IN THE DISTRICT COURT
AT WELLINGTON

I TE KŌTI-Ā-ROHE
KI TE WHANGANUI-A-TARA

CIV-2018-085-001011
[2019] NZDC 9169

BETWEEN	WILLIS 204 LIMITED Plaintiff
AND	KEEGAN JOHN WALLS Defendant

Hearing: 30 April 2019

Appearances: P Chisnall for the Plaintiff
Defendant in Person

Judgment: 16 May 2019

RESERVED JUDGMENT OF JUDGE S M HARROP

Introduction

[1] The plaintiff as vendor and the defendant as purchaser signed an agreement for sale and purchase on 26 March 2018 in respect of a commercial property at 204 Willis Street, Wellington ("the agreement"). The purchase price was $4,600,000. Originally the agreed deposit was $350,000 with a settlement date of 3 October 2018 with an interest rate for late settlement set at 12% but this was later varied to reduce the deposit to $180,000 with the settlement date brought forward to 2 July 2018.

[2] The defendant declared the agreement unconditional on 27 April 2018 at which point the deposit became immediately payable. He subsequently paid $50,000 of the deposit but the balance of $130,000 remains unpaid.

[3] On 5 July 2018 the plaintiff gave written notice under clause 2.2 of the agreement demanding immediate payment of the balance of the deposit. No response or payment was received from the defendant.

[4] On 7 September 2018 the plaintiff cancelled the agreement for non-payment of the deposit. At all material times it was ready, willing and able to perform its obligations under the agreement.

[5] The property was resold as at 30 November 2018.

[6] On 3 December 2018 the plaintiff issued this proceeding and sought summary judgment for the balance of the deposit of $130,000 together with interest at 12% per annum on that sum for the 217 days from 27 April 2018 to 30 November 2018: $9274.52.

[7] In addition, the plaintiff sought interest at the same rate on the balance of the unpaid purchase price, $4.42 million for the 151 days between the date when settlement was due, 2 July 2018, and the date of resale 30 November 2018. It claims $219,425.75 under this head.

[8] Overall then the plaintiff seeks judgment for $358,700.27 but limits its claim to $350,000 to bring it within the jurisdiction of this Court.

[9] The defendant has taken no formal step to oppose the claim or the application for summary judgment. He did however appear on 22 March when the matter was first called before me and questioned the period for which interest was properly claimed. As a result, counsel for the plaintiff Mr Grove filed a helpful memorandum dated 11 April 2019 in which he very fairly explains that there appear to be two possible interpretations of the applicable contractual and statutory provisions. The defendant appeared again on 30 April and was given the opportunity, without obligation, to file submissions in reply by 7 May but did not do so.

Issue

[10] The question I need to determine in this judgment is which of the two interpretations set out by Mr Grove is correct and consequently what is the correct award of interest to the plaintiff. If the plaintiff is correct it will be entitled to judgment for $350,000; if the interpretation less favourable to it is correct, it will be entitled to judgment for considerably less: $233,045.47. In either case it will also be entitled to interest on the principal sum determined from the date it crystallised.

Discussion

[11] There is no doubt that, the agreement having been declared by him to be unconditional on 27 April 2018, the defendant was liable to pay the plaintiff the balance of the full purchase price on 2 July 2018 being the amended date for settlement in the agreement. He failed to do so and at that point cl 3.12(1) of the agreement for sale and purchase applied. This provides:

> "3.12 If any portion of the purchase price is not paid upon the due date for payment, then, provided that the vendor provides reasonable evidence of the vendor's ability to perform any obligation the vendor is obliged to perform on that date in consideration for such payment:
>
> (1) the purchaser shall pay to the vendor interest at the rate for late settlement on the portion of the purchase price so unpaid for the period from the due date for payment until payment ("the default period"); but nevertheless, this stipulation is without prejudice to any of the vendor's rights or remedies including any right or claim for additional expenses and damages. For the purpose of this subclause, a payment made on a day other than a working day or after termination of a working day shall be deemed to be made on the next following working day and interest shall be computed accordingly….

[12] Accordingly, from 2 July 2018, the "due date for payment", the defendant was liable to pay the plaintiff interest at 12% per annum for late settlement on the portion of the purchase price then unpaid until the date of payment, this being described as "the default period".

