IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2008-404-006153

BETWEEN	SATNAM INVESTMENTS LIMITED Plaintiff/Respondent
AND	GEOFFREY PETER WORGER AND CHERRY CAROLINE WORGER AND CHARLES HARRY CARLTON AS TRUSTEES OF THE GEOFF AND CHERRY WORGER FAMILY TRUST Applicants/First Defendants
AND	ALLAN FREDERICK NEIL SUTHERLAND AND GILLIAN ELEANOR SUTHERLAND AS TRUSTEES OF THE OUTSPAN TRUST Applicants/Second Defendants

Hearing: 24 February 2008

Appearances: J D Turner for Applicants/Defendants
P A Craighead for Plaintiff/Respondent

Judgment: 10 March 2009 at 4.30 p.m.

JUDGMENT OF VENNING J

This judgment was delivered by me on 10 March 2009 at 4.30 pm, pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date……

Solicitors: McVeagh Fleming, Albany
Duthie Whyte, Auckland

Introduction

[1] Satnam Investments Limited operates a Kiwibank branch, Post Shop and Photo Lab from premises at 429 Beach Road, Mairangi Bay. It occupies the premises as tenant under an unregistered lease. Until 25 July 2008, the second defendants, the trustees of the Outspan Trust owned the property. On that day it was transferred to the first defendants, the trustees of the G and C Worger Family Trust.

[2] The lease contained a clause providing the tenant with a right of refusal to purchase. Satnam claims that the Outspan Trust breached this provision when it sold the property to the Worger Family Trust. Satnam seeks to set aside the transfer to the Worger Family Trust as a fraud within the meaning of the Land Transfer Act 1952, and seeks damages from the trustees of the Outspan Trust for breach of the clause.

[3] The Worger Family Trust denies it was guilty of fraud. The Outspan Trust denies the breach. Both defendants seek summary judgment against the plaintiff or, in the alternative, to have the plaintiff's claim struck out.

Principles

[4] A strike-out application generally proceeds on the basis that the facts pleaded will be made out. As the Court of Appeal confirmed in *Attorney-General v McVeagh* [1995] 1 NZLR 558 at 566:

> The Court ... will not attempt to resolve genuinely disputed issues of fact and therefore will generally limit evidence to that which is undisputed. Normally it will not consider evidence inconsistent with the pleading, for a striking-out application is dealt with on the footing that the pleaded facts can be proved; see *Electricity Corporation Ltd v Geotherm Energy Ltd* [1992] 2 NZLR 641, 645-646, *Southern Ocean Trawlers Ltd v Director-General of Agriculture and Fisheries* [1993] 2 NZLR 53 at pp 62-63, per Cooke P. But there may be a case where an essential factual allegation is so demonstrably contrary to indisputable fact that the matter ought not to be allowed to proceed further.

[5] The position is, however, different on a defendant's application for summary judgment. On such an application evidence may be adduced in order to enable the defendant to satisfy the test under r 12.2, which is that the plaintiff cannot succeed in any of its causes of action. The defendant has the onus of proving this to the standard of the balance of probabilities. Usually summary judgment for a defendant will arise where the defendant can offer evidence which is a complete defence to the plaintiff's claim: *Westpac Banking Corporation v M M Kembla New Zealand Ltd* [2001] 2 NZLR 298. However, as noted by the Court of Appeal in that case:

> [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. Although a legal point may be as well decided on summary judgment application as at trial if sufficiently clear (*Pemberton v Chappell* [1987] 1 NZLR 1), novel or developing points of law may require the context provided by trial to provide the Court with sufficient perspective.
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> ...
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> [64] The defendant bears the onus of satisfying the Court that none of the claims can succeed. It is not necessary for the plaintiff to put up evidence at all although, 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. The assessment made by the Court on interlocutory application is not one to be arrived at on a fine balance of the available evidence, such as is appropriate at trial.
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> (emphasis added)

[6] Affidavits in support of the defendants' summary judgment application have been filed by Dr Sutherland on behalf of the Outspan Trust and Mr Worger on behalf of the Worger Family Trust. The real estate agents involved in the transaction, Mr Lally and Mr Brosnahan, have also filed affidavits. In response, Mr Pahuja, a director of Satnam, and his friend Mr Chand have filed affidavits in opposition. There is some difference between the parties on certain issues, but the material issues can largely be resolved on the basis of the affidavits and the relevant documents

before the Court. The uncontested evidence on material matters, and the relevant documentation, provide the basis to consider the applications.

