bayleys) had placed particular reliance on that series of emails as the source of Bayleys' entitlement to commission, rather than the original general agency form.

Nature of this appeal

[10] This is a general appeal from the District Court. This appeal is therefore conducted by way of rehearing. As acknowledged by both Mr Waymouth and Mr Holmes, for Mr Piper, before me the parties are not strictly limited to the positions they took in the District Court. The function of an appellate Court is in essence to reconsider a matter already decided. There is therefore a reluctance to permit new points to be raised for the first time on appeal. However, if the points raised are arguable on the evidence presented to the Court below, and would not require evidence in rebuttal, the Court will generally permit them to be argued: *Savill v Chase Holdings (Wellington) Ltd* [1989] 1 NZLR 257; *Paulger v Butland Industries Ltd* [1989] 3 NZLR 549 (CA) and (PC). See also *Foodstuffs (Auckland) Ltd v*

Commerce Commission [2004] 1 NZLR 145 in which the Privy Council gave leave to pursue a new point on the basis of a lack of material prejudice and the importance of the matter.

[11] In accordance with *Austin, Nichols & Co Inc v Stichting Lodestar* [2008] 2 NZLR 481 (SC) the appellate Court is required to come to its own view of the merits on questions of fact and law.

Arguments on appeal

[12] Very much in summary, Mr Waymouth contended that:

a) Properly interpreted, the original agency contract entered into arguably applied to the transaction which had resulted. He said there was conflicting evidence which was relevant to the interpretation of the contract, particularly as to whether or not a flyer prepared by Bayleys which referred to "[s]ub-lease, assignment or new lease" had been seen and/or approved by Pipers. On that basis, therefore, the Judge had been wrong to grant Pipers summary judgment.

b) Mr Waymouth argued further, as he had done before the District Court Judge, that the exchange of emails constituted a variation to the original agency contract, or a collateral contract, pursuant to which Bayleys could found a claim for their commission, and that also should have meant summary judgment was not appropriate. Evidence was needed to explore the significance of that exchange of emails.

c) Additionally, there was an important factual dispute as to what had been the overall expectation of Pipers and Bayleys. Affidavit evidence from Bayleys was that Pipers wished to get out of the lease arrangements, either by an assignment or sublease, or in any other effective manner. It was Pipers' evidence that they had only ever contemplated an assignment or a sublease. Resolving that factual difference would be important to establishing the matrix of fact by reference to which the agency contract was to be interpreted. This

submission was made after I had drawn this possibility to Mr Waymouth's attention by reference to an affidavit filed on behalf of Bayleys.)

d) Finally, and although never pleaded, Mr Waymouth said that Pipers was effectively estopped from denying Bayleys' claim, as Pipers had never said to Bayleys, when Bayleys were negotiating the new lease/ surrender transaction, that that was a matter outside their mandate.

[13] Mr Holmes supported the Judge's decision by reference to the following factors:

a) The agency contract was clear on its face. It only extended to the lease, by sublease or assignment, of Pipers' leasehold interest. The general principle was that land agent's commission contracts were required to be drafted with a degree of clarity and precision. This was consistent with the policy of s 62 of the Real Estate Agents Act, which was introduced to reduce the plethora of claims for commission made by land agents in circumstances where agency contracts were either not drawn up, or were inadequately prepared.

b) Furthermore, there was no relevant factual dispute. The possible difference of view, in terms of what type of transaction the parties anticipated, was not a relevant disputed fact. Rather it was to be seen as evidence of prior negotiations or subjective intent – matters which were not relevant to the construction of the agency contract.

c) As for a collateral contract or estoppel, any collateral contract would also need to satisfy the requirements of s 62. Here the exchange of emails did not do that, and in any event by their terms did not operate to vary the original agency contract. Not only had estoppel not been pleaded, there was no basis for an argument that Pipers was estopped.

Discussion

[14] The law as to when it is appropriate to enter summary judgment for a defendant is clear:

a) Rule 152(2) of the District Courts Rules 1992 provides that the Court may give judgment against a plaintiff if the defendant satisfies the Court that none of the causes of action in the plaintiff's statement of claim can succeed. In the same terms is r 12.2 of the High Court Rules.

b) The onus is on the defendant to prove on the balance of probabilities that none of the plaintiff's causes of action can succeed: *Westpac Banking Corp v M M Kembla NZ Ltd* at [61]. Elias CJ (giving the judgment of the Court) continued at [64]:

> if the defendant supplies evidence which would satisfy the Court that the claim cannot succeed, a plaintiff will usually have to respond with credible evidence of its own. Even then it is perhaps unhelpful to describe the effect as one where an onus is transferred. At the end of the day, the Court must be satisfied that none of the claims can succeed. It is not enough that they are shown to have weaknesses.

