IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2009-404-004831

BETWEEN	PETER NOEL TURNER Appellant
AND	METRO CITY LIMITED Respondent

Hearing: 9 December 2009

Appearances: S H Barter for the Appellant
E St John for the Respondent

Judgment: 22 December 2009 at 2:00 p.m.

JUDGMENT OF WOODHOUSE J

This judgment was delivered by me on 22 December 2009 at 2:00 p.m. pursuant to r 11.5 of the High Court Rules 1985.

Registrar/Deputy Registrar

……………………………………

Solicitors:
Mr S H Barter, Barter & Co Limited, Solicitors, North Shore
Mr E St John, Barrister, Auckland

[1] Mr Turner has appealed against a summary judgment for debt in favour of the respondent, Metro, and against a subsequent award of costs.

[2] Metro is a licensed real estate agent. Mr Turner was a commissioned salesman for Metro, working as an independent contractor. Commissions payable by Metro to Mr Turner were set off against expenses and other sums due from Mr Turner to Metro. The contract commenced in 2004. At least from early 2005 Mr Turner was in debt to Metro, with the amount of the debt increasing over time. The contract came to an end in November 2008. Following termination Metro issued the summary judgment proceedings claiming a debt in excess of $137,000, plus interest. Judgment was entered by Judge Bouchier for the full amount claimed.

[3] Mr Turner does not dispute that he is indebted to Metro. However, there are arguments as to quantum. There is also an issue as to whether Metro is bound by an agreement with Mr Turner which entitles Mr Turner to repay the debt by instalments. These matters give rise to five broad issues on this appeal, which may be summarised as follows:

a) An arrangement was made between Mr Turner and Metro in December 2005 for repayment of the debt then owed by Mr Turner. This was acknowledged to be $94,673.45. Mr Turner agreed that 50% of his commissions would be applied to reduction of the debt. Mr Turner contends that Metro was in turn contractually bound not to deduct more than 50% of commissions to repay the debt. He further contends that Metro remains bound by this arrangement, notwithstanding termination of the contract, with the repayments at the rate of 50% of commissions to come from commissions payable to Mr Turner by the real estate company to which he is presently contracted.

b) Mr Turner contends in the alternative that, if Metro is no longer contractually bound, it is nevertheless estopped from recovering the

debt other than by instalment payments of 50% of commissions that he earns.

c) There is a quantum issue relating to calculation of interest. In June 2007 a further arrangement was made between Mr Turner and Metro in respect of the debt still owed by him. The question is whether this agreement entitled Metro to charge Mr Turner interest on the debt outstanding over the preceding three years.

d) There is another quantum issue relating to a debit by Metro in respect of commissions said to have been received by Mr Turner but which were the property of Metro.

e) The costs issue relates to a contractual provision for indemnity costs.

[4] Some other grounds of appeal were advanced in the written notice of appeal and in written submissions. These included a contention that the parties were bound to refer the dispute to arbitration. None of these other grounds were pursued at the hearing of the appeal.

The facts

[5] Mr Turner and Metro entered into an "Independent Contractor Agreement" dated 22 October 2004 (the "original contract"). Mr Turner was contracted as a commissioned real estate salesman for Metro. Real estate agency contracts procured by Mr Turner were required to be in the name of Metro. All real estate agents' commission payable on sales of real estate, including Mr Turner's share of commission, was payable to Metro. Metro was entitled to deduct from commission otherwise payable to Mr Turner any sums due from Mr Turner to Metro.

[6] By 23 December 2005 Mr Turner owed Metro $94,673.45. This led to the arrangement between Metro and Mr Turner referred to at [3]a) above. It is recorded in a short document on letterhead for Metro and its franchisor, Re/Max. The document is as follows:

> 23rd December 2005
>
> As at Friday 23rd December the debt owing between Re/Max Metro City / myself and Peter Turner is **$94,673.45**.
>
> **Peter,**
>
> I can no longer carry such a debt. I need to inject some cash into my own business next year therefore we need to have the following signed and in place.
>
> Peter agrees 50% commission will be paid from each & every unconditional contract that comes into the office until the debt is settled.
>
> All advances from Re/Max Metro City or myself will discontinue as from Friday 23rd December 2005.
>
> **China Business – the above borrowings have funded the growth of this business**
>
> Peter agrees Ngaire will participate in an agreed share acceptable to each party of the new company/earnings anticipated in an agreement with Mr B. Burkholders of Beijing.
>
> Such details of this agreement will be tabled by PNT at the time of receiving a draft copy for discussion.