The issues

[7] The legal issues raised by the applications are:

a) Is it arguable the Worger Family Trust was guilty of fraud under the Land Transfer Act?

b) Is it arguable the Outspan Trust was in breach of its obligation to give Satnam a right of first refusal in selling to the Worger Family Trust?

Is it arguable the Worger Family Trust was guilty of fraud under the Land Transfer Act?

[8] Satnam wants to purchase the property. To do so, it must have the Worger Family Trust removed from the title. That can only be done if Satnam can prove the Worger Family Trust acted fraudulently. The Worger Family Trust's application for summary judgment turns on whether Satnam's fraud claim is arguable.

[9] In mid 2008, the trustees of the Worger Family Trust were looking to purchase a commercial property on the North Shore. The property at 429 Beach Road, Mairangi Bay came to the attention of the Worgers' son. Mr and Mrs Worger visited the property on Saturday 7 June. They introduced themselves to Mr Pahuja. Mr Worger says he told Mr Pahuja he was interested in buying the property.

[10] Mr Pahuja accepts that Mr and Mrs Worger visited the property on 7 June, but says they introduced themselves as the purchasers of the property. Mr Pahuja must be mistaken about that. As at Saturday, Mr and Mrs Worger had not yet met with Mr Lally, the real estate agent who drew up the contract. Mr Lally confirms that he met Mr and Mrs Worger for the first time on 9 June, the day the Worger Family Trust and the Outspan Trust concluded the agreement for sale and purchase. Before that Mr Lally had only spoken to Mr Worger's son. That the Worgers met

Mr Lally for the first time on 9 June is borne out by the written agreement for sale and purchase, which records that it was entered into on 9 June. The agreement for sale and purchase is also stamped with Barfoot and Thompson's logo. Mr and Mrs Worger would not have access to that form before they met Mr Lally on Monday 9 June.

[11] Whether the agreement for sale and purchase was entered into on 7 June or 9 June is really immaterial. The important point is that, when the trustees of the Worger Family Trust signed the agreement to buy, they were not aware of Satnam's right of first refusal. Mr Worger says he would not have entered into the agreement to buy if there was any such impediment. Mr Pahuja does not suggest the Worger Family Trust knew of the right at the time they entered into the agreement. He says he told Mr Worger about it in a telephone conversation.

[12] Both Mr Worger and Mr Lally confirm that at the time the agreement for sale and purchase was made, Mr Worger did not have a copy of the deed of lease. Mr Worger had a copy of the assignment, which referred to the rental figure, the right of renewal and Mr Pahuja's personal guarantee. The agreement for sale and purchase included a due diligence clause which provided, inter alia, for inspection of the lease. The original date for confirmation of the contract was 16 June (five working days after the contract was made).

[13] Mr Worger says the right of refusal was first drawn to his attention when Mr Pahuja called him on 12 June and told him he was planning to put a caveat over the property. That is consistent with Mr Pahuja's evidence that:

> in an earlier conversation (prior to 29 June) I had warned [Mr Worger] about this clause and he claimed he had not read the lease.

I conclude that it was only after the Worger Family Trust had entered into the agreement for sale and purchase that it became aware of the lessee's right of refusal. Mr Worger says that on being told of the clause on or about 12 June, and Mr Pahuja's threat to lodge a caveat against the title, he asked his solicitor to check if there was a caveat. The solicitor checked the title and advised there was no caveat. That is consistent with the certificate of title, which records that Satnam's caveat was

not lodged until some days later, on 24 June. As there was no caveat, Mr Worger considered Mr Pahuja was bluffing. He confirmed the contract as unconditional and paid the deposit.

