IN THE HIGH COURT OF NEW ZEALAND
ROTORUA REGISTRY

CIV-2005-463-127

	BETWEEN	REALTY SERVICES HOLDINGS LIMITED Plaintiff
	AND	DAVID JOSEPH SLATER AND GERALDINE GRACE SLATER Defendants

Hearing: 25-27 October 2005

Appearances: Mr P Hunt for plaintiff
Mr M McKechnie for defendants

Judgment: 18 November 2005 at 12:50 pm

JUDGMENT OF LANG J

Solicitors:
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Counsel:
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[1] In December 2004 the plaintiff, Realty Services Holdings Limited, was the owner of a first floor apartment on the corner of Fenton Street and Whakaue Streets in Rotorua. It had built the apartment as part of a larger development that was completed on the site in July 2004.

[2] The object of the development was to provide the plaintiff with premises for one of its trading arms, Success Realty Limited. That company trades as Bayleys Real Estate in the Waikato and Bay of Plenty regions. For the sake of convenience I propose to refer to Realty as "Bayleys".

[3] The building that was constructed on the site has four discrete areas. These are the subject of three separate strata titles. The ground floor comprises a café (Lime Café) and the premises occupied by Bayleys. They are the subject of one of the strata titles. On the first floor there are two two-bedroom residential apartments, each of which has its own strata title. Apartment A, with which this proceeding is concerned, is directly above Lime Café. Apartment B is built above Bayleys' premises.

[4] Apartment B was sold off the plans in July 2004 for the sum of $641,000. By November 2004 Apartment A remained vacant, with an earlier auction having attracted no bidders.

[5] In late November and early December 2004 the defendants, Mr and Mrs Slater, became interested in purchasing Apartment A. Before committing themselves to purchase the property, however, they needed to decide how the purchase was to be financed. One option that was open to them was to sell one of their other properties.

[6] One of those properties was a bare section at Kawaha Point Road in Rotorua. That section had been subdivided into two lots, with a separate title having been issued for each lot. Up until then Mr and Mrs Slater had intended to build a townhouse on each lot, and had had plans drawn up accordingly. They had intended selling the front unit and retaining the rear unit as their principal residence.

[7] After some negotiation Bayleys agreed in January 2005 to sell Apartment A to Mr and Mrs Slater. They were to pay the sum of $300,000 in cash on settlement, and the balance of the consideration for the purchase was to be provided by the transfer to Bayleys of either part, or the whole, of the Kawaha Point Road property.

[8] I refer to the two alternatives deliberately, because therein lies the principal issue raised by this proceeding. Bayleys claims that the agreement provided for the whole of the Kawaha Point Road property to be transferred to it. Mr and Mrs Slater contend that they only agreed to transfer Lot 1, the front section, to Bayleys and that they were entitled to retain Lot 2, the rear section, for themselves.

[9] The agreement for sale and purchase recording the terms upon which Mr and Mrs Slater agreed to sell the property referred only to Lot 1, which comprises 383 square metres. The transfer reflected that fact, and Bayleys therefore became registered as the proprietor of Lot 1 following settlement.

[10] Bayleys says that the terms of the written agreement do not reflect the actual agreement that was reached with the Slaters regarding the sale of Kawaha Point Road. It therefore seeks the equitable remedy of rectification. It asks the Court to rectify the agreement to provide also for the sale of Lot 2, thereby reflecting the actual agreement that it says was reached.

[11] Alternatively, Bayleys says that it entered into the agreement under the influence of a mistake. It did so because it believed that the agreement included the whole of the Kawaha Point Road property and not just Lot 1. It says that Mr and Mrs Slater entered into the agreement under the influence of the same mistake or, alternatively, that the existence of its mistake was known to them.

[12] Bayleys also contends that the mistake has resulted in a substantially unequal exchange of values, because it failed to receive a substantial part of the consideration that it ought to have received for Apartment A. As a result, it claims that it is entitled to relief under the provisions of the Contractual Mistakes Act 1977.

Factual issues

[13] The proceeding raises three interrelated factual issues, each of which is critical to the outcome of both of Bayleys' claims. The first issue is whether the pre-contractual negotiations were conducted on the basis that the Slaters would transfer the whole of the Kawaha Point Road property to Bayleys or just Lot 1, the front section.

[14] If the intention of both parties throughout was that only one section was to be transferred to Bayleys neither cause of action can succeed, because the contract correctly reflected the agreement that the parties reached.

[15] If, however, the parties proceeded on the basis that the whole of the property was to be transferred, the written agreement contained a significant error, because it only provided for the sale of Lot 1. The issue that then arises is whether either of the parties appreciated the error at the time that they signed the agreement. If only one of the parties did so, the issue is whether that party knew that the other party had signed the agreement under the influence of a mistake.

[16] It is necessary to deal with each of these factual issues before considering the plaintiff's claims.

First issue: Did the pre-contractual discussions involve the whole of the Kawaha Point Road property?

[17] Mr and Mrs Slater signed the contract to purchase the apartment on 10 December 2004. The negotiations that preceded it took place over the preceding three weeks. They began on 19 November 2004.

19 November 2004

[18] On 19 November 2004 Mrs Slater had lunch with a friend, Mrs Betty Shepherd, at Lime Café. Mrs Shepherd had formerly been a real estate agent in the Rotorua area.

