IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV2009-404-2616

BETWEEN	TURN AND WAVE LIMITED Plaintiff
AND	GLEN JOHNSON First Defendant
AND	KIRSTEN JOHNSON Second Defendant

Hearing: 21 August 2009

Counsel: W A McCartney for Plaintiff
M S King for Defendants

Judgment: 18 December 2009 at 3 pm

RESERVED JUDGEMENT OF ASSOCIATE JUDGE H SARGISSON
(Application Summary Judgment)

This judgment was delivered by me on **18 December 2009** at **3 pm** pursuant to Rule 11.5 of the High Court Rules

Registrar/Deputy Registrar

Date .....

Solicitors:
CMS Legal, PO Box 105-887, Auckland Central
Sharp Tudhope, Private Bag 12020, Tauranga

[1] Both parties to this proceeding claim summary judgment. The plaintiff, Turn and Wave Ltd, for specific performance or in the alternative, for the full amount of its damages claim of $386,077.78 plus interest. The defendants, Glen and Kirsten Johnson, for various losses they claim to have suffered plus interest together with orders declaring that they validly cancelled their agreement with Turn and Wave and dismissing Turn and Wave's claim.

[2] The basis of Turn and Wave's claim is an agreement for sale and purchase entered into by the parties in March 2007. Under the agreement, the Johnsons agreed to buy an apartment in a tower block known as "Bianco Off Queen," which was to be developed by Turn and Wave. The parties also agreed in an addendum to the agreement that Turn and Wave would enter into a lease of the apartment to ART Apartments Ltd and its successors and/or assigns so that at the date of settlement the apartment would be transferred to the Johnsons subject to the lease.

[3] Settlement was to take place on the tenth business day after the later of the following events: the date of issue of the certificate of practical completion, the date of issue of the new title, or the date of issue of the code compliance certificate. There is no dispute that all of these events have occurred, and that ordinarily settlement would have taken place in early March this year. However settlement has yet to occur.

[4] The Johnsons have declined to settle or comply with the settlement notice that has been served on them, chiefly for two reasons. First, because ART Apartments has gone into liquidation and Turn and Wave cannot therefore provide a lease naming it as lessee. Secondly, because of misrepresentations made, they say, by Turn & Wave's real estate agent. They contend that the agent was Blue Chip NZ Ltd and, indirectly, a Mr Ray Meadows, who they say acted on Blue Chip's instructions. In these circumstances they claim not to be obliged to proceed with the agreement but rather to have a claim themselves against Turn and Wave for the loss they have suffered at the hands of Turn and Wave and its agent.

[5] Turn and Wave does not accept that the Johnsons are not obliged to settle. It contends that the substitution of a new lessee for ART Apartments Ltd is in the

nature of a technical or inconsequential breach, and that the important point is that a lease was in place and that the substituted lessee is fulfilling its obligations under the lease. Turn and Wave also says that the misrepresentations, if indeed made, were plainly outside the scope of the authority it gave to its agent, Monrad Ltd, and that it cannot be held to account for them.

[6] It is common ground that for the purpose of its application, Turn and Wave has established, on the documentation, a sufficient case for summary judgment unless the Johnsons have raised a tenable case for the defences they have raised that are based chiefly on repudiation and pre-contractual misrepresentation. It is also common ground that if the Johnsons' defences are tenable, then Turn and Wave's application for summary judgment cannot succeed, with the consequence that its claim must go to trial unless the Johnsons are able to show on the balance of probabilities that the defences are unanswerable. If their defences are unanswerable they will be entitled to the orders they seek by way of summary judgment, leaving for further determination, only their damages claim in their statement of claim.

Issues for determination

[7] For the purpose of the applications the primary issues the parties have raised for determination are:

Cancellation

a) Was Turn and Wave's inability to provide a lease naming ART Apartments as lessee, and its substitution of Bianco Accommodation as lessee:

i) a repudiation of contract, or a breach of the agreement of sufficient significance to entitle the Johnsons to cancel; or rather

ii) a breach of little or no consequence that did not entitle the Johnsons to cancel.