[14] There is some dispute about when the Worger Family Trust was required to confirm the contract as unconditional. Mr Pahuja says he was aware that the time limit for satisfaction of the due diligence clause was extended to 29 June 2008, but gives no basis for that assertion. Mr Worger says that the date for satisfaction of the due diligence condition was extended until 20 June 2008. That date of 20 June is consistent with the solicitor's correspondence which records an extension of the possession date under the contract to 30 June 2008. It is unlikely that the date for confirmation would have been extended to 29 June with a possession date of 30 June. It is also unlikely that Mr Worger would have paid the deposit and confirmed the contract if he was aware of Satnam's caveat, which was lodged on 24 June. As Mr Worger said, the Worger Family Trust would not have entered into the agreement if he had thought or known of any issues, interests or impediments to purchasing the property.

[15] Again, this issue is not material. After 24 June, when the Worger Family Trust learnt of Satnam's caveat over the property, they lodged their own caveat on 8 July to protect their position, and the deposit. Then, in Mr Worger's words:

> 22. ... we decided to simply defer settlement for some time to see whether or not our purchase would proceed or not. By mid June 2008 we went away overseas for a pre-arranged holiday and we did not return to New Zealand until 23 July 2008.
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> 23. On return I called my solicitor who told us that the issues between the parties had been resolved and that a caveat had in fact been lodged over the title to the property by the plaintiff, but that caveat had since lapsed or expired and had not been renewed.

On the basis that Satnam's caveat had lapsed or expired and had not been renewed, the Worger Family Trust settled the agreement with the Outspan Trust on 25 July 2008. Mr Worger's evidence is again consistent with the certificate of title which shows that Satnam's caveat was recorded as lapsed on 22 July 2008.

[16] The trustees of the Worger Family Trust are now registered as the owners of the land. The effect of ss 62 and 182 of the Land Transfer Act is that except in the case of fraud, they hold the land free of all other interests: s 62; and, except in the case of fraud their interest as registered proprietor is not affected by notice of any unregistered interest (such as Satnam's right of first refusal). Knowledge of such an unregistered interest is not of itself to be imputed as fraud.

[17] The recent Supreme Court decision of *Dollars and Sense Finance Limited v Nathan* [2008] 2 NZLR 557 confirmed that fraud in this context means actual fraud or dishonesty. The decision endorsed the position taken by the Privy Council in *Frazer v Walker* [1967] NZLR 1069 and *Assets Co Ltd & Mere Roihi* [1905] AC 176:

> [6] It is accepted for D & S that Rodney's forgery is for the purposes of these sections a species of fraud and that if Rodney was acting in the course of an agency for D & S when he committed the forgery, his fraud in doing so must be treated as the fraud of D & S regardless of the absence of any knowledge of the fraud by D & S or its solicitor. That concession was properly made. The position is as stated in *Frazer v Walker* where the opinion of the Privy Council referred to the words which we have italicised in the sections and said that the "uncertain ambit of these expressions has been limited by judicial decision to actual fraud by the registered proprietor or his agent". Lord Wilberforce cited the Judicial Committee's earlier decision in *Assets Co Ltd v Mere Roihi* in which Lord Lindley, for the Board, after famously declaring that by fraud under the Land Transfer Act is meant "actual fraud, i.e, dishonesty of some sort", went on to say that "the fraud which must be proved in order to invalidate the title of a registered purchaser … must be brought home to the person whose registered title is impeached or to his agents".

[18] Satnam's claim to set aside the Worger Family Trust's registration as owner is based on the allegation the Worger Family Trust committed a fraud against it as a holder of an unregistered interest. Assuming for present purposes the right of first refusal was triggered by the Outspan Trust's decision to sell, and thus Satnam had an unregistered interest in the reversion (see the discussion on the issue in *Motor Works Ltd v Westminster Auto Services Ltd* [1997] 1 NZLR 762) perhaps the most relevant decision to inform consideration as to whether the Worger Family Trust's actions could amount to fraud is the case of *Bunt v Hallinan* [1985] 1 NZLR 450.