[19] Over lunch Mrs Shepherd mentioned that the apartments above the café were for sale. This obviously piqued Mrs Slater's interest, because after lunch she and Mrs Shepherd called at Bayleys' office, which is immediately adjacent to the café. There they spoke to one of Bayleys' agents, Ms Lorraine Chapman, and learned that one of the apartments, Apartment B, had been sold. They accepted her offer to show them Apartment A, which was situated directly above the café.

[20] Ms Chapman believes that during this meeting Mrs Slater told her that she and her husband had a property that they would need to sell in order to purchase the apartment. Mrs Slater did not, however, tell her of the location of that property.

[21] Mrs Slater denies that any such discussion occurred on the date that she initially viewed the apartment. She says that financial matters were left entirely to her husband, and that at that very early stage she was not interested in the price that the vendor wanted for the apartment. Although nothing really turns on it, I consider that this aspect of Mrs Slater's evidence is a little surprising. I would have thought that, if Mrs Slater had any interest in the property at all, she would at the very least have wanted to know how much it was likely to cost.

[22] The evidence does not persuade me, however, that the possibility of a property trade was discussed during Mrs Slater's visit on 19 November. Mrs Slater's evidence convinces me that matters of finance were left entirely to her husband. It would in any event have been inherently unlikely that; during her very first visit to the apartment, Mrs Slater would have provided Ms Chapman with details of the manner in which she and her husband might be able to finance any purchase.

[23] In reaching this conclusion I do not ignore the evidence of Ms Chapman and her sales manager, Ms Beth Millard. Their evidence is to the effect that, shortly after Mrs Slater's visit on 19 November 2004, Mrs Chapman told Ms Millard that a property trade was a possibility. Ms Millard says that she then contacted Bayley's Managing Director, Mr Richard Cashmore, to enquire whether he might be open to such a proposal.

[24] Mr Cashmore's evidence however, is that this discussion occurred in late November 2004. Moreover, Ms Millard said that when she was told about the property trade Ms Chapman also told her that she had shown Mr and Mrs Slater around the unit again on 26 November 2004. For these reasons I consider that it is far more likely that the question of a property trade was mentioned for the first time at the visit on 26 November 2004.

26 November 2004

[25] The visit to the apartment on Friday 26 November was again conducted under the auspices of Ms Chapman. On this occasion both Mr and Mrs Slater were present.

[26] Although I accept that there was some discussion of a property trade during this visit, I am also sure that few, if any, details were discussed. The issue is likely to have taken the form of a passing comment made by Mr Slater. That may provide an explanation for the fact that Mr Slater does not recall any discussion of the topic occurring at all during this visit. The discussion was obviously sufficient, however, to cause Ms Chapman to mention the possibility of a property trade to Ms Millard shortly after Mr and Mrs Slater had left

30 November and 1 December 2004.

[27] On Tuesday 30 November 2004 Ms Chapman telephoned Mr Slater and asked him if he wanted to make an offer on the apartment. He asked her to call him back the next day.

[28] When Ms Chapman telephoned Mr Slater on 1 December, he told her that he was willing to put in an offer, but that he would need about five weeks to arrange finance.

[29] I consider that it is likely that during this conversation Ms Chapman told Mr Slater that Bayleys would be prepared to look at the possibility of a property swap. By that stage Ms Millard had spoken to Mr Cashmore, and had obtained approval in

principle to the proposal. That approval was subject, however, to the reservation that Bayleys would need to have an accurate idea of the value of any property that Mr Slater might offer in part payment of the purchase price of the apartment.

[30] I am also satisfied, however, that at this point Mr Slater had not mentioned any particular property to Ms Chapman.

[31] On the evening of the same day Ms Millard arranged to show Mr and Mrs Slater through the property again. The purpose of this visit was to gauge traffic noise during the evening hours. By this stage Mr and Mrs Slater were obviously interested in the apartment. Although the possibility of a property trade was undoubtedly discussed again during this visit, Ms Millard accepts that no particular property was discussed. She says merely that Mr Slater told her that he would consider the option of a trade.

2 December 2004

[32] On 2 December 2004 Ms Millard took over the responsibility for dealing with Mr and Mrs Slater. She did so because Ms Chapman had been admitted to hospital.

[33] On the same day Ms Millard telephoned Mr Slater and told him that he and his wife would need to come to a decision about the apartment fairly quickly, because there was other serious interest in it. When he told her that he would need five weeks to sort out his finances, she said that Bayleys would not consider an offer with a five week finance clause.

[34] I consider that, from this point on, both parties began to seriously consider the possibility of a property trade.

3 December 2004

[35] On 3 December Ms Millard telephoned Mr Slater again. She asked him if he had decided on a trade figure, and what property he was interested in trading. He told her that he was still working on his finances.

[36] I accept Ms Millard's evidence that the Kawaha Point Road property was mentioned for the first time during this particular conversation. She says that Mr Slater told her that he had vacant land at Kawaha Point Road, and that this might be available as a trade.

[37] Mr Slater's evidence regarding the events that occurred during the first week of December 2004 is somewhat vague. By way of example, he omitted in his written brief to mention that he had visited the apartment in the company of Ms Millard on 1 December 2004. He referred only in that brief to a telephone conversation with Ms Millard on 1 December, although he accepted during cross-examination that he and his wife had also visited the apartment on the evening of that day. His oral evidence regarding the events of the first week in December demonstrated in my view that, with some exceptions, he has little if any independent recollection of what occurred on specific dates.