In *Attorney-General v Jones*, Lord Bingham of Cornhill, giving the judgment of the Board, approved the "very clear statement" of the law in *Westpac Banking Corp v M M Kembla NZ Ltd* (at [5]), including that:

> it is clear, applying the guidance given by the Court of Appeal in *Westpac*, that summary judgment should not be given for the defendant unless he shows on the balance of probabilities that none of the plaintiff's claims can succeed. That is an exacting test, and rightly so since it is a serious thing to stop a plaintiff bringing his claim to trial unless it is quite clearly hopeless. (at [10]).

c) Legal points which are "sufficiently clear" may be decided on a summary judgment application (*Pemberton v Chappell* [1987] 1 NZLR 1), but novel or developing points of law may require the context provided by trial to provide the Court with sufficient perspective (*Westpac Banking Corp v M M Kembla NZ Ltd* at [62]).

d) Summary judgment is not, however, appropriate where there are material disputes of fact or real issues of credibility. As explained by Elias CJ in *Westpac Banking Corp v M M Kembla NZ Ltd* at [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.

Similarly, in *Attorney-General v Jones*, Lord Bingham confirmed at [5] that:

> rarely if ever will the procedure be appropriate where the outcome of the action may depend on disputed issues of fact, and reliance on the rule in an inappropriate case may serve to increase both the length and the cost of proceedings.

e) However, in *Bilbie Dymock Corporation Ltd v Patel* (1987) 1 PRNZ 84 the Court recognised at 85-86 that:

> … the need for judicial caution has to be balanced, when considering a summary judgment application, with the appropriateness of a robust and realistic judicial attitude when that is called for by the particular facts of the case. In the end it can only be a matter of judgment on the particular facts.

[15] Here, the basic issue is the proper interpretation of the agency contract – namely, whether that general agency contract, properly interpreted, entitled Bayleys to a commission when Pipers surrendered its lease and a new lessor took the lease of those premises from its owner.

[16] In general terms, the interpretation of a contract may well be amenable to determination in an application for summary judgment. Here, however, the appropriateness of summary judgment in my view depended crucially upon there being no relevant dispute of facts which the Judge was called upon to decide so as to enable him to properly interpret the contract. In other words, summary judgment would not be appropriate if the interpretation exercise required the Judge to have regard to the matrix of fact, and a dispute existed in relation to material facts comprising that matrix.

Interpreting by the "matrix of fact"

[17] In a celebrated statement in *Investors compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, Lord Hoffmann enunciated what has come to be recognised as the "modern law of contract interpretation". As relevant to the admission of extrinsic material, Lord Hoffmann stated at 912-913:

> (1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.
>
> (2) The background was famously referred to by Lord Wilberforce as the "matrix of fact" [*Prenn v Simmonds* [1971] 1 WLR 1381, 1384-1385], but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.
>
> (3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.

[18] That statement has been approved many times in New Zealand, for example in *Boat Park Ltd v Hutchinson* [1999] 2 NZLR 74 (CA).

[19] Until relatively recently, the approach in New Zealand has been that reference to the matrix of facts should only be made where the plain meaning of the written contract is ambiguous: Burrows, Finn & Todd *Law of Contract in New Zealand* (3ed 2007) at paragraph 6.2.2(b). Thus in *Benjamin Developments Ltd v Robt Jones (Pacific) Ltd* [1994] 3 NZLR 189 (CA) Casey J quoted (at 196) a statement in *Masport Ltd v Morrison Industries Ltd* CA 362/92 31 August 1993 at 18 (per Robertson J):

> When parties contract their obligations, rights and responsibilities are to be determined from a reading of the contract. If there is uncertainty or ambiguity then the surrounding factual matrix will be taken into account.