[19] Mr Hallinan became the registered proprietor of land knowing from the outset that a shed upon the land was used by Mrs Bunt as a pottery and that a

separate boat shed on the land was used by Mr Bunt. Mr Hallinan had been told by Mr Bunt that the Bunts had a lease of part of the land, and was aware that there was an agreement to lease "of some sort". No lease was registered, and no caveat was lodged against the title to protect the Bunts' unregistered lease. Hallinan asked his solicitor to check the position for him. The solicitor searched the title and confirmed there was no caveat. He also said he formed the view that if a purchaser obtained title, notice of an unregistered interest was not fraud. The solicitor advised Hallinan to proceed with the transaction as if this were the case. Settlement was effected and subsequently Hallinan entered the land, removed the Bunts' belongings and demolished or removed the sheds. In the High Court Roper J held that although Hallinan had acted in a disgraceful manner in exercising the rights as he did, he had not acted fraudulently. The majority of the Court of Appeal, after reviewing the authorities concluded at p 462:

> In acting in a way that would have left [the Bunts] to enjoy their rights under the lease had he been advised that they held rights as lessees which he could not defeat, we cannot see that [Hallinan] acted dishonestly, even though after settlement he acted in a highhanded manner. ... He did not acquire title with a view to depriving [the Bunts] of their rights; on the contrary, he had been advised that they had none. This, then, is not a case of a person whose suspicions have been aroused abstaining from making inquiries for fear of learning the truth. Rather does he seem to have been bent on making full inquiries.
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> We are not to be understood as saying that a person who receives legal advice to his liking, albeit incorrect, as to his rights to property, is entitled to ignore his own knowledge of material facts which would make that advice suspect. To do so would be to disregard altogether a person's wilful blindness which might amount to fraud for the purposes of s 62 of the Land Transfer Act. However, in the present case there is no suggestion in the evidence that [Hallinan] acted in this way, and it cannot be said that he did not accept, believe and act on the advice which he received from his solicitor.
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> (emphasis added)

[20] In the present case, the Worger Family Trust did not acquire title on 25 July 2008 with the intention of depriving Satnam of its rights. Rather, when it became aware of those rights prior to settlement, it left it to the vendor and Satnam to sort the matter out. The Worger Family Trust was aware that Satnam had supported the rights it asserted by lodging the caveat. When the caveat was discharged or allowed to lapse, and their solicitor confirmed that, the Worger Family Trust was entitled to

take the view that Satnam was no longer pursuing the issue, and to settle their purchase.

[21] Mr Craighead submitted that the Worger Family Trust was guilty of Nelsonian blindness: *Mawhinney v Chamberlain and Hall* (HC AK CIV-2004-404-6580 16 May 2005 Baragwanath J [15]). This is not a case of "Nelsonian" wilful blindness. The Worger Family Trust became aware of Satnam's claim after it entered the contract, but it did not settle until Satnam had allowed its caveat to lapse and the Worger Family Trust had received legal advice it was able to settle. The trustees made appropriate inquiries and settled in light of the information the inquiries disclosed. Nor was there an obligation at law on the Worger Family Trust to cancel their contract when they learned of Satnam's claim. They were entitled to wait and see if the vendor could sort it out.

[22] The fact the Worger Family Trust was aware of Satnam's claim to an unregistered interest does not assist Satnam. There must be an additional element, commonly an intention to dishonestly defeat another's interest. In the course of the *Bunt v Hallinan* decision, the Court referred to the following passage from the decision of the Privy Council in *Waimiha Sawmilling Co Ltd v Waione Timber Co Ltd* [1926] AC 101 at 106:

> If the designed object of a transfer be to cheat a man of a known existing right, that is fraudulent, and so also fraud may be established by a deliberate and dishonest trick causing an interest not to be registered and thus fraudulently keeping the register clear. It is not, however, necessary or wise to give abstract illustrations of what may constitute fraud in hypothetical conditions, for each case must depend upon its own circumstances. <u>The act must be dishonest, and dishonesty must not be assumed solely by reason of knowledge of an unregistered interest</u>.