[7] The document was signed by Mr Turner and again dated 23 December 2005 beneath his signature. This arrangement is the foundation for Mr Turner's argument that, although he is no longer contracted to Metro, he is entitled to continue to repay the debt by payment of 50% of real estate commissions he receives through a contract with another real estate agency.

[8] On 1 June 2007 a further arrangement was made between Metro and Mr Turner. This is in writing. The body of the document is as follows:

> **AGREEMENT BETWEEN:**
>
> **NGAIRE ROEBUCK/REMAX METRO CITY LTD & PETER NEOL [sic] TURNER**
>
> Over a period of time (2004-2007) Peter Turner has owed Ngaire Roebuck/Re/Max Metro City Ltd each month a substantial amount as schedule attached.
>
> These amounts have been averaged out at $60,000.00 per year.
>
> It has been agreed that interest is to be charged and shall be charged at 15%.
>
> Any debt owing from 30th June 2007 will be charged monthly.

> Should anything happen to Ngaire Roebuck the debt will still stand and will be payable to Brad Roebuck/Re/Max Metro City Ltd.

This document was signed and dated by Ngaire Roebuck, on behalf of Metro, and by Mr Turner. Ngaire Roebuck was and is a shareholder in and manager of Metro.

[9] The issue relating to calculation of interest in large measure arises from this document. The question is whether Metro was entitled retrospectively to charge interest at 15% per annum for the period up to 1 June 2007.

[10] The original contract required Metro to issue monthly statements to Mr Turner. Monthly statements were issued, recording debits for a variety of items and credits for commissions due to Mr Turner. The agreement dated 1 June 2007 provided that "any debt owing from 30th June 2007 will be charged monthly". On 1 August 2007 Metro issued an invoice to Mr Turner for interest. There is a charge for interest for the period 1 June 2004 to 1 June 2007 at 15% per annum on $60,000, a total of $27,000. There is a further charge of interest of $1,174.58 for the month of July 2007. The total of these two interest charges is $28,174.58.

[11] On about 5 August 2007 Metro also issued a three page statement to Mr Turner headed "Peter detail". This was in the same format as detailed monthly statements issued or given by Metro to Mr Turner at least since April 2005. The "Peter detail" statements were cumulative, recording all debits and credits from the commencement of the contract. The detailed statement as at 5 August 2007 records, as the final item, an interest charge of $28,174.58. From August 2007 Metro's accountant, Mr Xiang, produced monthly invoices showing cumulative interest, starting in each case with the $27,000 debit, and adding successive monthly interest charges. The increasing total for interest was then transferred to the comprehensive "Peter detail" statement for each month. There is uncontradicted evidence from Mr Xiang that he handed the invoices and statements to Mr Turner each month and gave him an opportunity to challenge any entries. Mr Xiang stated that on occasions some items were questioned by Mr Turner and on some of these occasions appropriate adjustments were made.

[12] Mr Xiang said that the statements that are now in issue were never challenged by Mr Turner. In this regard I note that the original affidavit in support of the application for summary judgment was made by Mrs Roebuck. She said, without much elaboration, that all of the sums in issue "have been invoiced to the defendant in the normal way". Mr Turner responded to Mrs Roebuck's affidavit. He denied that the debt had been charged monthly and denied that he had received monthly invoices. Mr Xiang's affidavit was an affidavit in reply. It set out the process, and the dealings Mr Xiang said he had with Mr Turner, in some detail, with a very large number of statements and invoices attached. This evidence is, because of its detail, quite different in kind from the generalised statement of Mrs Roebuck which was simply denied by Mr Turner. There was ample evidence for Judge Bouchier in the District Court to be satisfied that the interest calculations by Metro were given to Mr Turner and were not challenged until the contract was terminated in November 2008.

[13] A detailed statement from Metro to Mr Turner as at 3 October 2008 records a debit of $41,430.88 against the entry "Peninsula Lofts / Kea Consultants / City Land Limited". Metro debited Mr Turner for this sum on the basis that Mr Turner had wrongfully diverted to himself commissions which were payable to Metro. This debit has given rise to the second quantum argument.