[38] Mr Slater accepted, however, that a day or two after the visit on 1 December Ms Millard contacted him again, and that the Kawaha Point Road property was mentioned for the first time during that conversation. I consider that this particular telephone conversation is likely to have occurred on 3 December 2004.

[39] Although this may have been the first time the Kawaha Point Road property was referred to in the context of the purchase of the apartment, Bayleys knew of its existence prior to that date. Some months earlier Mr Slater had discussed with Bayleys the possibility of selling two commercial properties in Rotorua. During these discussions Mr Slater had told Bayleys, and Ms Millard in particular, about the Kawaha Point Road property. At that time, however, Mr and Mrs Slater had no intention of selling that property.

[40] I accept that it is also likely that the Kawaha Point Road property was only discussed in general terms during the telephone conversation on 3 December. There is no suggestion, however, that Mr Slater told Ms Millard that he was only prepared to sell one of the two sections

[41] The next event of importance is a meeting between Mr Slater and Ms Millard at Mr Slater's office in Riri Street, Rotorua. Although the evidence on this point is somewhat confused, I believe that it must also have occurred on Friday 3 December 2004. This is consistent with Ms Millard's evidence, and it is also consistent with Mr Slater's evidence that the meeting occurred within a day or two after the telephone call on 2 December. Mr Slater is also adamant that the meeting did not occur on Saturday 4 December 2004, and I consider that that is one detail that he is likely to be sure about.

[42] The meeting on 3 December lasted about 15 to 20 minutes. During the meeting Mr Slater showed Ms Millard the plans that he and his wife had had drawn up for the development of the Kawaha Point Road property. This showed a separate unit being built on each lot.

[43] Mr Slater maintains that he made it clear to Ms Millard that any proposal would involve trading only one of the two lots. In his written brief he also says that no offer was made during the meeting.

[44] I am prepared to accept that Mr Slater made no formal offer during the meeting in his office at Riri Street. At that stage the parties were still very much in the preliminary stages of their negotiation. I do not accept, however, that Mr Slater made it clear to Ms Millard that any trade would only involve one of the two sections. I reach this conclusion for several reasons.

[45] First, there is no doubt that Ms Millard left the meeting with the very clear impression that both sections were to be transferred as part of the overall package.

[46] This is best demonstrated by the fact that, within a few days of the meeting, Ms Millard took a team of agents to visit the Kawaha Point Road property. The purpose of that visit was to provide Bayleys with an estimate of the price that the entire property might realise if it was sold. Two of the members of that team, Ms Chapman and Ms Pitcher, gave evidence at the trial. Their evidence satisfies me that the team had been instructed to estimate the value of the entire property, and not just one lot. Ms Millard would not have arranged for the property to be valued as a

whole if she had been told that Mr Slater was only willing to trade one of the two sections.

[47] Secondly, Ms Millard was aware of the price that her immediate superior, Mr Cashmore, wanted to obtain for the apartment. The other apartment had sold in May 2004 for $641,000. Mr Cashmore obviously viewed that sale as an appropriate benchmark, because he wanted to obtain $630,000 for the other apartment. Mr Slater confirmed that he was aware throughout that that was Bayleys asking price.

[48] Mr Slater said, however, that he viewed Bayleys' asking price as being unrealistic. He thought the apartment was worth a lot less than $630,000. He also believed that the market value of the entire Kawaha Point Road property was in the vicinity of $500,000. For that reason he said that he would not have been prepared to offer a trade of both sections together with a significant cash payment. This was why he proposed the trade of one of the sections together with a large cash payment. The key factor from Mr Slater's perspective was therefore, he says, the amount of the cash differential.

[49] If this was really his view, I find it surprising that Mr Slater never raised it with Bayleys at any stage during the negotiations. To do so would have been an obvious strategic move, particularly given the value that he knew Bayleys was placing on the Kawaha Point Road property.

[50] Moreover, had the proposal been floated to Bayleys on the basis that just one section was to be transferred, a host of other issues would have arisen. The most obvious of these was which of the two sections were to be included in the bargain. And who would make that decision? Could Bayleys nominate which section it wanted, or did Mr and Mrs Slater have that right?

[51] This was obviously an important issue, because the two sections were significantly different. The rear section was larger in size, but it could potentially be built out if a multi-storey dwelling was constructed on the front section. The front section was closer to the lake, but it was smaller in area. The issue of who was to take which section, and how that decision was to be made, would inevitably have

required considerable discussion, yet there is no evidence that any such discussion occurred.

[52] The absence of any such discussion is significant given Bayleys' obvious determination to obtain a price of approximately $630,000 for the apartment. Had just one section been part of the proposal, I have no doubt that Ms Millard would have asked Mr Slater several obvious questions before taking the proposal further.

[53] I am of this view because Bayleys did not want to retain the Kawaha Point Road property. It proposed instead to convert the property into cash by on-selling it immediately. The fact that the property had already been subdivided into two sections, each with its own title, was an obvious attraction. It meant that the property could be marketed to potential buyers on the basis that it could be developed either as a single site or as two separate sites. That is, in fact, the basis upon which Bayleys later marketed the property until it only owned one of the two sections.

[54] If Bayleys was to receive only one of the sections, however, would have wanted to know what the Slaters proposed to do with the remaining section because that was a question that potential buyers were likely to ask. That particular issue was never canvassed with Mr Slater.