[20] However a different approach has been promoted by the Court of Appeal in more recent cases. Thus Gault P, giving the judgment of the Court in *Ansley v Prospectus Nominees Unlimited* [2004] 2 NZLR 590, commented at [36]:

> We do not accept the proposition that the factual matrix is to be considered only where there is ambiguity in the terms of a contract. We do not understand that to be the view of Lord Hoffmann in *Investors' Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 All ER 98 at p 115 on which this Court drew in *Boat Park Ltd v Hutchinson.*

[21] See also *Starrenburg v Mortre Holdings Ltd* (2004) 21 NZTC 18,696 (CA) at [43] per McGrath J:

> The absence of ambiguity does not preclude the consideration of the factual matrix …

[22] As indicated in the passage quoted from *Investors' Compensation Scheme,* Lord Hoffmann excluded from the examinable matrix of facts "the previous negotiations of the parties and their declarations of subjective intent". As noted in Burrows, Finn & Todd (at para 6.2.2(f)), this is "generally accepted to be a correct exclusion". The author, Emeritus Professor John Burrows QC, explains that exclusion in the following terms:

> Lord Hoffmann puts it down to "reasons of practical policy". It also has to do with the law's objective approach. Parties' subjective intentions are irrelevant to how their contracts should be interpreted. What matters is what a reasonable person, knowing what the parties know, would take their words to mean. Were it otherwise, and parties could plead what they subjectively intended, "there would be no end to an exchange of views as to what each party had in mind" [*Driffill v Frank Driffill Ltd* CA 118/87 10 February 1989 per McMullin J]. Moreover, the statements in such negotiations often reveal no more than what a party or parties *hoped* at one stage that the contract might say; they are superseded by, and merged into, the final contract itself. Again, contracts are often relevant to third persons in addition to the parties themselves … and those persons will have access only to the contract itself, and not the correspondence and discussion which preceded it. (footnotes excluded)

[23] Although, as the author notes, the position is not entirely clear-cut (as, for example, prior negotiations may be relevant to whether the written document misstates the actual agreement in which case the remedy of rectification may be available), the Courts have generally adhered to the exclusionary rule. Thus in *Potter v Potter* [2003] 3 NZLR 145 (CA) Fisher J, giving the judgment of the Court, commented at [34]:

> … with the exception of known unilateral mistake, non est factum, and rectification, the subjective intentions of the parties are irrelevant. … [P]re-contract negotiations are irrelevant except when used for the very limited purpose of ascertaining what objectively observable facts, as distinct from intentions, must have been within the contemplation of both parties: *Eastmond v Bowis* [1962] NZLR 954 (CA) at pp 959 and 960.

[24] See also *James Development Ltd v Mana Property Trustee Ltd* [2009] NZCA 483 at [26] per Miller J:

> Except in an action for rectification, evidence of the parties' negotiations is not ordinarily admissible: *Investors' Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 at 913 (HL) (per Lord Hoffmann). As it was put in *Canterbury Golf International Ltd v Yoshimoto* [2004] 1 NZLR 1 at [28] (PC), "[a]ll a Court can do is to decide what the final contract means."

[25] Conversely, the traditional prohibition on having reference to parties' subsequent conduct (see, for example, *McLaren v Waikato Regional Council* [1993] 1 NZLR 710) has recently been revisited. In *Gibbons Holdings Ltd v Wholesale Distributors Ltd* [2008] 1 NZLR 277 the Supreme Court held that such evidence is admissible as evidence of the original intentions of the parties at the time they entered into the contract. This does not infringe the rule against subjectivity because the subsequent conduct is used as objective evidence of the parties' intentions. Thus Thomas J commented at [114]:

> Much of the judicial reluctance to admit evidence of subsequent conduct has been due to an inability to distinguish between the objective task of giving effect to the mutual intention of the parties and the misguided exercise of seeking to ascertain the subjective intention of the parties. The latter exercise is illegitimate and will remain illegitimate. Evidence of subsequent conduct is admitted, not for the purpose of importing an intention which was not expressed in the contract, but with a view to elucidating the meaning which the parties intended their contract to have when they entered into it. The reasonable expectations of the parties to the contract should not be defeated by attributing a meaning to it which their subsequent conduct demonstrates they did not intend.