Representation

b) Did Turn and Wave authorise Blue Chip NZ Ltd, as well as Monrad, to act as its agent and if so:

i) what was the scope of the authority Turn and Wave conferred on Blue Chip, and

ii) were the alleged pre-contractual misrepresentations within the scope of that authority?

Background

[8] In June 2006, Turn and Wave bought land from Monrad Ltd, a subsidiary of Blue Chip, on the corner of Turner and Waverly Streets in central Auckland. The acquisition was made for the purpose of Monrad's proposal to build an apartment tower, now constructed and known as "Bianco Off Queen".

[9] The agreement between Turn and Wave and Monrad included an underwrite agreement that required Monrad to achieve a certain threshold of pre-sales of apartments as listed in the agreement. Under the underwrite agreement, Turn and Wave was to pay an underwrite fee to Monrad in respect of each sale, and in the event that Monrad could not achieve the approved threshold within six months, Monrad was to pay holding costs incurred by Turn and Wave. The underwrite agreement also required Monrad to procure a real estate firm to introduce purchasers to Turn and Wave. Monrad appointed as its agent a real estate agency, Ray Meadows & Associates Limited, who in turn appointed Mr Ray Meadows.

[10] Mr Meadows had some connection with Blue Chip and happened to be Mr Johnson's personal insurance broker and friend. He introduced the Johnsons to Turn and Wave. The Johnsons trusted Mr Meadows and his professional judgment. Mr Meadows has since been made bankrupt but well before that event the Johnsons entered into the agreement for sale and purchase, on his advice, with Turn and Wave for apartment 12C/2 in the apartment tower on 9 March 2007.

[11] On 19 March 2007, the Johnsons also signed an addendum to the agreement, which states that it is to be signed and read in conjunction with, and shall form part of, the agreement for sale and purchase. Relevant terms of the addendum stated:

> 1. "Lease" means the lease to the Lessee on the terms attached to this Addendum.
>
> "**Lessee" means ART Apartments Ltd and its successors and/or assigns**.
>
> 2. The Vendor shall enter into a lease of the unit from the Lessee for the purpose of short stay accommodation, being a taxable activity, from the Lessee on the terms set out in the Lease. The Vendor and Purchaser agree that the Unit shall be sold subject to an existing lease of the Unit to the Lessee…
>
> 4. The Vendor shall be the Guarantor under the Lease provided that the Vendor may at its sole discretion substitute Blue Chip NZ Ltd as Guarantor at any time prior to or after settlement, in which case the Purchaser shall execute a release of the Vendor's guarantee and its obligations and liabilities thereunder. The Purchaser shall accordingly settle the Sale and Purchase Agreement subject to the Lease guaranteed either by the Vendor or Blue Chip NZ Ltd, as determined by the Vendor at its sole discretion.
>
> [Emphasis added]

[12] An effect of these terms, was that:

a) Apartment 12C/2 was to be leased to ART Apartments Ltd and its successors or assigns, so that at settlement date the Johnsons would be purchasing a leased apartment that was a going concern for GST purposes. In that regard, the Johnsons were required to register for GST prior to settlement;

b) Either Turn and Wave or Blue Chip was to be the guarantor of the lease. Turn and Wave initially nominated Blue Chip and then subsequently substituted itself upon Blue Chip's liquidation.

[13] In keeping with the addendum, the attached lease contained the following relevant provisions:

> 1 INTERPRETATION
>
> In this lease unless the context indicates otherwise:
>
> 1.1 Definitions:
>
> ...
>
> "Guarantor" means the person specified as the Guarantor in the First schedule and includes the Guarantor's assigns.....
>
> "Lessee" means the person specified as the Lessee in the first Schedule and includes the Lessee's permitted assigns;
>
> "Lessor" means the person specified as the Lessor in the First Schedule and includes the Lessors successors and assigns;

And relating to the guarantee:

> 32 GUARANTEE
>
> 32.1 Guarantee: In consideration of the Lessor entering into this lease at the Guarantor's request, the Guarantor:
>
> 32.1.1 Guarantees: guarantees payment of the rent and the Lessee's performance of the Lessee's obligations in this lease; and.....
>
> 32.1.10 Replacement Lease: If any person validly disclaims this lease, the Guarantor must, on the Lessor's written request, accept a new lease of the Property from the Lessee:

[14] The liquidation of ART Apartments, itself a Blue Chip company, occurred on 8 February 2008. Blue Chip was liquidated on 15 April 2008. As a result, in December 2008 Turn and Wave substituted Bianco Accommodation Ltd as lessee of apartment 12C/2 and made itself guarantor in place of Blue Chip. The lease to Bianco Accommodation was dated 20 November 2008.

