IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2019-404-0580
[2019] NZHC 1911

UNDER	Real Estate Agents Act 2008
IN THE MATTER	Of an agreement for sale and purchase of real estate
BETWEEN	KIM EMILY JANES First Plaintiff
	JADE PAUL VATSELIAS Second Plaintiff
AND	MARGARET BENNEY First Defendant

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Hearing: 5 August 2019

Appearances: K J Sheehan for the Plaintiffs
No appearance for First Defendant
C R Andrews and K T O'Halloran for the Second and Third Defendants
No appearance for the Fourth Defendant

Judgment: 5 August 2019

ORAL JUDGMENT OF ASSOCIATE JUDGE R M BELL

Solicitors:
K J Sheehan, Kate Sheehan Lawyers, Auckland
C R Andrews and K T O'Halloran, McVeagh Fleming, Auckland
B R Webster, Morgan Coakle, Auckland

DAN REED
Second Defendant

UNLIMITED POTENTIAL LIMITED
Third Defendant

SANDI ANDERSON
Fourth Defendant

[1] In this vendor-purchaser case there are summary judgment applications:

(a) The plaintiffs, one of them the vendor, apply for summary judgment against the first defendant as purchaser.

(b) The plaintiffs seek judgment against the second defendant, a real estate salesperson.

(c) The plaintiffs sue the third defendant as the real estate agency that acted on the sale to the first defendant.

(d) The plaintiffs apply for judgment against the fourth defendant, the conveyancing lawyer who acted for the first plaintiff on the sale to the first defendant and acted for both plaintiffs on the purchase of another property.

(e) The second defendant, the real estate salesperson, applies for judgment against the first plaintiff and against the second plaintiff.

(f) The third defendant applies for judgment against the first plaintiff and the second plaintiff.

(g) The third defendant has filed a counterclaim and applies for summary judgment against the first plaintiff on the counterclaim.

There are then five plaintiffs' applications and four defendants' applications for summary judgment.

[2] I do not need to deal with the plaintiffs' application for summary judgment against the fourth defendant. By a joint memorandum the parties advised that the plaintiffs had withdrawn their summary judgment application against the fourth defendant. That claim will go through the normal steps for a full defended hearing. There may be a question of costs on the application against the fourth defendant, but I am not required to decide that today. All the other summary judgment applications remain alive.

[3] It will be necessary to go into some of the circumstances in greater detail, but I will first give a summary. In 2018, the first plaintiff, Kim Janes, owned a cross-lease property at 2/34 Clifton Road, Herne Bay, Auckland. The second plaintiff, Jade Paul Vatselias, is her partner. She was pregnant and with the increase in the family they wanted a larger place to live. She listed the property with the third defendant, Unlimited Potential Limited, a licensed real estate agent. Mr Dan Reed, the second defendant, is the salesman who took the listing and obtained a sale of the property. Ms Sandi Anderson, the fourth defendant, is the lawyer who acted for Ms Janes.

[4] Mr Reed introduced Margaret Benney, the first defendant, as a purchaser willing to buy the Clifton Road property. They made an agreement to buy the property for $1,250,000.00. The agreement was conditional only on due diligence. Ms Benney's lawyer declared the agreement unconditional. The settlement date was fixed for 5 December 2018. Ms Benney did not, however, pay the deposit and did not pay anything under the agreement. The agreement was cancelled for non-payment of the deposit.

[5] In the meantime, on 3 November 2018, Ms Janes and Mr Vatselias had found another property to buy. They entered into an agreement to buy 1 Hector Street, Herne Bay for $1,575,000.00. Settlement was set for 5 December 2018. That agreement was conditional on finance, obtaining a land information memorandum (LIM) and a satisfactory building report. Even though Ms Benney had not paid the deposit on the Clifton Road purchase, the agreement to buy Hector Street was declared unconditional. Ms Janes and Mr Vatselias completed the purchase of 1 Hector Street on 5 December 2018. They needed bridging finance because of Ms Benney's failure to settle. Ms Janes relisted the Clifton Road property for sale, but with another land agent. She resold it for $985,000.00. That sale settled on 5 March 2019. Ms Janes and Mr Vatselias have heavy obligations for bridging finance. It will fall due in December this year.

[6] The plaintiffs say that they have been let down not only by Ms Benney, the defaulting purchaser, but also by the real estate agency and its salesman for failing to collect the deposit from Ms Benney and to advise that the deposit had not been paid. They also blame their lawyer, Ms Anderson.

[7] Ms Janes says that she has suffered losses not only on the resale of Clifton Road but also the costs of bridging finance to complete the purchase of Hector Street. She also claims damages for distress and hurt feelings.