[14] Mrs Roebuck's first affidavit in support of the summary judgment application did not contain any explanation as to the reasons for this debit. Mr Turner, in his affidavit in opposition, noted that there was no explanation and continued:

> 13. … It is however my understanding that it relates to affairs relating to those that named clients [sic] where various transactions that they had entered become [sic] unconditional and those clients failed to make the payments due to the agency. My understanding is that the total debt was double that sum i.e. $82,000.00 and for some reason Ms Roebuck has decided that I should bear a debt to the agency in respect of those matters. There is no proper basis for this of any sort.
>
> 14. I entirely accept that I was the salesman involved in the transactions but the failure to pay commission was completely out of my hands. I understand that the companies concerned were later liquidated.

[15] There was a detailed response from Mrs Roebuck in her second affidavit. There was no challenge from Mr Turner to this further evidence from Mrs Roebuck. What these documents establish, to the necessary standard of proof, is that Mr Turner in 2006 entered into a factoring agreement with a company called Commercial Factors Limited. Mr Turner factored commissions due on contracts for sale of land which he had secured as a commissioned salesman for Metro. As already recorded in this judgment, all commissions paid by vendors on such contracts were payable in full to Metro. In terms of his contract with Metro, Mr Turner should not have factored these commissions.

[16] The uncontradicted evidence produced by Mrs Roebuck also establishes that, in respect of the factored contracts for payment of commission, the sum of $41,430.88 which was debited by Metro in its account with Mr Turner was a sum which had been paid by Commercial Factors Limited to Mr Turner and which Commercial Factors Limited had in due course recovered from the party required to pay the commission (the entities described as Peninsula Lofts and Kea Consultants in Metro's statement to Mr Turner).

[17] Mr Turner's statement in his affidavit that "the failure to pay commission was completely out of my hands" is not credible. Mrs Roebuck, in her second affidavit, produced a handwritten letter from Mr Turner to the director of one of the vendor companies (the company referred to as "Peninsula Lofts"). The body of the letter is as follows:

> Please direct payment of commissions due to me from the sale of future Peninsula Lofts units to Commercial Factors Ltd until the amount financed to-date ($27,000 incl. GST) is repaid.

This was sent to the Peninsula Lofts director by fax dated 10 February 2006 at 7:48 a.m. At 10:28 a.m. Commercial Factors Limited sent a fax to the same director of Peninsula Lofts thanking him for verification that the payment of the commission would be made to Commercial Factors Limited.

[18] This fax from Commercial Factors Limited, and further documents produced by Mrs Roebuck, make clear that Mr Turner, contrary to what he said in his affidavit, knew exactly what had occurred because he had arranged it. And the documents

also make clear that the sum of money diverted in this way, and recoverable from Mr Turner, was no less than the amount debited in the Metro statements to Mr Turner; that is to say, $41,430.88.

[19] Metro's detailed statement to Mr Turner as at 3 November 2008 included a credit to him totalling $30,000. This represented 100% of some commissions he had earned. Mr Turner contended that, pursuant to the arrangement recorded in the document dated 23 December 2005, Metro should have withheld only $15,000, being 50% of his commissions.

[20] Mr Turner terminated his contract with Metro in November 2008. Mr Turner said that it was the withholding of the commissions totalling $15,000 which "triggered" what he described as his resignation. Mr Turner said:

> The position was completely untenable as I was obviously going to end up not being able to meet my other commitments or look after my family. It was clear from [Ngaire Roebuck's] way of dealing with it that no appeal to her was likely to be successful.

[21] Mr Turner immediately obtained employment with another real estate agency. The principal of that agency, Mr Phillip Horrobin, said that he had some discussions with Mrs Roebuck about Mr Turner's position. Mr Horrobin said that he indicated to Mrs Roebuck that Mr Horrobin's company "would be prepared" to obtain an authority from Mr Turner to pay the debt due to Metro by deductions from commissions due to Mr Turner as those commissions "came to hand". Mrs Roebuck did not accept that proposal.

Is there a contractual right to pay by instalments?

[22] Mr Barter submitted that the 23 December 2005 arrangement was a contractually effective variation of the original contract. The latter entitled Metro to withhold all commissions otherwise payable to Mr Turner so long as there was debt owed by Mr Turner to Metro in excess of commissions. Mr Barter submitted that the 23 December 2005 arrangement bound Metro to withhold no more than 50% of commissions.