And at 107:

> Even now no attempt has been made to question the judgment of Sim J [removing the caveat] and that circumstance, in their Lordships' opinion, alone is sufficient; ... even if he were wrong in the view that he took [that the caveat should be removed] <u>it seems to their Lordships impossible to say that people who acted upon the faith of that judgment were guilty of fraud</u>.
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> (emphasis added)

In *Waimiha Sawmilling*, the issue was whether a transfer of land to the defendant, registered after the making of an order that a caveat lodged to protect the interest in question should be removed and after an appeal against that order had lapsed, (but before the hearing of a fresh appeal which ultimately upheld the plaintiff's right to a caveat), was fraudulent. It was alleged that as the transfer had been made with full notice of the plaintiff's rights, it was made with the object of depriving the plaintiff of those rights. The majority of the Court of Appeal held that on the facts no moral fraud had been shown, and the judgment removing the caveat justified the purchaser and his solicitor in believing, and they did honestly believe, that the vendor was entitled to purchase the land free from the rights claimed by the plaintiff. The Privy Council dismissed the appeal.

[23] Similar reasoning can be applied to the present case. It cannot be said that in completing the transaction and settling the purchase in reliance upon the fact that the caveat lodged by Satnam had lapsed, the Worger Family Trust were guilty of fraud. Nor can their actions be described as in any way dishonest. Satnam permitted the most tangible and public notice of its assertion of a right to the property to lapse.

[24] Mr Craighead's suggestion that cross-examination of the solicitors will no doubt be "fruitful" is no more than speculative.

[25] In summary, the evidence establishes that the Worger Family Trust entered the agreement to purchase without knowledge of Satnam's right of first refusal in the lease, but when it learnt of Satnam's claimed right of first refusal (later supported by the caveat lodged on 24 June) it effectively left matters for the vendor and Satnam to resolve. Had the matter not been resolved satisfactorily from its point of view, or had Satnam's caveat remained, then the Worger Family Trust would not have settled and become registered as owners of the land. The Worger Family Trust was purchasing the property as an investment. It had no interest in becoming involved in unnecessary litigation with Satnam. The Worger Family Trust only proceeded to settle after taking advice from their solicitor, and learning Satnam's caveat had lapsed so that there was no impediment to settlement. On the authorities, the actions of the Worger Family Trust cannot be described as dishonest. Their actions fall short of fraud for the purposes of the Land Transfer Act.

[26] I conclude that Satnam has no arguable case for fraud under the Land Transfer Act against the Worger Family Trust. As that is the basis of its claim the Worger Family Trust is entitled to summary judgment as a defendant against Satnam.

[27] In the circumstances it is unnecessary to consider whether Satnam actually had an unregistered interest capable of supporting a claim to the land at the relevant time.

Was the Outspan Trust in breach of its obligations to give Satnam a right of first refusal?

[28] The right of refusal is contained in clause 18 of the lease:

> 18. THE LESSEE'S RIGHT OF REFUSAL TO PURCHASE
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> 18.1 Provided there has been no default on the part of the Lessee in respect of its obligations under this lease the Lessee shall have the first right of refusal in the event that the Lessor sells or proposes to sell the property comprised in the premises during the term of this lease or any renewal thereof as follows:
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> (a) The Lessor shall on each occasion that the Lessor offers the property comprising the premises for sale notify the Lessee of the proposed sale price and the terms and conditions of the proposed sale and offer to sell the property to the Lessee at that price and upon those terms and conditions. The Lessee shall notify the Lessor in writing within seven days if the Lessee accepts the proposed sale terms and desires to purchase the property. If such notification is not received by the Lessor from the Lessee then the Lessor shall be at liberty to proceed with the proposed sale. Should the proposed sale not proceed at the sale price first offered by the Lessor to the Lessee then the Lessee's right of refusal herein shall apply in respect of any subsequent proposed sale to the intent that the Lessor shall not alter the sale price without on each occasion when altering the sale price first offering to sell the property to the Lessee for such altered sale price ...