[13] Accordingly, at least as long as the contract remained on foot and uncancelled, that liability continued until payment was made. However, on 7 September 2018 the

agreement was cancelled by the plaintiff and at that point s 42 of the Contract and Commercial Law Act 2017 ("the Act") applied. This provides:

> **42 Effect of cancellation**
>
> (1) When a contract is cancelled, the following provisions apply:
>
> (a) to the extent that the contract remains unperformed at the time of the cancellation, no party is obliged or entitled to perform it further:
>
> (b) to the extent that the contract has been performed at the time of the cancellation, no party is, by reason only of the cancellation, divested of any property transferred or money paid under the contract.
>
> (2) This section is subject to the rest of this subpart.
>
> (3) Nothing in this section affects the right of a party to recover damages for a misrepresentation or the repudiation or breach of the contract by another party.

[14] Notably, s 34 of the Act provides that s 42, among other sections, has effect subject to any express provisions in the agreement for sale and purchase dealing with remedies, or with any of the matters to which ss 35 to 49 relate. It is not suggested the other sections are material here.

[15] On the face of s 42, once the plaintiff cancelled the agreement on 7 September 2018, its provisions no longer applied and neither party was obliged or entitled to perform the agreement further. In lieu, the parties' rights and liabilities were thereafter governed by the Act. On that basis cl 3.12 ceased to have effect from 7 September 2018 and the plaintiff is entitled to interest only under the Interest on Money Claims Act 2016 from that date.

[16] Mr Grove submits that the above approach, which he describes as *"the strict interpretation"* (and so will I), is not the correct one. He relies on cl 11.0 of the agreement. Relevantly this provides:

> **11.0 Notice to complete and remedies on default**
>
> 1.1 (1) If the sale is not settled on the settlement date, either party may at any time thereafter serve on the other party a settlement notice.

(2) The settlement notice shall be effective only if the party serving it is at the time of service either in all material respects ready, able, and willing to proceed to settle in accordance with this agreement or is, not so ready, able, and willing to settle only by reason of the default or omission of the other party.

(3) If the purchaser is in possession, the vendor's right to cancel this agreement will be subject to sections 28 to 36 of the Property Law Act 2007 and the settlement notice may incorporate or be given with a notice under section 28 of that Act complying with section 29 of that Act."

(….)

11.4 If the purchaser does not comply with the terms of the settlement notice served by the vendor then, subject to subclause 11.1(3):

(1) Without prejudice to any other rights or remedies available to the vendor at law or in equity, the vendor may:

(a) sue the purchaser for specific performance; or

(b) cancel this agreement by notice and pursue either or both of the following remedies namely:

(i) forfeit and retain for the vendor's own benefit the deposit paid by the purchaser, but not exceeding in all 10% of the purchase price; and/or

(ii) sue the purchaser for damages.

(2) Where the vendor is entitled to cancel the agreement, the entry by the vendor into a conditional or unconditional agreement for the resale of the property or any part thereof shall take effect as a cancellation of this agreement by the vendor if this agreement has not previously been cancelled and such resale shall be deemed to have occurred after cancellation.

(3) The damages claimable by the vendor under subclause 11.4(1)(b)(ii) shall include all damages claimable at common law or in equity and shall also include (but not limited to) any loss incurred by the vendor on any bona fide resale contracted within one year from the date by which the purchaser should have settled in compliance with the settlement notice. The amount of that loss may include:

(a) **interest on the unpaid portion of the purchase price at the interest rate for late settlement from the settlement date to the settlement of such resale**; and

(b) all costs and expenses reasonably incurred in any resale or attempted resale; and

> (c) all outgoings (other than interest) on or maintenance expenses in respect of the property from the settlement date to the settlement of such resale. (**emphasis added**)

[17] Mr Grove submits that a broad interpretation of the relationship between cl 3.12 and cl 11.4(3)(a) should be applied. He acknowledges this case is unusual because the vendor did not cancel the agreement for non-payment of the deposit until the date for settlement had passed and did not serve a settlement notice under cl 11.1, though it became entitled to do so. As far as Mr Gove is aware, the issue is a novel one with the closest authority being *Mana v Fleming*[1], but as he acknowledges, in that case a settlement notice *had* been served and the cancellation was based on non-compliance with it. Here, by contrast, no such notice was issued and the cancellation was based (solely) on non-payment of the deposit and non-compliance with the clause 2.2 deposit-related notice of 5 July 2018 threatening cancellation for *that* default. Clause 2.2 provides:

> 2.2 If the deposit is not paid on the due date for payment, the vendor may at any time thereafter serve on the purchaser notice requiring payment. If the purchaser fails to pay the deposit on or before the third working day after service of notice, time being of the essence, the vendor may cancel this agreement by serving notice of cancellation on the purchaser.

