EDITORIAL NOTE: NO SUPPRESSION APPLIED.

IN THE DISTRICT COURT
AT WAITAKERE

CIV-2014-090-001378
[2016] NZDC 23223

BETWEEN	G A NIGHTINGALE AND L M NIGHTINGALE Plaintiffs
AND	B P JAMES AND W R JAMES Defendants
AND	LOYAL REALTY LIMITED First Third Party
AND	LYNDSAY KERR Second Third Party

Hearing: 26, 27 July, 5 August 2016

Appearances: B O'Callahan for the Plaintiffs
K J Crossland & E Latimer-Bell for the Defendants
S B Mitchell & G J Duff for the First and Second Third Parties

Judgment: 23 November 2016

JUDGMENT OF JUDGE B A GIBSON

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[1] This case concerns the sale of a residential property at 1/56 Savoy Road, Glen Eden, Auckland. The property is on a cross-lease title. The title gives the legal description of the property as an undivided one half share in an estate in fee simple of 866 m^2 with a lease created by LD501986.4, that being for 999 years from 1 September 1988.

[2] The property was listed for sale by the plaintiffs, in their capacity as trustees of the Bolton Trust, in July 2014, with Blue Fern Realty Limited ("Blue Fern"), a company operating in West Auckland as real estate agents under the Harcourts franchise.

[3] The property was offered for sale at a listing price of $619,000 and on 2 August 2014 the listing agent, Mrs Anne Banks, conducted an 'open home' at the property for perspective purchasers who were able to attend and view the property, including the dwelling-house. The defendants went to the open home and were accompanied by Mr Lyndsay Kerr, a real estate agent who was a licensee of Loyal Realty Limited ("Loyal Realty), the first third party in the proceeding. Loyal Realty is another West Auckland company and a member of the Harcourts franchise.

[4] An offer to purchase the property was made by the defendants on Saturday 3 August 2014, with Mr Kerr, the second third party, bringing an agreement for sale and purchase to them at their home for their signature. The offer, on the Real Estate Institute form, ninth edition, was for $600,000 and provided for a deposit of $60,000 to be paid on acceptance.

[5] The agreement had been partially completed by Blue Fern Realty, the firm for which the listing agent, Mrs Banks, worked. The names of the vendors and the legal description, shown as cross-lease (fee simple) in part and then with a fuller legal description with the lot and deposited plan number and the lease number, were already inserted on the agreement as part of the prepared form before it was signed by the defendants. Mrs James said she could not recall the lines describing the various legal interests, presumably other than cross-lease, being struck out before she signed the agreement but I am satisfied from the evidence of Mr Kerr they were. The agreement shows the legal interests struck out, where appropriate, in a way that suggests it has been done electronically, supporting the agents' evidence of a pre-prepared agreement needing only the insertion of the purchasers' names, purchase price and deposit and any special conditions of sale.

[6] Once the offer to purchase for $600,000 was signed by the defendants, Mr Kerr forwarded it by electronic transmission to Mrs Banks to enable her to present it to the vendors.

[7] To this point the parties were largely in agreement as to the chronology. The plaintiffs counter-offered at a price of $605,000, initialling where appropriate the

provision of the contract dealing with the purchase price and inserting the amended price.

[8] Mr Kerr said he received the amended agreement from Mrs Banks by email and then went to the defendants' home after phoning Mrs James to advise of the counter-offer. While he was there he said the defendants initialled the counter-offer, thereby agreeing to purchase the property for $605,000 with settlement to be on 25 September 2014.

[9] Mr Kerr's evidence was that he emailed the front page of the now concluded sale and purchase agreement to Mrs Banks, the vendors' agent, and had at some point, either at the time the offer of $600,000 was presented or subsequently, after the counter-offer was received, he amended the agent details on the front page of the contract to record himself and his firm as the salesman and struck out Mrs Banks' name. Both he and Mrs Banks, under Harcourts' operating rules, were to receive a share of the commission.