[55] Mr Slater's evidence is also somewhat confusing regarding the manner in which the site to be sold to Bayleys was to be selected. His written brief was to the effect that "it was agreed" that one section would be traded. He made no mention of the manner in which the identity of that lot was to be decided. In oral evidence, however, he suggested that Ms Millard chose the front lot. Given the obvious importance of this issue, it is odd that Mr Slater does not remember clearly how the decision came to be made. His evidence also conflicts to some extent with that of his wife, who said in her brief of evidence that she and her husband agreed that they were selling Lot 1 and retaining the rear section.

[56] Moreover, although Mr Slater says that the discussion at the meeting at his office canvassed the proposed sale of a single section "at length", he was unable to

elaborate regarding those details. Such detail as he was able to recall was general in nature, and could equally relate to the sale of the section as a whole. By way of example, he said that they discussed the respective sizes of the two sections and the fact that there were two separate titles rather than a cross-lease arrangement.

[57] I think that the production of the plans to Ms Millard is also significant. Mr Slater obviously regarded the existence of the plans for the development of two sites as being something of a selling point. This is not surprising, because the plans create the impression that the property is capable of producing a quality two-unit development.

[58] Ms Millard's evidence is to the effect that she was not particularly interested in the plans, because Bayleys were proposing to on-sell the property immediately. Overall, Mr Slater's evidence also confirmed the fact that Ms Millard was not particularly interested in the plans. The fact that they were produced at all suggests, however, that Mr Slater was proposing that the entire property be transferred to Bayleys. What value did plans for a two-unit development have for Bayleys if it was only to receive one section?

[59] It is also surprising that, notwithstanding the fact that such a proposal would have provided for Mr and Mrs Slater to retain the rear section, they never raised the possibility that a height restriction might be placed on the front section. That could easily have been done, but Mr Slater never raised the issue. The absence of any height restriction could easily, as the valuation witnesses agreed, have led to diminution of the value of the rear unit if a large dwelling was erected in front of it. I have little doubt that, had Mr Slater actually intended to retain the rear section, he would have turned his mind to this important issue.

[60] Finally, the significance to Bayleys of the value of the Kawaha Point Road property needs to be borne in mind. If Mr Slater's evidence is accepted, Ms Millard must have completely misunderstood the entire thrust of the proposal that he was putting to her. I find that proposition to be completely unrealistic in the circumstances that prevailed.

[61] Ms Millard was an experienced real estate agent. Her own firm was involved in the transaction. She knew that Mr Cashmore was anxous to ensure that the apartment fetched a price close to $630,000. If the Kawaha Point Road property was to form part of the consideration to be provided for the sale of the apartment, its value would therefore be critical to be the equation. Given those circumstances, I have no doubt that, had just one section been on offer, Ms Millard would have realised that that was the case. Her experience as a real estate agent would then have alerted her to the issues that the proposal raised. I do not accept that the nature of the property to be traded for the apartment was a detail that would have been missed in the context of the discussion that was being held.

[62] This is also confirmed by the fact that in a telephone conversation after the Riri Street meeting Ms Millard advised Mr Slater that her agents had placed a value of $300,000 to $330,000 on the two sections. Mr Slater did not react to this comment, notwithstanding the fact that he knew that Bayleys were using that value in their calculation of the sale price of the apartment. Had he intended to sell just one section, I have no doubt that he would immediately have queried the relevance of the combined value of the sections. The fact that he did not do so suggests that he, too, was including both sections in the equation.

[63] All of these matters persuade me that, during and following the meeting at Riri Street on 3 December 2004, both parties proceeded on the basis that any offer to purchase the apartment would comprise a transfer of the whole of the Kawaha Point Road property together with a cash adjustment.

[64] Before proceeding to consider the next critical issue, I propose to consider the events that occurred between 6 December and 10 December 2004.

6 to 10 December 2004

[65] I have already referred to the fact that, shortly after the meeting on 3 December, Ms Millard arranged for a team of real estate agents to visit the Kawaha Point Road property and to estimate its value. Although none of the witnesses were able to put a date on that event, they all say that it occurred in early December. I

infer that it probably occurred on Monday 6 December. I have no doubt that Ms Millard would have arranged for the visit as soon as possible after the meeting at Riri Street.

[66] Thereafter Ms Millard advised Mr Slater of the outcome of the visit, and, during a telephone conversation, he made an offer to purchase the apartment. His offer comprised (in terms of my earlier finding) the entire Kawaha Point Road property together with $250,000 in cash. Ms Millard told him that Bayleys would not consider an offer with a cash payment at that level. Their response to this initial offer no doubt reflected the fact that, in Bayleys' mind at least, the Kawaha Point Road property had a value of $300,000 to $330,000.

[67] On 8 December 2004 Mr Slater met with Ms Millard at Lime Café to discuss the purchase again. Although Ms Millard does not recall this, I am satisfied that Mr Slater opened by offering the Kawaha Point Road property together with a sum of $260,000. This offer was firmly rebuffed. Mr Slater then increased his offer to $270,000 but this was also rejected. Ms Millard made it clear to Mr Slater that Bayleys would not consider a cash payment of less than $300,000.

[68] At the end of the meeting Mr Slater told Ms Millard to draw up an agreement, subject to solicitor's approval, with $300,000 as the cash component. He would then see his solicitor to discuss the proposal.