[18] In support of his submission for the broad interpretation to be adopted, Mr Grove relies on the observation of the Court of Appeal in *Mana v Fleming* at [62]:

> This agreement provided for settlement of the purchase price on 21 January 2005. The parties agreed that the Flemings would pay interest at 14% on any monies owing for the period of default. That was their method of compensating the trust for the loss caused by any delay in receipt of all monies on due date. The Flemings would have been liable for contractual interest on $860,000 if they had delayed settlement until 9 December 2005. They must be liable for the same loss suffered by the trust in settling with a third party on that date where their breach caused the cancellation and resale.

[19] Mr Grove notes that in this case, the plaintiff cancelled the agreement 26 working days after settlement was due. Had a settlement notice been served under cl 11.1, the minimum 12 working day period would have expired and there can be no doubt that the plaintiff would have been entitled to late settlement interest as claimed

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[1] (2007) 8 NZCPR 469; [2007] NZCA 324

under cl 11.4(3)(a). Mr Grove submits that the plaintiff should not be put in a worse position, as applying the strict interpretation would mean, simply because it sensibly relied on the defendant's extant failure to comply with the deposit notice in order to achieve a quick and commercial resale.

[20] There is considerable practical and equitable force in Mr Grove's submission. The plaintiff could easily have put itself in the position where there could be no argument about its entitlement to 12% interest through to 30 November 2018. However, the short point is that it did not do so and the agreement, in clause 11.4 ("If the purchaser does not comply with the terms of the served by the vendor…") provides a clear threshold requirement before it may acquire that entitlement, namely the service of a settlement notice followed by non-compliance with that notice. That simply did not occur here and *Mana v Fleming* is therefore distinguishable.

[21] This contract does not provide for interest under clause 3.12 to be payable beyond the date of cancellation in circumstances where there has been a failure to settle on settlement date, or a failure to comply with a deposit notice - unless a settlement notice is first served and then not complied with. It may be that this case has highlighted a lacuna in the agreement for sale and purchase, but the Court can only apply the detailed written agreement reached by the parties to the events which occurred. It would have been very easy for the parties to have agreed in cl 11.4 that the rights then set out in that subclause applied, not only when a purchaser does not comply with the terms of a settlement notice, but also if the vendor is otherwise in default. But they did not do so.

[22] Clause 11.4(3)(a) may either be seen as a provision by which the parties have agreed that even after cancellation, and therefore overcoming the default provision in s 42 of the Contract in Commercial Law Act, cl 3.12 will continue to apply, or alternatively as simply invoking in the post-cancellation phase a provision which no longer applies, but which the parties have agreed sets out the basis for the award of damages by way of interest at that stage.

Conclusion

[23] I conclude that the strict interpretation set out by Mr Grove is the correct one and reject his submission in favour of the broader interpretation. Clause 11.4 does not apply in this case because the threshold requirement of service of a settlement notice, let alone non-compliance with it, did not occur.

[24] The plaintiff is entitled to judgment for:

(a)	The unpaid portion of the deposit	-	$130,000.00
(b)	Interest at 12% per annum on $130,000 for 133 days (from 27 April 2018 to 7 September 2018)	-	$ 5,684.38
(c)	Interest at 12% per annum on $4,420,000 for 67 days (from 2 July 2018 to 7 September 2018)	-	$ 97,361.09
			$233,045.47

[25] In addition, the plaintiff is entitled to, and I award, costs against the defendant on a 2B basis in the sum of $4,717 as calculated in the schedule to Mr Grove's memorandum of 11 April 2019, together with disbursements of $340, as detailed in the schedule.

[26] Finally, the plaintiff is entitled to interest calculated under the Interest on Money Claims Act 2016 on the principal sum awarded, $233,045.47 from the date the principal sum crystallised, namely 7 September 2018, to the date of payment.

Judge S M Harrop
District Court Judge

Date of authentication: 16/05/2019
In an electronic form, authenticated pursuant to Rule 2.2(2)(b) Criminal Procedure Rules 2012.