[26] It is, however, apposite to note that the members of the Court differed in respect to whether the subsequent conduct must be of both parties (Tipping and Anderson JJ) or whether that of one party alone may sometimes suffice (Thomas J): see Burrows *Interpretation of Statutes and Contracts* (NZLS Seminar, June 2008) at 29. Justice Anderson also warned that:

> [75] As a generalisation, I think there should be caution about imputing a common intention different from what would naturally be inferred from the

> language of reasonably common form conveyancing or commercial documents. That is because of the likelihood of subsequent reliance by later assignees or sublessees, unaware of subjective or contextual indications of a common intention.
>
> [76] Idiosyncratic users of language should themselves be cautious. They might, through negligence or principles of estoppel, find themselves with different rights or obligations between the contracting parties on the one hand and subsequent parties on the other, founded on the same terms of the contract.

[27] *Gibbons* has been described as "demonstrat[ing] a move towards a position that it is permissible sometimes to derive evidence of the actual intentions of the parties from material outside the contract document": Burrows *Interpretation of Statutes and Contracts* (NZLS Seminar, June 2008) at 29.

The agency contract and s 62

[28] I am of the view that the contract here is inherently ambiguous. As noted above, in accordance with the ticked boxes in the agency contract, Bayleys was contracted on a "general" agency to "lease real estate". Bayleys, as agent, was to:

> list[] for sale/lease and endeavour[] to effect the sale/lease (which includes exchange or trade) of the real estate located at 18 Byron Ave, Takapuna (described as the 'property')

[29] The reference to "sale/lease" is likely intended to be read in relation to the ticked box "lease real estate" such that the clause should be read "list for lease and endeavour to effect the lease ...", although this may be open to argument.

[30] Based on the ticked boxes and Pipers' actual interest in the land (a leasehold interest), literally interpreted, the agency contract would appear to a contract under which Bayleys was to endeavour to effect the leasing of that interest – i.e. to sub-lease the property. Alternatively, however, it could be interpreted as authorising Bayleys to effect the leasing of the underlying property – the real estate located at 18 Byron Ave – whether by way of sub-lease from Pipers, assignment of Pipers' lease interest or a new lease directly from Pipers' landlord.

[31] I also note that Pipers itself does not seem to give the agency contract its apparent literal meaning: even in the current proceedings, Pipers accepts that it

contracted with Bayleys to "list, and endeavour to sublease *or assign*" Pipers' leasehold interest. An assignment is, in general terms, the sale or transfer of a leasehold interest rather than a leasing of that interest.

[32] In light of this ambiguity, and on normal contractual principles, it is necessary to have reference to the matrix of fact to assist in interpreting the objective intentions of the parties.

[33] Here, however, the situation is complicated by s 62 of the Real Estate Agents Act, which provides (as relevant):

> **62 Real estate agent to have written contract of agency**
>
> 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—
>
> ...
>
> (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.

[34] Therefore, the ambits of the appointment of Bayleys are constrained by the terms of any written and signed agreement – here, the agency contract (at least primarily, as discussed below).

[35] The District Court Judge relied on *Walsh & Anor v Beasley Packard & Chamberlain Limited* (1988) 2 NZBLC 103,075 (HC) in finding that the general agency given in the agency contract could only be for the property and interest of Pipers (i.e. the leasehold interest), being the only interest that Pipers could dispose of. In *Walsh* the issue was interpreting the following clause in an agency agreement:

> The Lessor confirms the appointment of BEASLEY, PACKARD AND CHAMBERLAIN LIMITED to act as his Agents to lease the above property and agrees to pay half the professional charges in accordance with The Real Estate Institution of New Zealand Scale of Professional Charges concerning this lease, the Lessee agrees to pay the other half of the Real Estate Agents fees in respect of the lease but the Lessee shall not be responsible for any fees relating to the sale of the freehold. (my emphasis)

[36] Justice Tipping held that that clause could not be interpreted as the lessor giving authority to the respondent to act as his agents in relation to the sale of the

property (the lease containing an option to purchase): the lease referred to in the expression "concerning this lease" could only be that lease in respect of which the applicants appointed the respondent to act as their agent, and the only appointment was made in the words "The Lessor confirms the appointment … to act as his Agents to *lease* the above property" (my emphasis). His Honour acknowledged that, in terms of s 62, "the agent must be able to point to a writing which appoints him in respect of the particular work or service for which he is claiming commission, reward or other consideration". He held that "[u]ltimately the question must always be whether the appointment was made with sufficient clarity and certainty to cover the claim for commission which is made", and:

> … At best there is uncertainty and ambiguity as to what the parties did in fact mean by the words "to lease the above property".
>
> Adopting the words of McCarthy P in *Markham's* case [*Markham v Dalgety Ltd* [1974] 1 NZLR 192, 195] if the Respondent intended to look to the Appellant for commission in respect of the exercise of the option to purchase its right to do so should have been put beyond all doubt either by obtaining the signature of the Appellants to a suitable form of authority to that effect or by the incorporation in the documents of a sufficiently explicit statement to that effect. It is to avoid exactly this sort of problem and debate that s 62 exists.
>
> As with *McKillop's* case [*M McKillop Ltd v Borthwick* [1976] 2 NZLR 482] this case may arguably be a hard one for the agent but it would in my judgment be adopting an approach quite inconsistent with the purpose of s 62 to hold that the Respondent has here proved a sufficiently clear and unequivocal appointment in writing to perform the work or service for which it now seeks to be paid commission.

[37] More recently, however, the Court of Appeal in *Houlahan v Royal Oak Realty (1993) Ltd* [1996] 3 NZLR 513 has taken a less strict approach to s 62. In that case the purchasers had signed a conditional sale and purchase agreement containing an appointment clause but the sale eventually proceeded under a second agreement which the agent had no involvement with. The Court found that the agent was entitled to commission. More generally, the Court made some observations on the effect of s 62. Gault J, giving the judgment of the majority, commented (at 524):

> The statutory requirement for appointment in writing is clear. There always will be questions as to the correct construction and application of particular appointments, but that cannot be taken as requiring any more restrictive approach to agency contracts than to other contracts.

[38] The minority of Richardson P and Henry J concurred in respect of the proper approach to s 62, stating (at 519):

> Whatever writing is relied on, it must comply with s 62. … Whether or not there is a sufficient signed authority answering that description is a matter of interpreting particular writing. There are no special principles of construction applicable to commercial contracts with real estate agents.
>
> The rights of the agent and the obligations of the principal must depend on the exact terms of the contract in question, and upon a construction of those terms (*Luxor (Eastbourne) Ltd v Cooper* [1941] AC 108, 124 per Lord Russell of Killowen). The document relied on must of course be construed having regard to the factual matrix and the object appearing from its provisions which the parties had in view.
>
> While the printed agreement here was in a standard form approved by the Real Estate Institute and the New Zealand Law Society, and obviously was the product of professional advice, the commercial purpose and use of the document and, in this regard, of the agency clause, require that it be given its ordinary and practical meaning. (my emphasis)

[39] For completeness, I note a recent High Court decision, *IH Wedding & Sons Limited v Greenhill Holdings Limited & Anor* HC AK CIV-2008-404-005502 30 April 2009, in which Justice Duffy drew a distinction between "strict" and "liberal" approaches to the requirement for a written appointment (albeit holding that, "[e]ven on a liberal construction of s 62, the writing relied upon must be unequivocal" (at [20])). Duffy J did not refer to *Houlahan*. Her Honour proceeded to consider the facts in light of both approaches.

[40] On the basis of *Houlahan*, notwithstanding the statutory requirement in s 62, it is in my view clear that reference should be made to the matrix of fact to interpret the written signed authority and ascertain its ordinary and practical meaning. I therefore find that the District Court Judge erred in not considering the matrix of fact in construing the ambits of the agency contract.

The matrix of fact – a dispute of fact?

[41] As noted, the parties disagree as to whether the agency contract – by itself, or as varied by subsequent email correspondence – gave Bayleys an agency in respect of Pipers divesting its leasehold interest by any means possible, or whether it was restricted to a sub-lease or assignment situation. Bayleys contend that Pipers wished to relieve itself of the contingent liability represented by the lease, and was indifferent as to how that was achieved. Conversely, Pipers say that they were only

looking to assign or sublease their interest, and that a surrender/new lease transaction formed no part of the extent of Bayleys' mandate.

[42] The issue is whether any of the facts admissible to determine the parties' objective intentions are materially in dispute. That will include objective evidence of the parties' intentions, including subsequent conduct, but will not include evidence of prior negotiations or subjective intent.

[43] Bayleys' brochure advertising the property (said to be generated at around the same time as the agency contract) is in my view relevant. Underneath an ID number, it states "For Lease", before giving contact details. In describing the property, however, the brochure states:

> Sub-lease, assignment or new lease.