[69] This led to a series of events that have resulted in the present dispute. Ms Millard immediately instructed an office administrator, Ms Megan Bell, to prepare the two agreements. Unfortunately, Ms Millard did not follow her usual practice of preparing handwritten versions of the proposed agreements or dictating the terms of the two agreements to Ms Bell. Instead, she explained the proposal in broad terms to Ms Bell, and then left it to her to document it. She told Ms Bell to look up the street number and legal description of the Kawaha Point Road property on the Quotable Value website by matching the Slaters' names with the property.

[70] Ms Bell carried out an electronic search to identify any property owned by the Slaters and situated in Kawaha Point Road. For some unexplained reason, the

search only brought up Lot 1. Ms Bell obviously did not appreciate that two separate sections were involved in the transaction, because she only included Lot 1 in the description of the land that was the subject of the agreement for sale and purchase of the Kawaha Point Road property. The consideration for the purchase of Lot 1 was stated, however, to be $330,000.

[71] Ms Bell's initial error was compounded by the fact that, when Ms Millard picked up the agreements, she failed to notice this error. She also failed to appreciate that the agreement for the sale and purchase of the apartment recorded that Apartment B was being sold rather than Apartment A. Ms Millard can offer no real explanation for this, other than to say that it was simple human error.

[72] Ms Millard then delivered copies of both agreements to both Mr Slater and to Mr Peter Lewis, his solicitor.

[73] On 9 December 2004, Mr and Mrs Slater went to see Mr Lewis to discuss the purchase of the apartment. By that stage the error in relation to the description of the apartment had been discovered and was rectified. Mr and Mrs Slater duly signed the agreements and they were returned to Ms Millard so that she could arrange for Mr Cashmore to sign them.

[74] When Ms Millard sent the agreements to Mr Cashmore for signature, he did not notice the error in the agreement for the purchase of the Kawaha Point Road property either. This is probably understandable, because Mr Cashmore was relying on Ms Millard to ensure that the two properties were correctly described in the agreements. Mr Cashmore's primary concern related to the essential commercial terms of the proposed transaction. As a result, Mr Cashmore signed the agreements without alteration on 10 December 2004 and returned them to Ms Millard.

Subsequent Events

[75] Although they are only peripherally relevant to the important factual issues in this proceeding, it is appropriate to also briefly record the events that followed the execution of the two agreements.

[76] Settlement of the two transactions was initially scheduled to occur in January 2005. At Mr Slater's request, however, settlement was brought forward to 19 December 2004, just nine days after the agreements were signed.

[77] Settlement occurred without incident, and Mr and Mrs Slater duly took possession of the apartment.

[78] In January 2005 Bayleys began actively marketing the Kawaha Point Road property. Oblivious to the fact that they only owned one of the two sections, they advertised the entire property for sale. In doing so, they extolled its virtues, one of which was the ability of the purchaser to enhance its value by means of a two-unit development.

[79] Matters came to a head on the weekend of 20 to 22 January 2005, when Ms Millard's attention was drawn to the fact that Bayleys was only registered as the owner of one of the sections. On Monday 23 January 2005 she telephoned Mr Slater. By that stage he had seen at least one of Bayleys' advertisements and he says that Ms Millard contacted him just as he was about to contact Mr Lewis to discuss the fact that Bayleys was advertising both of the sections. Discussions between Ms Millard and Mr Slater failed to resolve matters, however, and the present proceeding followed as a result.

Conclusion: First issue

[80] I have already referred to my conclusion that the proposal put by Mr Slater to Ms Millard at the Riri Street meeting on 3 December 2004 involved the transfer of the whole of the Kawaha Point Road property. I am equally satisfied that that remained the position up to and including the meeting at Lime Café on 6 December 2004.

[81] The omission of Lot 2 from the agreement for the sale and purchase of the the Kawaha Point Road property was, I am satisfied, a mistake on Bayleys' part. Although it indicates a complete lack of care in preparing and checking the

agreement, I consider that any other conclusion flies completely in the face of all of the events that preceded the preparation of the agreement

[82] I do not accept for a moment that Bayleys deliberately set out to deceive Mr Slater after settlement. The purchase price referred to in the agreement, coupled with the fact that it marketed both of the sections for sale demonstrates in my view that Bayleys believed that it had acquired them both as part of the overall transaction.

[83] Neither is there any realistic basis to suggest that, immediately before the agreements were prepared, Bayleys altered its position and elected to accept just one of the sections together with a cash payment of $300,000. Given that Bayleys was intent on securing a sale price of $630,000 for the apartment, there is no rational explanation for it to have accepted an offer that, on its own view of the matters, would result in the apartment being sold for about $470,000.

[84] The fact that the agreement recorded the purchase price of the Kawaha Point Road property as being $330,000 is a further clear indication that Bayleys intended the agreement to include both of the sections.

[85] For these reasons I have no hesitation in concluding that all of the pre-contractual negotiations after 3 December 2004 proceeded on the basis that any offer to purchase the apartment would include a transfer to Bayleys of the whole of the Kawaha Point road property.

Second issue: Was Bayleys alone in believing that the agreement for the sale and purchase of the Kawaha Point Road property included both sections?

[86] For the reasons that I have already given, I have no doubt that Bayleys entered into the agreement to purchase the Kawaha Point Road property under the influence of a mistake. They believed that the agreement included both sections. I now need to consider the position from Mr Slater's perspective.

[87] On this point, there is little doubt. Mr Slater's own evidence is that he always intended to sell only one of the two sections. Although I do not accept that particular aspect of his evidence, I do accept that he knew that the agreement for sale and purchase only included Lot 1 before he signed it.