[15] On 5 February 2009 Turn and Wave required the Johnsons to settle their apartment and when they did not, Turn and Wave issued a settlement notice requiring settlement no later than 5 March 2009.

[16] The Johnsons declined to settle for reasons of repudiation and representation earlier mentioned. They claimed that the change of the lessee and guarantor in the lease was a repudiation of the sale and purchase agreement, and that but for the lease to ART Apartments or another Blue Chip company and the guarantee by Blue Chip company, they would not have entered into the agreement. For present purposes

they do not pursue their argument in relation to the substitution of Turn and Wave as guarantor but they maintain their argument that the agreement was repudiated by the substitution of the lessee. They also maintain their argument that Mr Meadows made certain pre-contractual misrepresentations to them on behalf of Blue Chip that give rise to an entitlement to cancel the agreement on the basis that Blue Chip as well as Monrad, was Turn and Wave's agent.

[17] The alleged misrepresentations are said to be that:

a) The investment would not cost the Johnsons anything;

b) Blue Chip would buy back the property after 4 years at an increased price;

c) Blue Chip would manage the whole investment;

d) Blue Chip system was insured with Lloyds of London.

[18] The Johnsons say the representations provided them an entire Blue Chip package deal.

[19] Each side has responded to the other by making an application for summary judgement.

[20] That brings me to the specific issues the parties have raised for determination for the purpose of dealing with their applications. First it is convenient to set out the relevant principles that apply on such applications.

Relevant Legal Principles

Summary Judgement

[21] The principles are well settled and are not in dispute. As the Court of Appeal stated succinctly with respect to summary judgment sought on plaintiff's application in *Krukziener v Hanover Finance Ltd* [2008] NZCA 187, the question on a summary

judgment application is whether the defendant has no defence to the claim. That is, that there is no real question to be tried: *Pemberton v Chappell* [1987] 1 NZLR 1 at 3 (CA). The Court must be left without any real doubt or uncertainty. The onus remains on the plaintiff throughout and summary judgment will be denied if on the hearing of the application it appears there is an issue to be tried. But where the plaintiff's evidence is sufficient to show there is no defence, the defendant will have to respond if the application is to be defeated: *MacLean v Stewart* (1997) 11 PRNZ 66 (CA). While the Court need not accept uncritically evidence that is inherently lacking in creditability, it will not normally resolve material conflicts of evidence or assess the credibility of deponents: *Eng Mee Young v Letchumanan* [1980] AC 331 at 341 (PC).

[22] On a defendant's application the question is whether the defendant has demonstrated that none of the plaintiff's causes of action can succeed.

Cancellation for repudiation, breach and misrepresentation.

[23] A breach of contract, no matter what form it may take, always entitles the innocent party to maintain an action for damages, but the rule previously established by a long line of authorities and now contained in s 7 of the Contractual Remedies Act 1979 is that the right of the party to cancel the contract arises is limited to two types of cases. The first is where the party in default has repudiated the contract before performance is due or before it has been fully performed. The second is where the party in default has committed what may be called a substantial breach. Breaches of this nature arise if, having regard to the contract as a whole, the promise that has been violated is essential to the innocent party, or the breach which has been committed has major consequences. It should be noted that in this respect the rules about cancellation in New Zealand are identical for both misrepresentation and breach: See Burrows Finn & Todd *Law of Contract in New Zealand* at para 18.2.

[24] The two types of case are clearly identified in s 7, which states:

> **7 Cancellation of contract**
>
> (1) Except as otherwise expressly provided in this Act, this section shall have effect in place of the rules of the common law and of equity governing the

circumstances in which a party to a contract may rescind it, or treat it as discharged, for misrepresentation or repudiation or breach.