[29] Mr Turner first submitted that Satnam was not entitled to rely on the right of refusal under cl 18. He submitted that Satnam had defaulted under the lease on a number of occasions by late payment of rent, rates and insurance premiums and that the proviso applied. Although Satnam was not in default at the relevant time, June 2008, Mr Turner relied on cl 16.2 of the lease. Clause 16.2 provides that a waiver by

the lessor of any one breach of the lease shall not operate as a waiver of any other breach. But Outspan accepts that it did offer to sell the property to Satnam in satisfaction of its obligations under the lease. In doing so, it chose to waive its rights to rely on the proviso in cl 18.1 (a). While it arguably could have relied on the earlier breaches pursuant to cl 16.2 when cl 18 was engaged, it did not do so at the time. It can not now, much later, seek to resurrect and rely on those prior breaches.

[30] Mr Turner also noted that at the time the property was sold the lease had formally expired without renewal. There is however nothing in that point. Albeit late, Mr Pahuja had given notice of Satnam's intention to renew on 8 May 2008 while the lease was still current. Satnam undoubtedly would have been entitled to relief against forfeiture under the relevant provisions of the Property Law Act 2007.

[31] Mr Turner then submitted that in any event, any obligations Satnam may have had under cl 18 were satisfied by Outspan's various offers to sell the property to Satnam, in particular an offer to sell at $620,000 on or about 3 June.

[32] The right of first refusal in cl 18 is a right of pre-emption. A number of cases have considered the legal effect of a right of refusal in similar terms to that in the present case. The prevailing weight of judicial opinion, both in New Zealand and overseas, is that before any event triggering the right, a bare right of pre-emption does not create an interest in the land as it is a mere personal right against the grantor: *MacKay v Wilson* (1947) 47 SR (NSW) 315; *Re Rutherford* [1977] 1 NZLR 504; *Pritchard v Briggs* [1980] 1 All ER 294; *MJ & CML Poland Limited v Alexander & Anor* (1987) ANZ ConvR 407; *Anderson v Te Wharau Investments Limited* (1992) ANZ ConvR 156; *Gainford v Stinson* (1994) 2 NZ ConvC 191, 768 (CA); *Motor Works Limited v Westminster Auto Services Limited* [1997] 1 NZLR 762; *Bruce v Edwards* (2003) 4 NZ ConvC 193,637, para 54 and *Octra Nominees Pty Ltd v Chipper* (2007) ANZ ConvR 455;

[33] The rights and obligations arising from the clause must depend on the particular wording used in each case. The wording varies from case to case. In the present case the introductory words confirm the clause is engaged in the event the lessor "sells or proposes to sell". The clause is not well drafted. If the lessor

actually sells to a third party without giving the lessee the right of refusal, then it would necessarily be in breach. To have any practical utility the lessee must have a right of refusal in the event the lessor proposes to sell the property.

[34] The operative part of the clause, cl 18.1(a) is also unfortunately drafted. It refers to the lessor's obligations arising whenever the lessor "offers the property ... for sale". Mr Craighead sought to argue that that should be read as whenever the lessor receives an offer for the property. But that is a strained interpretation. The clause is more readily understood as referring to the lessor's decision to sell or to offer the property to the market for sale at a particular price. In those circumstances the lessor must advise the lessee of the proposed sale price and the terms and conditions upon which the lessor would sell. It is the sale at that price and on those proposed terms and conditions which is the "proposed" sale referred to in the clause, rather than a sale to a specific purchaser. For that reason I also reject Mr Craighead's submission that the clause obliged Outspan Trust as lessor to provide a copy of any agreement for sale and purchase from a third party purchaser to Satnam.