[10] The deposit of $60,000 was not paid by the defendants, although on 7 August 2014, at the defendants' request, Mr Kerr prepared a typewritten form headed 'Variation to Contract' which recorded the purchase price as $605,000 and which provided that the deposit would be payable when the contract became unconditional. Under the existing terms the deposit was payable immediately on execution of the agreement. At that time the only condition was the obtaining of a LIM report and approval by the purchasers of the same with clause 9.2 of the agreement providing that if the LIM was not to be approved the purchaser was required to give notice to the vendor on or before the fifteenth working day after the date of the agreement failing which the purchaser was deemed to have approved the LIM.

[11] By clause 5 of the agreement the purchaser was deemed to have accepted the vendor's title subject to objections or requisitions the purchaser was entitled to make, with notice to be given on or before the tenth working day after the date of the agreement. Clearly objection to the nature of the title itself, a cross-lease, is not a properly founded objection given it was clearly described in the description of the land in the contract itself.

[12] For the defendants it was asserted that there was no concluded contract as they denied counter-signing the final version of the agreement. As for the subsequent variation dealing with the time for payment of the deposit the defendants claimed it was blank, other than the typewritten parts, when they signed it. The handwritten interlineations which deal specifically with the variation and record the purchase price of $605,000 were, they say, inserted after they had signed it and in breach of a condition agreed with Mr Kerr that he would hold the document until they decided whether they would accept the counter-offer of $605,000.

[13] Mr and Mrs Nightingale believed they had a signed acceptance of their counter-offer of $605,000 and the agreement, as at 3 August, was only conditional on the provisions concerning the LIM report. Mr and Mrs James' position was they had not initialled the counter-offer, and as at 3 August 2014 were thinking it over.

[14] Mr James deposed that on Sunday 10 August 2014, he was visited at home by Mr Kerr and told that the vendor no longer wished to keep the counter-offer open. That evidence, given in an affidavit dated 12 July 2016 was never contradicted directly by Mr and Mrs Nightingale or by Mr Kerr although he maintained, consistently, that Mr and Mrs James had counter-signed the agreement at $605,000 and the reason for the proposed variation concerning payment of the deposit was that his attention had been drawn by Mrs Banks to the failure of the purchasers to pay the same, a matter of considerable moment for real estate agents given its payment would secure the early payment of their commission. He contacted Mrs James to be told the money was available but tied up in a trust and the defendants needed more time to withdraw it. That led to him preparing the proposed variation to the contract and having Mr and Mrs James sign it. However the variation was not accepted by the vendors which is consistent with them wanting to proceed with the concluded agreement. I do not accept the evidence that they wished to withdraw the 'counter-offer' on 10 August 2014. There was, as far as they were concerned, a concluded agreement from 3 August 2014 onwards and their actions since have been entirely consistent with that.

[15] There then followed a series of messages between the defendants and Mr Kerr. On 15 August Mrs James wrote a long email to Mr Kerr in which she asserted:

> *On 10th August 2014 the withdrawal of the offer was communicated to you via Text Message as below in respond to your enquiry with Mr James in which you stated the following:*
>
> - *That your vendors intend to cancel the contract*
> - *That there is no deposit*
> - *That we as the purchasers caused embarrassment to Harcourts as agents.*

[16] On Wednesday 13 August 2014, Mrs James forwarded an email to Mr Kerr confirming that they wished to withdraw the offer on the property saying that when they entered into the contract they had understood that a deposit would be payable on it becoming unconditional, there would not be a shared drive-way and '*there was not to be a cross-lease or leasehold of any kind'*.

[17] On 14 August 2014 Mr Kerr texted Mrs James asking her to ring him and suggested to her that she was not replying to his messages.