[88] I reach this conclusion based not only on Mr Slater's own evidence, but also as a result of the evidence given by his solicitor, Mr Lewis. Mr Lewis was aware that the agreement referred to only one of the sections and he specifically discussed this aspect of the transaction with Mr Slater before he and his wife signed the two agreements.

[89] The position must therefore be that Mr Slater did not enter into the agreement for the sale and purchase of the Kawaha Point Road property under the influence of any mistake. He knew that it referred only to Lot 1, and he signed it on that basis.

[90] This conclusion leads to the next issue, which is whether Mr Slater knew of Bayleys' mistake.

Third issue: Did Mr Slater know of Bayleys' mistake?

[91] Mr Slater had participated in all of the discussions regarding the purchase price to be paid for the apartment. He knew that Bayleys was determined to secure what it considered to be an appropriate purchase price, and that that price was $630,000. If Bayleys valued the Kawaha Point Road property at $300,000 to $330,000, it would therefore need to receive a cash payment of at least $300,000 to achieve its objective. Ms Millard had consistently turned down offers involving a cash payment of less than that amount.

[92] Mr Slater would also have seen that the agreement recorded a sale price of $330,000 for the Kawaha Point Road property. He knew that that was the value ascribed by Bayleys to the whole of the property, and not just to one of the sections.

[93] I have already referred to the fact that, given Bayleys' opinion regarding the value of the three properties, Mr Slater's version of events would see Bayleys

receiving just $470,000 for the apartment. Mr Slater cannot seriously have believed that, at the eleventh hour and without prompting, Bayleys had decided to reduce the sale price of the apartment by approximately $160,000.

[94] The closest that Mr Slater came to acknowledging the true situation was at the end of his evidence, when I asked him some questions regarding this issue. The evidence records my last questions on the topic, and his answers as follows:

> Did the thought ever cross yr mind that what might have happend here was that they were ascribing a value of 330 to both sections and that they thought they were getting both … that thought was there but my deal was done on a cash difference
>
> Help me on the last answer what possibility crossed your mind .. it's a deal I wondered why Bayleys wld want to even trade but they obviously wanted to sell the apartments.

[95] I have concluded that when the agreement arrived Mr Slater realised that Bayleys had made a serious error, because it omitted to include Lot 2. He knew that it was supposed to include both Lot 1 and Lot 2, because that was how the proposal had always been framed since the Riri Street meeting one week earlier.

[96] Rather than bring the error to Bayleys' attention, Mr Slater decided to sign the agreement as it stood The only realistic inference to be drawn from this is that Mr Slater decided to derive whatever advantage he could from Bayleys' mistake. It is also likely that he told his wife that the proposal involved the transfer of just one section, because that is also the impression that she had of it.

[97] In reaching this conclusion I do not derive a great deal of support from the fact that settlement was brought forward or from the telephone discussions that followed Bayleys' discovery of the error. It seems to me that the evidence surrounding those matters is somewhat equivocal, and little weight should be placed upon them.

[98] The balance of the evidence persuades me, however, that Mr Slater had actual knowledge of Bayleys' mistake at the time that he signed the agreement.

[99] Given the above findings I now need to consider the causes of action pleaded in the statement of claim.

1. Rectification

[100] To succeed in its claim for rectification Bayleys must establish that, up until the moment the contract was signed, the parties were in agreement: See *Dundee Farm Limited v Bambury Holdings Limited* [1978] 1 NZLR 647 at p651. The whole basis for the doctrine is that the written agreement fails to record the common intention of the parties.

[101] My factual findings are therefore fatal to Bayleys' claim for rectification, at least as it is traditionally understand. This is because, at the time that the agreement for the sale and purchase of the Kawaha point road property was signed, the parties were not ad idem. Bayleys intended to purchase both Lot 1 and Lot 2, but Mr Slater only intended to sell Lot 1. The agreement cannot therefore be rectified so as to reflect the common intention of the parties. There was no common intention in existence at that time.

[102] There is authority for the proposition that, where only party discovers that the other is mistaken but signs the agreement nevertheless, rectification may still be available: See eg *Jenkins v Lind* (Unreported. CA147/87, 20 September 1990). The approach adopted by the Curt in this situation case is that it would be unconscionable for the party who discovers the mistake to be able to take advantage of it.

[103] That approach has, however, recently been the subject of some debate: See *Tri-Star Customs and Forwarding Ltd v Denning* [1999] 1 NZLR 33 at p 39.

[104] In the present case it is not necessary to enter into that debate. I consider that Bayleys' claim is more appropriately determined on its alternative cause of action, which is based on mistake.

2. Mistake

[105] Relief for mistake is now to be found within the provisions of the Contractual Mistakes Act 1977. The criteria for relief under the Act is set out in s 6 of the Act, which provides as follows:

> 6 Relief may be granted where mistake by one party is known to opposing party or is common or mutual
>
> (1) A Court may in the course of any proceedings or on application made for the purpose grant relief under section 7 of this Act to any party to a contract—
>
> (a) If in entering into that contract—
>
> (i) That party was influenced in his decision to enter into the contract by a mistake that was material to him, and the existence of the mistake was known to the other party or one or more of the other parties to the contract (not being a party or parties having substantially the same interest under the contract as the party seeking relief); or
>
> (ii) All the parties to the contract were influenced in their respective decisions to enter into the contract by the same mistake; or
>
> (iii) That party and at least one other party (not being a party having substantially the same interest under the contract as the party seeking relief) were each influenced in their respective decisions to enter into the contract by a different mistake about the same matter of fact or of law; and
>
> (b) The mistake or mistakes, as the case may be, resulted at the time of the contract—
>
> (i) In a substantially unequal exchange of values; or
>
> (ii) In the conferment of a benefit, or in the imposition or inclusion of an obligation, which was, in all the circumstances, a benefit or obligation substantially disproportionate to the consideration therefor; and
>
> …

[106] In the present case I have already found that Bayleys entered into the contract for the purchase of the Kawaha Point Road property in the belief that the agreement included both sections.