[23] From this it was submitted that Metro's withholding of 100% of the commission of $30,000 in September and October 2008 was repudiation of the contract by Metro. This forced Mr Turner to terminate the original contract, but this did not bring an end to Mr Turner's claimed right to repay the debt at a rate equal to no more than 50% of commissions he earned. It was submitted that Mr Turner was entitled to make repayments from 50% of commissions from his new employer, but that was rejected.

[24] For Metro, Mr St John submitted that the 23 December 2005 arrangement did not amount to a contract because there was no consideration. This question was not addressed by Judge Bouchier. The 23 December 2005 document suggests that there may have been consideration flowing from Mr Turner, being his agreement that Mrs Roebuck could participate in what is described in the document as the "China business". I will therefore proceed on the basis that there was consideration and the December 2005 arrangement otherwise had contractual effect.

[25] Mr St John submitted that, assuming there was a contract, its effect in relation to the 50% of commissions provision was to bind Mr Turner to that percentage as a minimum, but not to bind Metro to that percentage as a maximum. So far as a maximum was concerned, Metro already had the contractual entitlement to withhold 100% of commissions. Mrs Roebuck said, in her second affidavit:

> The reference to the 50% commission in the letter of 23 December 2005 was a means of insisting that Mr Turner reduce the debt. As I have explained above, Mr Turner had become quite practised in asking for advances and it had reached the point where we were trying to draw a line in the sand with him.

I accept that evidence as relevant background. It is, in any event, entirely consistent with what is recorded in the first two paragraphs of the 23 December 2005 document.

[26] The consequence of a conclusion that Metro was not limited to a maximum deduction of 50% is that the withholding of the $15,000 in September and October 2008 was not a breach of the contract. There is an added reason based on interpretation as to why this was not a breach of the contract. This is that the

December 2005 arrangement was directed to the debt that existed at that date. It is clear from the evidence that there was new debt, and substantially in excess of $15,000. If there was some restriction on Metro, it did not apply to new debt.

[27] Mr Turner's arguments under this heading cannot succeed for a separate reason. If there was breach by Metro in withholding the $15,000, and assuming that this gave rise to a right of cancellation for Mr Turner (which is doubtful), Mr Turner was entitled either to cancel the contract constituted by the December 2005 arrangement, or to affirm it. He could not purport to cancel some aspects of the December 2005 arrangement and seek to hold Metro to other parts of it, but that is what he has sought to do.

[28] If Metro had been limited to debt recovery at the rate of 50% of Mr Turner's commissions, that was in my judgment plainly dependent upon Mr Turner's continuing as a contractor to Metro. Mr Turner, by his own act, elected to bring that to an end.

[29] Mr Barter submitted that a term should be implied into the December 2005 arrangement to the following effect:

> [I]n the event that [Metro] repudiates the payment arrangement as set out in the agreement, which forces Mr Turner to cancel the Independent Contractor Agreement, [Metro] cannot then call up all arrears due to [Metro] without offering Mr Turner the opportunity to continue the payment arrangement through his new employers … The agreement is ineffective without this implied term.

I do not agree that any such term may be implied. It would not be a reasonable term. It is not necessary to give effect to the agreement. It is contrary to express provisions in the December 2005 document. It would be incapable of being given effect because it would be entirely dependent on Mr Turner's own actions.

[30] The result is that, subject to the alternative submission founded on estoppel, I am satisfied, as was Judge Bouchier, that Mr Turner is not entitled to pay the debt by instalments.

Estoppel

[31] The essence of Mr Barter's submission was that Mr Turner had altered his position to his detriment in reliance on an assurance from Metro that a maximum of 50% of commissions would be deducted. When pressed, Mr Barter was unable to point to any evidence that Mr Turner had in fact altered his position to his detriment. For this reason this argument cannot succeed. It was dismissed for the same reason in the District Court.

Interest

[32] As earlier recorded, the question is whether the agreement of 1 June 2007 entitled Metro to charge interest at 15% per annum for the period before 1 June 2007. Judge Bouchier held that Metro was entitled to charge interest for the earlier period on the basis that this was the clear intention of the June 2007 document and that this conclusion was supported by evidence from Metro's accountant, Mr Xiang.