[44] Therefore, the brochure appears to be contemporaneous evidence that the scope of the agency included a new lease. Mr Howe-Smith's evidence is that that brochure was "forwarded to Pipers for their approval and it was never objected to". Mr Piper and Mr Murphy dispute that they ever saw the brochure. Hearing evidence from these parties would assist the Court to make a credibility finding in this respect.

[45] As to the subsequent email correspondence, *IH Wedding & Sons Limited v Greenhill Holdings Limited & Anor* is an illustration of a case where, there being no written contract, the Judge looked to other written material (invoices) to determine whether there was a written appointment. In addition, the email correspondence may be relevant in respect of subsequent conduct establishing the objective intention of the parties.

[46] In my view, the July 2007 emails between the parties indicate that Bayleys was acting as Pipers' agent in its dealing with Gosling Chapman at that time. Subsequently, on 10 September 2007 Mr Howe-Smith of Bayleys wrote to Mr Murphy of Pipers in the following terms:

> By way of an update, an agreement to lease has been drafted and forwarded to Gosling Chapman for signature and I would hope that I would have something from them this week that I can present to your landlord. It is on the basis of Gosling Chapman taking a new lease and subject to the prior surrender of your lease.

[47] Mr Murphy replied on the same date:

> OK Thanks Nick

[48] In my view, it is possible to interpret Mr Howe-Smith's email as an agent updating his principal in relation to actions taken under the relevant agency contract. The affirmative reply indicates that a new lease was acceptable to Pipers. On that basis these emails would appear to constitute evidence that the parties' objective intention in entering into the agency contract was to provide Bayleys with an agency broad enough to encompass the surrender and new lease outcome that eventuated.

[49] In *DTZ New Zealand Ltd v Henry* (2007) 8 NZCPR 457 Associate Judge Doogue found on the facts that the written authority relied on did not appoint the agent in respect of leasing the property but only in relation to promoting the property at the initial stages of the process. As to whether summary judgment was appropriate he commented:

> [58] The only remaining issue is whether it is satisfactory to draw the conclusions I have mentioned in the previous section on a summary judgment application. On reflection I believe that I can safely enter summary judgment. The issue is a straightforward one: is the plaintiff able to point to a written appointment to carry out the services on which its claim for commission is based?
>
> [59] In determining that matter, it is necessary to construe what the letters objectively considered convey. That has involved considering them in the context in which the letters were written. This last part of the determination does, it is true, open up a wider field of factual enquiry. Superficially at least, it might be said that the plaintiff should not be required to enter a factual contest in this area without the advantage of discovery and other interlocutory procedures which would be available to him at the post-summary judgment phase of the case. On the other hand, the essential factual background is uncontested. Further, the path that the transaction took as it developed is marked by contemporaneous documents that came into existence. The documents that throw light on the intentions of the parties are documents which were common to both parties and the existence of which are known to both of the parties. It does not seem likely that discovery might yield documents which the plaintiff is unaware of and which materially influence a judgment as to what the factual context was in which the letters were written. Given all of those considerations, I do not believe that there is a risk of injustice to the plaintiff in entering summary judgment. In my assessment the plaintiff cannot succeed. The fact that the route to that conclusion involves consideration of the factual background and application of legal principles governing the application of s 62 of the Act, should not deter the Court from making a judgment at this point if it can.

[50] Here, of course, the essential factual background is contested. Bayleys also submits that discovery and inspection is important, as is the opportunity to test the evidence and credibility of Mr Howe-Smith, Mr Piper and Mr Murphy.

[51] I am of the view that the proper interpretation of the agency agreement depends on making assessments as to the matrix of fact that are not available or appropriate on summary judgment. Although it may be difficult for Bayleys to establish that it had a written and signed appointment to obtain a new lease, given the policy behind s 62, it is not in my view a situation where it can be said to have no chance of success. On that basis, Bayleys' appeal must be allowed.

[52] In light of the above, it is not necessary for me to consider Bayleys' alternative arguments in terms of estoppel or collateral agency/variation of contract.

[53] The question of costs was not addressed before me. I do not see, however, any reason why costs should not follow the event in the normal course for a half-day appeal. In the hopefully unlikely event of any dispute on the question of fixing costs, the parties may refer brief memoranda to me as soon as possible.

"Clifford J"

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