[18] On 15 August 2014 at 8.18 am, Mr Kerr texted Mrs James reminding her '*your contract is due to go unconditional today'* and requested details of her lawyers. That seems to have led to Mrs James' lengthy email of the same day, timed at 11.38 am, in which she alleged that the defendants had no wish to purchase properties with a right of way or lease, saying they were at cross-purposes in their earlier discussions about the nature of cross-leased properties and saying, *inter alia*:

> *What is the problem? We've entered into a contract. I had to request a copy of the contract after several days. I made it very clear before we put the offer in that deposit on unconditional* [sic]. *They are free to enter into back up offers. That right is theirs to exercise. I make clear my position refer to my email in six hours when I finish my shift tonight from work. I am entitled to the 10 days as per contract. What is the misunderstandings here? in thise* [sic] *10 days I have to satisfy as per your conditions. During which I will hand over the contract to a nominated legal representative of my choice. I now withdraw the offer and ask you to now refer to my email.*

and

> *5. The sale and purchase were signed on Sunday* 3rd. *Counter-signed by your vendor on Monday altering the price. We sign that price off 5th or 6th*

with variation to deposit. I only manage to place my hands on a copy on the Thursday 7th at work after 2.30 pm.

6. I had my first appointment with my accountant on Friday at 10.30 am. Concerns were raised.

To summarise, this has been a bad experience to say the least. We feel harassed that after your Vendor agreed to a 10 day condition, my husband was then harassed that they would pull the deal. He confirmed that we withdrew our offer on the subject property. The LIMS report have confirmed just what we don't want to enter into, a leasehold property.

We do hope that this clarifies your concern.

[19] On 19 August 2015 Mrs James wrote, by email, to Mr Kerr alleging that he had forged '*our signatures on a Sale and Purchase Agreement'* copying the same to Mr C R Howard, the manager of Loyal Realty. She threatened to complain to the Real Estate Agents Authority and to bring criminal proceedings, ending her email with the salutation '*You will mob* [sic] *the mess up!'*.

[20] The plaintiffs attempted to proceed to settlement by issuing a settlement notice but then accepted the repudiation of the contract and shortly thereafter re-sold the property for $610,000. They sued for the deposit and damages.

Was there a concluded agreement?

[21] Although no email trail between the agents demonstrating receipt of a concluded agreement on 3 August 2014 was produced, I am satisfied one was. The agreement became unconditional on the fifteenth working day after it was entered into. The defendants' assertion, in correspondence, that the LIM report confirmed it was a leasehold property was not a reasonable ground to cancel as the fact that the property was on a cross-lease title was obvious from the legal description in the agreement for sale and purchase, and also from the Harcourts publicity brochure available at the property during the open home for purchasers to inspect. It included a copy of the Certificate of Title showing the nature of the property. There was no right of way shown as an easement on the title and the nature of the property was described further in the agreement as 'cross-lease'.

[22] I accept Mr Kerr's evidence that he overheard a discussion between Mrs Banks and the defendants in which she referred them to the marketing brochure. It would be unusual for Mr and Mrs James not to have looked at that material given they made an offer to purchase within a short time, but in any event Mrs James said she had discussions with Mr Kerr prior to making an offer over the nature of a cross-lease interest. Mrs Banks said she explained the cross-lease to the defendants at the open home and showed them a site plan. I have no reason to disbelieve this evidence. It is logically consistent with the subsequent discussion about the title Mr Kerr said he had with Mr and Mrs James. In any event Mrs James did not refute it, simply saying when cross-examined that she could not recall it.

[23] The defendants were not new to the process of buying residential real estate, having purchased and then sold approximately 30 properties. They had, through Mr Kerr, recently attempted to purchase the property in which they had resided.

[24] I accept the counter-offer was presented to and signed by the defendants on 3 August. For the agents it was important they obtain a concluded agreement before 4 August as that was when the Harcourts' agency expired. Mrs James, in her affidavit of 14 July 2016 deposed she was told this by Mr Kerr on 2 August 2014. Therefore her statement in her email that, with reference to the counter-offer, '*we signed that price off 5th or 6th with variation to deposit'* is not correct as the counter-offer was signed on 3 August and the agreement was then concluded. Further, the email statement is an acknowledgement that the variation of the contract document was complete, at least as to the new price, and was not blank, other than in the typed part, as Mrs James asserted.