(2) Subject to this Act, a party to a contract may cancel it if, by words or conduct, another party repudiates the contract by making it clear that he does not intend to perform his obligations under it or, as the case may be, to complete such performance.

(3) Subject to this Act, but without prejudice to subsection (2) of this section, a party to a contract may cancel it if—

(a) He has been induced to enter into it by a misrepresentation, whether innocent or fraudulent, made by or on behalf of another party to that contract; or

(b) A [term] in the contract is broken by another party to that contract; or

(c) It is clear that a [term] in the contract will be broken by another party to that contract.

(4) Where subsection (3)(a) or subsection (3)(b) or subsection (3)(c) of this section applies, a party may exercise the right to cancel if, and only if,—

(a) The parties have expressly or impliedly agreed that the truth of the representation or, as the case may require, the performance of the **[**term**]** is essential to him; or

(b) The effect of the misrepresentation or breach is, or, in the case of an anticipated breach, will be,—

(i) Substantially to reduce the benefit of the contract to the cancelling party; or

(ii) Substantially to increase the burden of the cancelling party under the contract; or

(iii) In relation to the cancelling party, to make the benefit or burden of the contract substantially different from that represented or contracted for.

(5) A party shall not be entitled to cancel the contract if, with full knowledge of the repudiation or misrepresentation or breach, he has affirmed the contract.

(6) A party who has substantially the same interest under the contract as the party whose act constitutes the repudiation, misrepresentation, or breach may cancel the contract only with the leave of the Court.

(7) The Court may, in its discretion, on application made for the purpose, grant leave under subsection (6) of this section, subject to such terms and conditions as the Court thinks fit, if it is satisfied that the granting of such leave is in the interests of justice.

[25] In their discussion on the application of s 7(2) and 7(4) and the two types of cases, the learned authors in Burrows, Finn & Todd observe at p 566 that repudiation

is an expression often loosely used. They explain that it is used properly when one party makes plain its intention not to perform the contract. And at p 567 they say:

> **Whether a breach of contract amounts to a repudiation** is "serious matter not to be lightly found or inferred". What has to be determined is that the defaulting party has made clear beyond reasonable doubt the intention no longer to perform his or her side of the bargain. Proof of such an intention requires an investigation… In the words of Lord Selbourne [in *Mersey Steel & Iron Co v Naylor Benzon & Co* (1984) 9 App Cas 434 at 438-439]:
>
> > You must look at the actual circumstances of the case in order to see whether the one party to the contract is relieved from its future performance by the conduct of the other; you must examine what that conduct is so as to see whether it amounts to **a renunciation**, **to an absolute refusal to perform the contract**.
> >
> > [Emphasis added]

[26] And at page 570 the authors go on to state:

> In many cases the repudiation by the defendant is the repudiation of the *whole* of his or her obligations under the contract. In a typical case, the purchaser under a contract to sell land may state that he or she is not proceeding with the purchase at all. **More difficulty may arise if the defendant renounces only part of his or her contractual obligations. In such a case the law treats the threatened breach as a repudiation**, **and permits the innocent party to cancel the contract**, **if the threatened breach is substantial**. Lord Wright said [in *Ross Smyth & Co Ltd v T D Bailey Son & Co* [1940] 3 AUER 60 at 72]:
>
> > I do not say that it is necessary to know that the party alleged to have repudiated should have had an actual intention not to fulfil the contract. **He may intend in fact to fulfil it, but may be determined to do so in a manner substantially inconsistent with his obligations** and not in any other way.
>
> Lord Wright's dictum envisages a breach of either of two kinds. The first is where the party evinces an intention not to perform a stipulation which is essential to the cancelling party… The second is where the threatened breach of part of the contract will have serious consequences in that it will substantially reduce the benefit or increase the burden of the innocent party under the contract.
>
> [Emphasis added]

[27] I turn to the issues with these principles in mind.

Cancellation

Did substitution of the lessee (arguably at least) amount to repudiation of the sale and purchase agreement under s 7(2)?