[8] For their part Unlimited Potential and Mr Reed say that they not only have arguable defences to the claims against them but that the plaintiffs do not have an arguable case against them. Unlimited Potential Limited also sues Ms Janes for the commission on the sale of Clifton Road and says that she has no defence to that claim and seeks summary judgment on its counter-claim for the commission.

Summary judgment principles

[9] The principles on which summary judgment applications are decided are well established and they were not in contention here. For plaintiffs' applications for summary judgment, the Court of Appeal said in *Krukziener v Hanover Finance Ltd.*[1]

> [26] The principles are well settled. The question on a summary judgment application is whether the defendant has no defence to the claim; that is, that there is no real question to be tried: *Pemberton v Chappell* [1987] 1 NZLR 1 at 3 (CA). The Court must be left without any real doubt or uncertainty. The onus is on the plaintiff, but where its evidence is sufficient to show there is no defence, the defendant will have to respond if the application is to be defeated: *MacLean v Stewart* (1997) 11 PRNZ 66 (CA). The Court will not normally resolve material conflicts of evidence or assess the credibility of deponents. But it need not accept uncritically evidence that is inherently lacking in credibility, as for example where the evidence is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable: *Eng Mee Yong v Letchumanan* [1980] AC 331 at 341 (PC). In the end the Court's assessment of the evidence is a matter of judgment. The Court may take a robust and realistic approach where the facts warrant it: *Bilbie Dymock Corp Ltd v Patel* (1987) 1 PRNZ 84 (CA).
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> [27] Under r 141A the defendant need not file a statement of defence. The onus remains on the plaintiff, and summary judgment will be denied if on the hearing of the application it appears that there is an issue worthy of trial.

[10] For defendants' applications for summary judgment the leading authority remains the Court of Appeal's decision in *Westpac Banking Corporation v MM Kembla New Zealand Ltd*.[2]

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1 *Krukziener v Hanover Finance Ltd* [2008] NZCA 187, (2008) 19 PRNZ 162 at [26] and [27].

2 *Westpac Banking Corporation v MM Kembla New Zealand Ltd* [2001] 2 NZLR 298 (CA) at [58]-[68].

[58] The applications for summary judgment were made under Rule 136(2) of the High Court Rules which permits the Court to give judgment against the plaintiff "if the defendant satisfies the Court that none of the causes of action in the plaintiff's statement of claim can succeed".

[59] Since Rule 136(2) permits summary judgment only where a defendant satisfies the Court that the plaintiff cannot succeed on any of its causes of action, the procedure is not directly equivalent to the plaintiff's summary judgment provided by Rule 136(1).

[60] Where a claim is untenable on the pleadings as a matter of law, it will not usually be necessary to have recourse to the summary judgment procedure because a defendant can apply to strike out the claim under Rule 186. Rather Rule 136(2) permits a defendant who has a clear answer to the plaintiff which cannot be contradicted to put up the evidence which constitutes the answer so that the proceedings can be summarily dismissed. The difference between an application to strike out the claim and summary judgment is that strike out is usually determined on the pleadings alone whereas summary judgment requires evidence. Summary judgment is a judgment between the parties on the dispute which operates as issue estoppel, whereas if a pleading is struck out as untenable as a matter of law the plaintiff is not precluded from bringing a further properly constituted claim.

[61] The defendant has the onus of proving on the balance of probabilities that the plaintiff cannot succeed. Usually summary judgment for a defendant will arise where the defendant can offer evidence which is a complete defence to the plaintiff's claim. Examples, cited in McGechan on Procedure at HR 136.09A, are where the wrong party has proceeded or where the claim is clearly met by qualified privilege.

[62] Application for summary judgment will be inappropriate where there are disputed issues of material fact or where material facts need to be ascertained by the Court and cannot confidently be concluded from affidavits. It may also be inappropriate where ultimate determination turns on a judgment only able to be properly arrived at after a full hearing of the evidence. Summary judgment is suitable for cases where abbreviated procedure and affidavit evidence will sufficiently expose the facts and the legal issues. Although a legal point may be as well decided on summary judgment application as at trial if sufficiently clear (*Pemberton v Chappell* [1987] 1 NZLR 1), novel or developing points of law may require the context provided by trial to provide the Court with sufficient perspective.

[63] Except in clear cases, such as a claim upon a simple debt where it is reasonable to expect proof to be immediately available, it will not be appropriate to decide by summary procedure the sufficiency of the proof of the plaintiff's claim. That would permit a defendant, perhaps more in possession of the facts than the plaintiff (as is not uncommon where a plaintiff is the victim of deceit), to force on the plaintiff's case prematurely before completion of discovery or other interlocutory steps and before the plaintiff's evidence can reasonably be assembled.