[25] Mrs James, in her affidavit sworn 14 July 2016, with reference to the plaintiffs' counter-offer of $605,000 accepted she received a phone call from Mr Kerr. She deposed:

> *I asked Lyndsay whether he needed to come back to see us that day with it. He said no and added that the Nightingales were going away. We left the agreement on the basis that we would consider it further and come back to him. The initialled version of the contract at $605,000 was not something that Lyndsay ever brought back for us to sign and initial ourselves.*

[26] This evidence is simply not plausible and contradicts the email referred to in para [24]. Once Mr Kerr had the counter-offer signed by the plaintiffs it was of no importance to the transaction, at that point, that the Nightingales were going away. What he needed to do was get the purchasers to sign the counter-offer, especially given Harcourts' agency expired the following day. It is simply not credible that he would have said that he did not need to see the James' that day. I am satisfied that he did and secured their initials to the amendment. If he had not done so there would have been no need to prepare the variation of contract document on 7 August 2014. In Mrs James' version of events there was, at that point, no concluded contract and if that was so all the defendants need have done was vary the deposit provision on the agreement for sale and purchase itself, in effect, a further counter-proposal. The fact that a formal variation of contract document was prepared is compelling evidence that there already was a contract between the parties for $605,000.

[27] The transaction report referred to by Mr Howard in his evidence is also consistent with the agreement being entered into on 3 August 2014, as this was entered on the document subsequently filed at Harcourts together with a copy of the sale and purchase agreement.

[28] Overall I accept Mrs Banks' and Mr Kerr's evidence. I found them both credible witnesses. I am satisfied the counter-offer was signed by Mr and Mrs James on 3 August with the front page forwarded by email by Mr Kerr to Mrs Banks. To find otherwise, as the copy of the signed counter-offer was received by Mrs Banks, I would have to conclude that someone, in all likelihood Mr Kerr, had falsely initialled the agreement with the defendants' initials. This certainly was the allegation made by Mrs James in her email of 19 August 2014 but it was not referred to in the defendants' statement of defence to the plaintiffs' amended statement of claim and by trial Mr and Mrs James were not prepared to say who placed the initials on the contract, save they were not theirs.

[29] Where there was an apparent discrepancy was in the dating of the agreement. One version of the contract for the sale at $605,000 had the date inserted in capitals. Mr Kerr said he had written that on the contract. The other version, in identical

terms, had the date written in a plainly different hand and was identified by Mrs Banks as having been inserted by her ('the Banks agreement').

[30] The version with Mrs Banks' handwriting on it was forwarded by email to Mrs James on or about 7 August 2014 by Mr Kerr. That email was timed at 11.19 am and on that day, in the evening, Mr Kerr had Mr and Mrs James sign the variation of contract insofar as the deferment of the date of payment of the deposit was concerned. By that time, Mr and Mrs James had a copy of the agreement for sale and purchase, albeit the one dated by Mrs Banks. That agreement did not have the additional initials of the defendant beside the amended purchase price figure of $605,000, which the final agreement dated by Mr Kerr had. A copy of the Banks agreement was also sent to the vendor's solicitors by the real estate agents. Consequently when the dispute arose the vendors' solicitors, on 26 September 2014, believing that copy to be the final agreement, wrote to the defendants' solicitors insisting that the defendants had initialled the amended offer, with the initials of the defendants by the deposit figure referred to by the plaintiffs' solicitors as being the initials they had placed there on acceptance of the counter-offer. In fact they were the initials they had originally inserted by the deposit figure when the original offer to purchase at $600,000 was made. The defendants' initials accepting the counter-offer on the copy of the agreement dated by Mr Kerr are not present on the agreement dated by Mrs Banks and appear on the final agreement underneath their original initialling of the purchase price and parallel to the plaintiffs' initials for the counter-offer. This was not apparent to the plaintiffs' solicitors as, through muddlement in Harcourts' office, they, as with Mr and Mrs James, had been sent the wrong copy of the signed agreement for sale and purchase, receiving instead a copy of the counter-offer initialled by the plaintiffs.