[28] The answer to this question turns essentially on whether Turn and Wave made clear, or arguably made clear, by its act of substituting Bianco Accommodation for ART Apartments that it did not intend to perform its contractual obligations or to complete their performance, such that there was a renunciation or an absolute refusal to perform the contract as described in *Mersey Steel*.

[29] Counsel for the Johnsons submitted that the substitution amounts to a clear case of repudiation under s 7(2). He raised what were essentially two points in support:

a) First, that Turn and Wave did not have a contractual entitlement to substitute a new lessee and therefore made clear that it did not intend to perform its obligation under the contract to provide a lease with a named lessor at the date of settlement;

b) Secondly, the required lease was a key element of the deal the Johnsons were offered by Turn and Wave via Blue Chip as its agent. The deal was a package deal that gave them guaranteed rental, an option to require buy back, and a management contract. In other words, they had a total and guaranteed package, in which the lease and lessee could not be changed without undermining the entire package.

[30] Counsel for Turn and Wave rejected this argument while acknowledging that in strict terms the substitution of the lessee was a breach. He submitted that when ART Apartments and Blue Chip were put into liquidation it responded to those events, which were beyond its control, and it responded responsibly. It had made clear throughout that it intended to substantially complete and perform its obligations under the agreement by substituting a suitable lessee, and that it would stand as

guarantor of the lessee's obligations. He submitted the approach taken by the Johnsons is misconceived and that s 7(2) has no application. The reason he said, was that this is not a case where one of the parties has declined to perform or to complete the contract. Rather it is a case where the substitution of the lessee in the deed of lease plainly was done in order to allow the contract to be performed and is the very opposite of a repudiation.

[31] I agree. It is clear that there was no wholesale renunciation or absolute refusal to perform the agreement. The failure to name ART Apartments as lessee and the decision to substitute Bianco Accommodation do not undermine the entire agreement, or indeed any package deal even if such a deal could be spelled out of the parties' contractual arguments. The substitution, is precisely as counsel submitted, the very opposite of repudiation. As the terms of the agreement itself show, the identity of the lessee was not critical. The express reference to ART Apartments and its successor and assigns indicates the contrary, as do the guarantee provisions. What was important was that a lessee was in place and that the lease was guaranteed by either Blue Chip or Turn and Wave. The evidence, or rather lack of any evidence that might support the assertion that Turn and Wave renounced the agreement, similarly reinforces this conclusion.

[32] In reaching this view it is useful, although not strictly necessary, to refer to the recent decisions of Venning J issued in this Court in respect of a number of Blue Chip related entities: (see: *Lester & Ors v Greenstone Barclay Trustees Ltd & Ors* HC AK CIV-2008-404-005159 25 November 2009; *Hickman & Ors v Turn & Wave Ltd & Ors* HC AK CIV-2008-404-005871 25 November 2009; *Icon Central Ltd v Collingwood & Ors* HC AK CIV 2008-404-007424 25 November 2009). In *Hickman* Venning J considered agreements for sale and purchase virtually identical to those involved here, and whether the plaintiff purchasers had validly cancelled them. The right of cancellation was said to arise in a number of ways, including whether substitution of the lease amounted to repudiation. Venning J held that the agreements had not been repudiated and that section 7(2) did not apply. He found that the plaintiffs would only be able to cancel the agreements were there a substantial breach or threatened breach to which s 7(4) applied.

[33] As His Honour noted in *Hickman* the important feature of the addendum to the agreement for sale and purchase and lease it contained, was to put in place a lease to run with the sale of the apartment. In other words, what was important was that a lease was in place. The identity of the lessee was not critical. Precisely that position applies here.

[34] For the above reasons, I cannot find or infer that there was repudiation, or indeed the possibility of repudiation.

[35] The question remaining for the Court in respect of the substitution of a new lessee is whether the substitution was a breach of sufficient significance to meet the statutory threshold for cancellation.

Was substitution of the lessee a substantial breach of the agreement giving rise to a right of cancellation under s 7(3) and (4)?