[35] The object of the clause is to ensure that if the lessor decides to sell the property the lessee is to have the right of first refusal. That obligation is satisfied if the lessor advises the price and the terms upon which he would be prepared to sell. There need not be a third party offer before the lessor at the time.

[36] In the present case the clause was engaged by Outspan's decision to sell the property when it listed it with Mr Brosnahan in April 2008. The first issue is whether Outspan's obligation under cl 18 to Satnam was satisfied at that time. Satnam was advised of Outspan's intention to sell. Mr Pahuja said that the agent, Chris Brosnahan, visited him and gave him a contract form completed except for the price. It therefore appears that Satnam was aware of the terms and conditions Outspan would sell at. There is however a conflict in evidence about the price. Mr Pahuja said the agent told him Outspan would sell for $600,000. Mr Brosnahan says he told Mr Pahuja the asking price was $630,000. I note the listing brochure suggests an indicative price of $600,000, which is more consistent with Mr Pahuja's evidence on that point. Without the price being inserted and given the uncertainty over it, this cannot constitute an offer in terms of cl 18. But Outspan does not rely

on this initial "offer". Rather it relies on a definite offer it made to Satnam on 3 June.

[37] Mr Pahuja inserted a price of $487,654 into the agreement that Mr Brosnahan had left with him. The Outspan Trust rejected that offer, but then on 3 June made a counter offer to sell the premises to Satnam for $620,000. The counteroffer was made in a completed agreement for sale and purchase form. Satnam were aware of the price and the terms and conditions Outspan would sell at. By presenting the agreement for sale and purchase at $620,000, Outspan offered the property to Satnam. Satnam rejected the opportunity to purchase at $620,000. It did so by making a counteroffer at $545,454.

[38] Mr Craighead submitted that the negotiations that were taking place between Satnam and Outspan were not in the context of cl 18, and did not satisfy Outspan's obligations under that clause. But Satnam's claim against Outspan can only be based on its rights, and Outspan's obligations under cl 18. The clause gave Outspan a right of refusal, an opportunity to purchase the property at the price at which Outspan was prepared to sell. Outspan's obligations under the claim were to notify Satnam of the proposed sale price, the terms and conditions of the proposed sale and offer to sell it at that price and on those conditions to Satnam. Subject to the following two matters, Outspan's offer to sell the property to Satnam for $620,000 on the terms and conditions in the standard agreement for sale and purchase form, satisfied Outspan's obligations under the clause.

[39] The first matter is that Outspan sought to introduce into the offer a time limit on Satnam's approval. The time limit was less than the seven days provided for in cl 18. Outspan could not have enforced that time limit against Satnam. Satnam would have been entitled to have insisted upon having seven days to accept the offer to sell at $620,000. If, before the seven days expired, or before Satnam rejected the offer, Outspan sold to another, then it would have been in breach. Satnam was free to accept or reject the offer at any time within that seven day period, but Satnam did not seek further time. Mr Pahuja made a counteroffer on the evening of 4 June when he attended Dr Sutherland at his home. In this case it was not the length of time for acceptance that was relevant to Satnam, but the price. Mr Pahuja does not suggest

otherwise. In making the counteroffer, Satnam rejected the offer at $620,000. In my judgement the attempt to introduce a time limit on the acceptance does not affect the validity of the offer. Following Satnam's rejection of the offer, the Outspan Trust was free to sell to a third party at $620,000.

[40] The next issue is the effect of the sale to the Worger Family Trust at $630,000, a price $10,000 more than the offer to Satnam. The wording of cl 18 is that the lessor "shall not alter the sale price without on each occasion offering to sell the property to the lessee for the altered sale price". On a literal interpretation of the clause, even though the Worger Family Trust's offer was $10,000 more than the price rejected by Satnam, the clause required Outspan to offer the property to Satnam at that increased and therefore altered price before selling to the Worger Family Trust.

[41] There is an obvious and strong argument that there would be little commercial utility in Outspan having to offer the property to Satnam at $630,000 when Satnam had rejected Outspan's offer to sell at $10,000 less five days earlier. As Satnam had rejected the chance to buy at $620,000, Outspan could have sold to the Worger Family Trust for $620,000. Outspan should not be in a worse position by selling at $630,000.