[31] I accept Mrs Banks' evidence that she was in all likelihood the cause of the confusion. She accepted she received the completed counter-offer from Mr Kerr. However she dated her copy of the agreement, as it was before acceptance of the counter-offer by Mr and Mrs James, and forwarded that to the vendor's solicitors as if it were the final agreement, which it was not. It was only the counter-offer. Before sending it she dated it 3 August 2014, as her copy of the offer had not at that

point had the date inserted in it. She wrongly assumed this was the concluded agreement.

[32] As for the copy sent to Mrs James on 7 August 2014, which was also a copy of the offer signed by the plaintiffs, but dated by Mrs Banks in the way described, I accept that what likely happened was that Mrs Banks sent Mr Kerr a further copy of the agreement, as she believed it to be, which she had also forwarded to the solicitors, and he forwarded that on to Mr and Mrs James not realising it was a copy only of the counter-offer, and not the concluded agreement. There would have been little point in his having Mr and Mrs James sign a variation to the contract unless he thought he had a concluded agreement and his email attachment for 7 August 2014 refers to '*the signed S&P agreement'*, not the counter-offer.

[33] The position is reinforced by the evidence of Mr D L Boot, a Senior Document Examiner for the New Zealand Police, who said the only original hand-writing on the final agreement dated by Mr Kerr was the date itself and the additional initials, those disclaimed by the defendants, which is consistent with Mr Kerr's account of his receipt of the counter-offer by email and his dating it once the defendants had initialled the new purchase price.

[34] Overall, therefore, I am satisfied that Mr and Mrs James executed the counter-offer on 3 August 2014 in the way described by Mr Kerr so that a concluded agreement was reached. It follows that I reject Mr and Mrs James' assertion that there was no concluded offer as at 7 August 2014 when they signed the contract variation, and in doing so Mr Kerr agreed, in effect, to hold the document in escrow until they determined whether they were going to accept the counter-offer. That allegation was never put to Mr Kerr in cross-examination in any event.

[35] What happened was that after signing the counter-offer on 3 August 2014, and after taking advice from their accountant, the defendants simply went 'cold' on the deal. They may well have been confused by the Banks agreement which had been mistakenly sent to them by Mr Kerr, but their subsequent email correspondence with the agent, and their entering into the variation of the contract, demonstrates they were aware they had accepted the counter-offer.

[36] The plaintiffs have satisfied me as to their claim for a concluded agreement. Mr and Mrs James by their email of 13 August 2014 acknowledged they entered into the contract, but assert it was on the basis that the deposit would be payable when it became unconditional, and it was not to be a shared drive-way nor a cross-lease or leasehold of any kind. Not only does this email contradict their assertion that there was not a concluded contract, I am satisfied that what, in effect, are misrepresentations, were not made. They were well aware the property was a cross-lease property at the time they entered into the agreement. I prefer the evidence of Mr Kerr that on seeking payment of the deposit Mr and Mrs James then asserted difficulty in getting the funds immediately because they were in trust. Had the deposit been payable when the agreement became unconditional, and had that been made known to Mr Kerr at the time the agreement was being prepared, it would have been a simple matter to have amended the deposit provision to give effect to that before agreement was reached with the Nightingales.

The plaintiffs' relief

[37] The plaintiffs seek to recover the deposit of $60,000 notwithstanding that the property was on-sold. Under the agreement where the purchaser fails to comply with the terms of a settlement notice served by the vendor, which notice was served by the plaintiffs' solicitors on 26 September 2014, the plaintiff could sue for the deposit as damages, irrespective of whether it had been paid, if the defendants failed to complete the purchase in terms of the settlement notice thereby entitling the plaintiffs to cancel the agreement and sue for damages.

[38] The agreement became unconditional because of deeming provisions as to acceptance of title and approval of the LIM report contained in the contract. The plaintiffs' solicitors issued a settlement notice and the defendants' wrongful repudiation of the agreement was subsequently accepted by the plaintiffs who cancelled it, once the defendants failed to settle in terms of the settlement notice. The plaintiffs are entitled to sue for the deposit notwithstanding that it had not been paid as at the date of cancellation of the contract; see para 7.10 *Sale of Land*, Third Edition, 2011, D W McMorland, citing in support *Brown v Langwoods Photo Stores Ltd* [1991] 1 NZLR 173 (CA). Mr Crossland, for the defendants, did not dispute this

is the position at law and so it follows the plaintiffs are entitled to judgment for $60,000 being the deposit, and to damages for breach of contract for failure to settle the agreement.