[36] There is no evidence that provides confirmation for the proposition that the parties expressly agreed the identity of the lessee was essential and leaves no room for an implied agreement. If the defendants had considered it essential that the lessee be ART Apartments Ltd, then they would not have agreed to the possibility of the lessee being one of ART Apartments Ltd's assigns.

[37] It will be apparent from my finding that the identity of the lessee was not critical, that I cannot find or infer that the substitution was a substantial breach that reaches, or arguably reaches, the thresholds for cancellation under s 7(4)(b) or is an impediment to summary judgment as to liability. This is so, even taking into account counsel's acknowledgement on behalf of the defendants that the substitution was indeed a kind of breach.

[38] My brief reasons follow.

[39] As the substitution was not critical it cannot be said that it substantially reduced the benefit of the contract to the defendants or increased their burden. Nor can it be said that it made the benefit or burden of the contract substantially different

from that represented or contracted for. In addition, there is no evidence that the defendants considered that the identity of the lessee would have any impact on their benefit or burden under the contract. There is not even a hint of a suggestion that the Johnsons had carried out any sort of investigation of ART Apartments as could be expected if the identity of the lessee had been a key element for them. The uncontroverted evidence is that given the liquidation of ART Apartments and Blue Chip, the defendants are better off with Bianco Accommodation as the lessee, which is not only solvent but operating above expectations, and with Turn and Wave as guarantor.

[40] The same must be said of the substitution with respect to the question of whether the parties expressly or impliedly agreed that the identity of the lessee was essential to the Johnsons so as to cross the threshold for cancellation under s 7(4)(a).

[41] The only conclusion I can properly reach is that in the net result substantial performance has been offered and there is no apparent detriment. The new lessee appears to be sound and to be honouring the terms of the lease, and Turn and Wave continues to stand as guarantor.

[42] That brings me to the remaining issue of whether the Johnsons have a right of cancellation (or arguably have such a right) because of representations made "via Blue Chip as its agent".

Misrepresentation

Was there a right (or arguably a right) to cancel the agreement for sale and purchase based on misrepresentation?

[43] The representations the Johnsons rely on were purportedly made by Mr Meadows, they say, on Blue Chip's instructions. There is no dispute for present purposes that it must be accepted as at least arguable that Mr Meadows did indeed make the alleged misrepresentations.

[44] At the very heart of the claimed right to cancel for those representations is the Johnsons' contention that Blue Chip was the agent of Turn and Wave. In their notice of opposition they state the contention in the following way:

> The plaintiff via Blue Chip as its agent made pre-contractual misrepresentations…

[45] In argument, counsel for the Johnsons advanced the foundation for the assertion of Blue Chip's alleged agency in an almost cursory way. He submitted that Turn and Wave accepts for the purposes of the summary judgment applications that Monrad and Mr Meadows were agents of the plaintiff, and that, by implication, Turn and Wave accepts that Blue Chip was also its agent. He relied in support on the following statement in the submissions of counsel for Turn and Wave:

> 36. For the purposes of the summary judgment application, it is accepted that the underwrite agreement between [Turn and Wave] and Monrad constituted an agency. Although [Turn and Wave] had never heard of Mr Meadows, again, for the purposes of the application, it is accepted that he was acting on behalf of Monrad, and therefore indirectly as agent for Turn and Wave.

[46] I do not agree with counsel. I am unable to find in the submission he relies on any implied concession that Blue Chip, as well as Monrad and Mr Meadows, was an agent for Turn and Wave.

[47] Further, I am unable to find anything else in the evidence, or indeed the submissions made for Turn and Wave, that provides any foundation for the assertion that Blue Chip acted as Turn and Wave's agent when it allegedly instructed Mr Meadows to make representations to the Johnsons. While there is evidence that points to the definite possibility that Mr Meadows made representations of the kind alleged on the instruction of Blue Chip, that evidence does not confirm in any way the possibility that Turn and Wave instructed Blue Chip as its agent. There is evidence that Monrad was itself a subsidiary of Blue Chip but the relationship between Monrad and Blue Chip does not cause Blue Chip to be the agent of Turn and Wave and cannot render Turn and Wave liable for representations Mr Meadows made on the instruction of Blue Chip.