[33] On appeal, Mr St John accepted that Mr Xiang's evidence as to the meaning of the June 2007 document was inadmissible. However, there is some background evidence from Mr Ziang which I consider is admissible. He said:

> I was asked to average out the amounts owing and that was found to be $60,000 a year. That was done in consultation with Mr Turner. That was a simple way of calculating interest because the agreement provides that interest is payable at the rate of 1.5% per month (see clause 6.5 of the agreement). It was a [sic] inconvenience to go through and calculate on a monthly basis since 2004 all the interest that he owed to the defendant on invoices on that basis, so the defendant was given a discount at the rate of 15% per annum as opposed to 1.5% per month which on a compounding basis would have worked out at 18% per annum.

[34] Mr Barter submitted that Metro's claim is not made out for the following principal reason:

> The wording of the agreement of 1 June 2007 does not expressly allow interest to be charged retrospectively from 1 June 2004 to 1 June 2007. If it were the intention of the parties to allow such interest, it would have stated that any debt owing from 1st June 2004 (instead of stating 30th June 2007) will be charged monthly.
>
> (original emphasis)

[35] I am satisfied that the 1 June 2007 document does record an agreement that interest would be charged retrospectively at 15% per annum, as well as monthly from 1 July 2007. If the intention had been to record an agreement limited to future charges of interest, there would have been no reason for the references to the earlier "period of time (2004-2007)" and to the average debt over that period being $60,000 per year. The reasonably plain reason for recording an average debt of $60,000 over the preceding "period of time (2004-2007)", coupled with the immediately following statement "that interest is to be charged and shall be charged at 15%", was to provide for the charging of interest for the preceding period.

[36] This interpretation is based on the words in the document. It is supported by Mr Xiang's evidence and by the broader background including the interest provision in the original contract. This conclusion is further supported by the evidence from Mr Xiang relating to the monthly invoices and statements that were issued following the 1 June 2007 agreement. The evidence is that the retrospective interest charge of $27,000 was accepted by Mr Turner. Mr Barter did not argue that this evidence could not be relied on to assist in determining the intention of the parties. It is unnecessary to consider the extent to which subsequent conduct may be relied on to assist in construing a contract. I consider that the evidence from Mr Xiang is uncontradicted and credible evidence of what amounts to an acceptance by Mr Turner of the correctness of the calculation recorded in the statements he received. In consequence, I agree with Judge Bouchier that Metro was entitled to charge the sum it has charged for interest.

The factoring contracts

[37] The issue under this heading is entirely one of fact. The facts were set out above in some detail. As recorded there, I am satisfied that Mr Turner effectively received, as a result of the factoring arrangements he made with Commercial Factors Limited, a total sum of $41,430.88 which should have been paid to Metro by the vendors of the properties. However, an adjustment is required to this figure. Mr St John accepted that Mr Turner was entitled to a share of the total commissions payable by the vendors in question. As a result a portion of the total debited to Mr

Turner should be deducted. Mr Barter and Mr St John agreed that, if the claim was upheld in principle, the adjustment should be 50% of the total. In other words, it was agreed that the debit to Mr Turner should be reduced from $41,430.88 to $20,715.44.

Costs

[38] The original contract provides that Metro is entitled to recover from Mr Turner "all costs, including Court costs, litigation expenses, and reasonable attorneys' fees" incurred in collecting amounts due from Mr Turner. In reliance on this provision Metro sought solicitor client costs of $13,113.81.

[39] Judge Bouchier awarded the costs sought by Metro. She noted that she had received memoranda from counsel. She said that "such costs are clearly at the discretion of the Court even if provided for". It appears that the Judge was there directing herself to the need to determine whether the costs sought are reasonable, notwithstanding the contractual provision. She concluded that the sum sought did not appear to be unreasonable, particularly when assessed against the total judgment, inclusive of interest, of $147,227.25.

[40] I am not persuaded that there are any grounds for interfering with this decision.

Result

[41] For the reason recorded in paragraph [37] above the appeal is allowed as to quantum only with the result that the District Court judgment for the principal sum of $137,391.89 is quashed and judgment is entered for $116,676.45 plus interest plus costs in the District Court of $13,113.81.

[42] The respondent is entitled to reasonable costs and disbursements on the appeal. If the parties are unable to agree memoranda should be filed.

____

Peter Woodhouse J