[42] Against that, the words the drafters of the clause have used are clear. The wording of the clause in the present case can be distinguished from the wording in other cases where the clause has expressly referred to a "lesser amount" or "lower price". For example, In *MacMillan v Covic* (2004) 5 NZ ConvC 193,841 the clause in question referred to the lessor not selling the property to a third party "for a lesser amount than the price offered". In *Motor Works Ltd v Westminster Auto Services Ltd* the clause provided:

> ... the Landlord shall not be entitled to sell the property to any third party at any lower price or upon terms more favourable than those offered to the tenant ...

[43] The drafters of the present clause have not chosen to use such words. Instead they have used the phrase "shall not alter the sale price". An increase is obviously an alteration. The clause is not ambiguous.

[44] Therefore, there is an equally strong argument that the lessee should be entitled to rely on the plain words of the clause. It can be supported to some extent by the argument there may be a commercial purpose in requiring the offer to be made, even at a higher price.

[45] The best argument to be made for Satnam in response to the "no commercial sense argument" is that if Mr Pahuja had been advised on 9 June (when the offer from the Worger Family Trust was presented) that the landlord proposed to sell at $630,000 then that would have influenced Satnam and Mr Pahuja's view of the market price. Satnam might have chosen to exercise the option to buy at $630,000, albeit that it had only five days earlier rejected the opportunity at $620,000. That is the effect of Mr Pahuja's evidence at present. He said that if he knew of the $630,000 offer Satnam would have matched or bettered it. The ASB's accommodation would have allowed that. That evidence is untested.

[46] I am forced to conclude that the matter is not entirely clear at this stage. As this is an application for summary judgment it cannot be said that the position advanced for Satnam is not at least arguable. For that reason the application for summary judgment and the application to strike out by the Outspan Trust must be dismissed.

Damages

[47] Although counsel did not directly deal with the issue of damages, I refer to them briefly in order to assist the parties' consideration of the future of this litigation. There are real issues as to damages even in the event that Satnam was able to establish a breach of the clause by the Outspan Trust.

[48] Satnam calculates its loss as a loss of opportunity, and claims the difference between the $630,000 purchase price of this building and the $820,000 for an alternative building of a similar purpose. However, that is not the basis upon which its loss would be calculated by the Court. Satnam's loss is more properly calculated on the normal measure for breach of a contractual term. That is, it should be calculated at the value of the property on the market if offered for sale at the date of

the purported exercise of the option, less the amount Satnam would have been required to pay under the option, with perhaps a deduction of a sum representing the value of the remainder of the lease, namely the rent that could be obtained for the lease in the market less the contractual rent reserved by the lease: *Wright v Dean* [1948] Ch 686; *Diamond v Campbell-Jones* [1961] Ch 22. As the $630,000 appears on the evidence to be the market price and as the rental was increased at about the time of the purchase it is difficult to see Satnam establishing a loss on that basis.

[49] Satnam's alternative formulation for damages for breach of contract is also difficult. Mr Pahuja's evidence is that Satnam now has to pay rent instead of interest upon a mortgage of $500,000. At present the rent is $3,433.00 per month and the mortgage interest would be $3,843.66 per month. There is no loss on that basis at present. The suggestion that interest rates are dropping and rentals are increasing is speculative and may not necessarily remain so.

Result

[50] The first defendant's application for summary judgment is granted. The first defendants are to have costs on a 2B basis against the plaintiff for all steps in the proceeding to date including the hearing before me.

[51] The second defendant's application for summary judgment and/or strike-out is dismissed. Costs are fixed on a 2B basis, but the ultimate incidence for those costs is reserved pending the outcome of the substantive case if there is to be one.

Directions/review

[52] The plaintiff is to file an amended statement of claim against the second defendants by 27 March 2009. The Registrar is to allocate a review date before an Associate Judge after that date.

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Venning J