[48] I find therefore that there is no evidential foundation for the assertion that Blue Chip was Turn and Wave's agent. It follows that there is no basis for the contention that Turn and Wave is fixed with responsibility for misrepresentations made by Mr Meadows on Blue Chip's instructions.

[49] Even had the Johnsons' case been framed differently and attributed responsibility for Mr Meadows' representations to Monrad, the misrepresentations would be of no consequence because they plainly could not come within the scope of the agency conferred by Turn and Wave on Monrad.

[50] The uncontroverted evidence as to Monrad's agency is that it was appointed as agent by the underwrite agreement between itself and Turn and Wave. The underwrite agreement makes clear what the scope of the agency was and leaves no room to find or infer that the representations could possibly come within the scope of the task Turn and Wave appointed Monrad to carry out. The sales agents' authority derived from their appointment to market and sell the apartments and was directly limited to representations about the apartments or development.

[51] I am reinforced in this finding by the same factors as Venning J was in *Hickman* when he considered the scope of Monrad's agency appointment made under the same underwrite agreement and concluded that the sales agents authority was directly limited to representations about the apartments or development, so that any representation about Blue Chip and Blue Chip products were outside the scope of the task Turn and Wave had engaged them to perform. The factors included:

a) That under the terms of the underwrite agreement:

i) the sales agents were appointed to market and sell apartments, not to sell Blue Chip investment product,

ii) the sales agents had limited authority and their role, as selling agent, was proscribed. They were required among other things to present amended offers, to Turn and Wave,

iii) there was an express clause in the underwrite agreement which restricted the scope of the sales agents' authority regarding representations,

b) A provision in the agreement for sale and purchase that excluded representations made by the vendor's agent not set out in the agreement for sale and purchase.

[52] As in *Hickman*, so too here, the underwrite agreement conferred the same limited authority, and the same clause restricted the scope of the sales agents authority regarding representations. In addition, the agreement for sale and purchase the Johnsons signed also contained an entire agreement clause excluding representations. It expressly provides:

> 20.2 The parties acknowledge that this agreement, and the schedules and addendums to this agreement contain the entire agreement between the parties, notwithstanding any negotiations or discussions prior to the execution of the agreement, and notwithstanding anything contained in any brochure, report or other document. The Purchaser acknowledges that it has not been induced to execute this agreement by any representation, verbal or otherwise, made by or on behalf of the Vendor or its agent, which is not set out in this agreement.

[53] As in *Hickman* the net effect here is that Turn and Wave could not have made clearer that its agents' authority was limited and did not extend to representations about Blue Chip. There is nothing the Johnsons have pointed to that shows any confirmation for their assertion that Turn and Wave made representations via Blue Chip as its agents.

[54] In the circumstances it is not necessary to deal further with the Johnson's allegations as to misrepresentations. It suffices to say that if the Johnsons do have any claim it will be a claim against Blue Chip and Mr Meadows and not a claim against Turn and Wave.

Conclusion

[55] For the reasons discussed above, it will be apparent that:

a) Turn and Wave is entitled to a finding that the Johnsons' defences are not tenable and that it has proved its claim for summary judgment to the requisite standard;

b) The Johnsons' claim for summary judgment must fail.

[56] A final issue remains however in relation to the matter of remedies. At the hearing, counsel for Turn and Wave advanced its case chiefly on the basis of liability. Little was said about the appropriateness of the alternative remedies of specific performance and damages. In the circumstances I propose to issue this judgment as an interim judgment and to call for further submissions.

Interim Orders

[57] While the plaintiff has made out its case for summary judgment on liability, final orders are deferred on its application pending further submissions as to the appropriate remedy. Submissions are to be filed and served as follows:

a) By the plaintiff – by **22 January 2010**;

b) By the defendants – by **29 January 2010.**

[58] If counsel wish to be heard further on the memoranda they are to request a telephone conference.

[59] Costs on the plaintiff's application are reserved pending the final judgment on its application.

[60] The defendants' application for summary judgement is dismissed.

[61] Costs on the defendants' application are awarded to the plaintiff on a 2B basis with disbursements as fixed by the Registrar.

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Associate Judge Sargisson