[107] I have no doubt that this mistake was material to Bayleys, because it had based its projections throughout on the premise that it would be receiving both sections. I have also already held that the existence of that mistake was known to Mr Slater. This is sufficient to satisfy the requirements of s 6(1)(a)(i) of the Act.

[108] I now need to determine whether the requirements of s 6(1)(b) have been satisfied.

Did Bayleys' mistake result at the time of the contract in a substantially unequal exchange of values or in the conferment of a benefit that was, in all the circumstances, substantially disproportionate to the consideration therefor?

[109] Bayleys' case proceeds on the basis that the apartment was worth $630,000 and that is confirmed by the fact that Apartment B had sold in May 2004 for the sum of $641,000. Bayleys says that, in order to be able to provide that purchase price, Mr Slater needed to pay the sum of $300,000 in cash and to trade the whole of the Kawaha Point Road property. That would provide Bayleys with property and cash totalling $600,000 to $630,000.

[110] Bayleys also relies on the expert evidence given by Mr Hayes, who has been a registered valuer since 1996. He has worked in Rotorua since August 2003, primarily in the field of residential property. At Bayleys' request Mr Hayes prepared a valuation report for the Kawaha Point Road property as at 10 December 2004. He valued the front section at $170,000 (inclusive of GST if any) and the rear section at $160,000 (inclusive of GST if any). Mr Hayes' valuation therefore supported Bayleys' view regarding the market value of the two sections as at the date upon which the two agreements were signed.

[111] Mr and Mrs Slater dispute these values. As I have already indicated, Mr Slater said in his evidence that he always regarded the apartment as being worth considerably less than Bayleys' asking price. He also considered that the two Kawaha Point Road properties were worth considerably more than the value ascribed to them by Bayleys.

[112] Mr and Mrs Slater also rely on the evidence of another registered valuer, Mr Geoffrey Tizard. Mr Tizard has been a registered valuer since January 1978, and presently works in a firm of registered valuers in Hamilton. He carried out the same exercise as Mr Hayes in relation to the Kawaha Point Road property. As at

December 2004 he valued the front section at $215,000 and the rear section at $195,000. As at the same date he valued Apartment A at $575,000.

[113] During his closing submissions Mr McKechnie contended that this evidence demonstrates that, even if a mistake occurred, it did not result in a substantially unequal exchange of values. Similarly, he argued that the sale of the Kawaha Point Road property did not confer upon Mr and Mrs Slater a benefit that was, in all the circumstances, substantially disproportionate to the consideration therefor.

[114] Mr McKechnie drew my attention to the fact that the word "substantially" as it is used in s 6 of the Act has not been the subject of previous judicial comment. He referred me, however, to the decision of the Court of Appeal in *MacIndoe v Mainzeal Group Limited* [1991] 3 NZLR 273 in which the Court considered the wording of s 7 (4) of the Contractual Remedies Act 1979. That section provides relief for misrepresentation or breach of contract when the effect of the misrepresentation or breach is:

> "(i) Substantially to reduce the benefit of the contract to the cancelling party; or
>
> "(ii) Substantially to increase the burden of the cancelling party under the contract; or
>
> "(iii) In relation to the cancelling party, to make the benefit or burden of the contract substantially different from that represented or contracted for.

[115] Richardson J said (at p 284):

> The question for consideration against that background is whether any one or more of the subparagraphs of s 7(4)(b) is satisfied on the facts of the case. Substantiality in that statutory context is a matter of fact, degree and impression.
>
> It has the same flavour as "significantly" and "considerably". It is equally incapable of any kind of arithmetical analysis. One must stand back and, assessing the matter objectively, determine whether the effect of the breach will be, to take the most obvious provisions subparas (i) and (ii), substantially to reduce the benefit of the contract to Mainzeal or substantially to increase the burden on Mainzeal under the contract

[116] I agree that a similar approach should be adopted in applying s 6 of the Contractual Mistakes Act 1977. It, too, appears in remedial legislation designed to

reform an area of the law of contract that was notoriously confused and contradictory. Adopting a similar approach to that taken in relation to the availability of relief for misrepresentation and breach of contract, the legislature determined that not all mistakes should qualify for relief under the new legislation. Instead, relief should only be available where the mistake in question has had a significant effect.

[117] The wording used in s 6(1)(b) also reflects the fact that the legislature intended to avoid the technical terms previously associated with the law of mistake. The wording of the section plainly requires the Court to objective consider the effect of the mistake as a matter of fact, degree and impression.

[118] Like Richardson J, I agree that the concept of substantiality is incapable of any kind of arithmetical analysis. For that reason it is not particularly helpful to review earlier cases in order to try to discern a threshold of disproportionality, expressed in percentage terms, that will qualify for relief under the Act. Instead, the Court is required to view the evidence objectively in order to ascertain whether the effect of the mistake is sufficiently significant, taking into account the particular circumstances of the case before it, to satisfy the statutory test.