[39] In that respect the measure of damages sought was interest on the unpaid deposit at the contractual interest rate of 14% and interest on the unpaid portion of the settlement price until the plaintiff was able to resell the property. Judgment in the sum of $1,219.73 and $8,121.75 was sought with respect to these claims. Given the defendants' default it follows that the claims are damages claimable under the terms of clause 10 of the agreement for sale and purchase.

[40] The plaintiffs also seek to recover costs and disbursements reasonably incurred in the re-sale and outgoings on all maintenance expenses in respect of the property from the settlement date under the agreement between the parties to the settlement on the re-sale. They include advertising on resale of $2,523.50 which I accept would be payable under the terms of clause 10 of the agreement if the loss could be proved. Mr and Mrs Nightingale, in their affidavit evidence, state they listed the property with Harcourts on 30 September 2014 and made payments to them in that sum for advertising fees for the re-sale. They exhibited a copy of their bank statements and ascribed $2,523.50 of payments made on 30 September 2014 and 10 October 2014 totalling that sum to advertising on the re-sale. Given time was still running for settlement under the settlement notice given on 26 September 2014, the payments seem unlikely to have been for advertising costs on the re-sale, and in all likelihood were advertising costs on the sale which the agents had not recovered as the deposit was not paid. The invoices themselves were not exhibited. Given the plaintiffs have been successful in their claim for the deposit there would be an element of 'wind-fall' if they were to obtain payments for the advertising costs in addition to the deposit. I am not satisfied that the plaintiffs have demonstrated this claim does in fact relate to advertising costs on re-sale and so the claim fails.

[41] I am also unwilling to allow the plaintiffs' claim for lost rental income at $820 per week from the settlement date to re-sale. Mr and Mrs Nightingale in their affidavit sworn 27 May 2016 say that it was difficult to objectively verify the weekly rental was $820. Some rental was received from a tenant after 25 September 2014

but they state this was for arrears of rental and outgoings of the relevant period but given there were several tenants all payable separately I am unsure whether the payments can be attributed to the tenancy for the property and I am not satisfied that the plaintiffs have established, on the balance of probabilities, that the lost rental income for the property was $820 each week. Neither am I prepared to allow the claim for electricity of $332.05 or the water rates. Those liabilities could have been avoided by the plaintiffs simply disconnecting the electricity and stopping the supply of water to the property. Understandably, for the purposes of re-sale, they did not wish to do so, but nevertheless that is a choice the plaintiffs made.

[42] The plaintiffs also claim legal fees of $17,883.70. There is no specific contractual provision in the agreement for sale and purchase allowing the plaintiffs to claim indemnity costs because of the wrongful default of the defendant and in the course of argument Mr O'Callahan accepted the invoices may not be claimable as a contractual right. I agree. The claims sought concern the costs incurred in the litigation and ought to be subject to the Courts costs jurisdiction under the District Courts Rules 2014. They are not damages arising from the defendants' default and so the claim for $17,883.70 as damages also fails.

Summary

[43] Judgment is entered for the plaintiffs and the third parties against the defendants.

[44] Judgment for the plaintiffs is in the sum of $60,000 as damages for failure to pay the deposit, with interest thereon at the contractual interest rate of 14% from 3 August 2014 to 25 September 2014 at 14% and thereafter until the date of judgment at the maximum rate prescribed by the District Courts Act 1947.

[45] The plaintiffs are also entitled to judgment in the sum of $8,121.75 being the lost interest on the unpaid portion of the settlement price at the contractual rate of 14% per annum for 35 days at $232.05 per day, and the rates paid on the property of $144.86 between the settlement date and the date of re-sale.

[46] Both the plaintiffs and the third parties are entitled to costs and disbursements against the defendants. Memoranda concerning costs and disbursements may be filed and served within 21 days of the date of this decision.

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B A Gibson, DCJ