[119] In the present case, adopting Bayleys' figures, Bayleys sold an apartment worth approximately $600,000 for an effective price of $460,000. It received one section rather than the two that it believed that it was to receive as part of the purchase price. Using these figures, I have no hesitation in concluding that the mistake resulted in a substantially unequal exchange of values. It also resulted in Mr and Mrs Slater obtaining a benefit that was substantially disproportionate to the consideration that they provided.

[120] Even on the defendants' evidence, however, I reach the same conclusion. The evidence for Mr and Mrs Slater would see Bayleys selling the apartment worth $575,000 for the sum of $300,000 in cash and a section worth $215,000. Using those figures, Bayleys still received $60,000 less than the market value of the apartment. In my view that is a substantial difference notwithstanding the fact that, as Mr McKechnie emphasised, it amounts to a diminution in the purchase price of

just 10.4 per cent. In the circumstances of this particular case, I consider that a diminution of that amount would qualify as a substantially unequal exchange of values for the purposes of the Act.

[121] For this reason I do not need to undertake a detailed analysis of the manner in which the two valuers arrived at their respective valuations of the Kawaha Point Road property. Had I been required to do so, I would have found that the market value of the two sections was closer to those contained in Mr Hayes' valuation than those contained in Mr Tizard's. I would have reached that conclusion for three principal reasons.

[122] First, I place some store on the fact that Mr Hayes is a valuer who practises in Rotorua. Although I accept that Mr Tizard was appropriately qualified and experienced to carry out valuation s in the Rotorua area, nevertheless Mr Hayes can be taken to have a greater familiarity with Rotorua properties and values.

[123] Secondly, I do not discount (as did Mr Tizard) the fact that Bayleys' team of real estate agents collectively valued the property at between $300,000 and $330,000. I consider that they were likely to have had a reasonable appreciation of the market value of residential properties and sections in the Rotorua area.

[124] Thirdly, I place considerable significance on the fact that Mr Slater did not demur when Ms Millard advised him of the value that her team had placed on the Kawaha Point Road property. Had Mr Slater really believed that the property was worth considerably more that the value ascribed to it by Bayleys, I have no doubt that Mr Slater would have advised her of his views immediately. The fact that he did not do so suggests that Mr Slater also believed that the market value of the two sections as at December 2004 was approximately $300,000 to $330,000.

[125] The significance that I place on this point is influenced by the fact that Mr Slater is an experienced property investor. In answer to questions from me he said that he had purchased approximately 20 properties, of which five or six were residential and the rest were commercial or industrial. All but two of the properties were in the Rotorua region.

[126] My impression of Mr Slater is that he is an astute businessman who could be expected to have a reasonably accurate idea of the market value of his properties at any given time. In the present case the proposal involving the trade of the Kawaha Point road property matured over a reasonably lengthy period. I have no doubt that Mr Slater would have had ample time within that period to reflect upon the realistic market value of his property.

[127] The matters to which I have referred satisfy me that jurisdiction exists to grant relief under s 7 of the Contractual Mistakes Act 1977.

What relief should be granted to Bayleys?

[128] I have little difficulty in reaching my conclusion regarding this aspect of the proceeding.

[129] As will already be evident, I am satisfied that Bayleys and Mr Slater proceeded throughout on the basis that the transaction was to involve the trade of both sections coupled with a cash payment. Mr Slater always knew that he would have to pay $300,000 in cash in order to be able to purchase the apartment. The tenor of his last discussion with Ms Millard is that he had virtually decided to accede to Bayleys' requirement in this respect. Whether or not that is correct, the fact remains that he always knew that, if he was to purchase the apartment, he would be required to trade both sections to Bayleys.

[130] The Court has the power under s 7 of the Contractual Mistakes Act 1977 to make a wide variety of orders. There is discretion under s 7(3) to make such orders it thinks just and, in particular but not in limitation, it may make any of the orders set out in that section. Before it does so, however, the Court is entitled to take into account the extent to which the party seeking relief caused the mistake.

[131] In the present case there is no doubt that Bayleys caused the mistake. It occurred because Ms Millard and Mr Cashmore failed to properly check the agreement. I have given consideration to the issue of whether I should exercise my discretion in a manner that takes into account Bayleys' conduct in this regard.

Ultimately, however, I have decided that I should not allow that factor to influence the exercise of my discretion.

[132] Mr Slater had the opportunity to bring the mistake to Bayleys' attention. He did not do so, and instead deliberately tried to obtain some form of advantage from it. That has led to the inevitable expense and anxiety of this proceeding. In those circumstances I do not consider that Bayleys should be penalised further for their mistake.

[133] In my view a just result in the present circumstances would be for the parties to be returned to the basis upon which they conducted their negotiations. For that reason I propose to grant relief designed to achieve that objective.

Order

[134] I grant relief to Bayleys under s 7(3)(c)of the Contractual Mistakes Act 1977 by varying the contract for the sale of the Kawaha Point Road property so as to include Lot 2 within the property that was to be sold pursuant to the contract.

[135] Leave is reserved to both parties to apply for any ancillary or incidental orders that may be needed to enable the above order to be implemented.

Costs

[136] My first impression is that costs should follow the event. I would also have thought that this is a category 2B proceeding. Should either counsel advocate a different approach, he should file a memorandum to that effect within 21 days. A memorandum in response is to be filed within 21 days thereafter. I will then determine the issue of costs on the papers.

Lang J