[64] The defendant bears the onus of satisfying the Court that none of the claims can succeed. It is not necessary for the plaintiff to put up evidence at all although, if the defendant supplies evidence which would satisfy the Court that the claim cannot succeed, a plaintiff will usually have to respond with

> credible evidence of its own. Even then it is perhaps unhelpful to describe the effect as one where an onus is transferred. At the end of the day, the Court must be satisfied that none of the claims can succeed. It is not enough that they are shown to have weaknesses. The assessment made by the Court on interlocutory application is not one to be arrived at on a fine balance of the available evidence, such as is appropriate at trial.

Mr Vatselias

[11] In this proceeding, Mr Vatselias has a limited role. He was not a legal owner of the Clifton Road property; he was not a party to the agreement to sell the Clifton Road; and he was not a party to the listing agreement with Unlimited Potential Limited. He was one of the purchasers of Hector Street. Ms Anderson, the lawyer, acted for both Ms Janes and Mr Vatselias on the Hector Street purchase, but I am not required to consider that aspect of the case. Ms Janes claims, as part of her losses, the costs of bridging finance. Mr Vatselias is liable for those costs as well. That is the only area where he has any relevance to the summary judgment applications I am required to deal with.

Ms Janes' application for summary judgment against Ms Benney

[12] Ms Benney has taken no formal steps under the proceeding. She did not file a notice of opposition and affidavits in response to the summary judgment application. Ms Janes has proved service of the proceeding on Ms Benney on 1 May 2019. Ms Benney informally indicated that she does not oppose the summary judgment application. Ms Janes is still required to satisfy me that Ms Benney can have no arguable defence to the claims in the amended statement of claim. The amended statement of claim was filed on 30 May 2019 after Ms Benney had been served. There is no evidence that the amended statement of claim was served on Ms Benney. I am, however, satisfied that so far as Ms Benney is concerned there are no material differences between the original statement of claim and the amended statement of claim.

[13] Here are the key facts for the claim against Ms Benney. Ms Janes was the sole proprietor of the Clifton Road property. That was a cross-lease title. Her bank had a registered first mortgage against the title. On 18 October 2018 Ms Janes made a written agreement with Ms Benney to sell her the property for $1,250,000.00 inclusive

of GST. The agreement was the Real Estate Institute of New Zealand/Auckland District Law Society form (9th edition 2012)(7). Settlement was originally set for 27 November 2018. The deposit was $125,000.00, payable on the contract becoming unconditional. There was a due diligence condition under which Ms Benney had seven working days from the date of the agreement to investigate the property. There were no other conditions. In particular, there was no condition as to finance or as to Ms Benney selling any other property. Ms Benney's lawyer requested an extension of time to complete due diligence. The parties agreed to extend until noon on 5 November 2018 and the date for completion was similarly extended to 5 December 2018. On 5 November, Ms Benney's lawyer emailed Ms Anderson to confirm that the due diligence condition had been satisfied and the agreement was unconditional.

[14] Clause 2 of the agreement for sale and purchase deals with payment of the deposit. Clause 2.1 requires the purchaser to pay the deposit once the agreement became unconditional. Clause 2.2 says:

> 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 the notice, time being of the essence, the vendor may cancel this agreement by serving notice of the cancellation on the purchaser. No notice of cancellation shall be effective if the deposit has been paid before the notice of cancellation is served.

On 16 November 2018 Ms Anderson sent Ms Benney's lawyer a notice under cl 2.2 of the agreement demanding payment of the deposit. That was a notice. Ms Benney did not pay. On 30 November 2018 Ms Anderson sent Ms Benney's lawyer a further letter giving notice of cancellation for non-payment of the deposit but reserving all Ms Janes' rights under the agreement.

[15] In the meantime, on 3 November 2018, Ms Janes and Mr Vatselias had entered into an agreement to buy the property at 1 Hector Street. The purchase price was $1,575,000.00. The settlement date was 5 December 2018. The agreement was conditional on obtaining finance within five working days and within the same time obtaining a LIM and a building report. The agreement was not conditional on Ms Janes completing the sale of Clifton Road. The purchase of 1 Hector Street was declared unconditional on the afternoon of 9 November 2018. With Ms Benney's

failure to pay the deposit and to settle under the agreement, Ms Janes and Mr Vatselias had to obtain bridging finance urgently. Ms Janes listed the Clifton Road property for sale with another land agent and was presented with two offers which she did not accept. She then instructed a third land agent and that led to an offer for the property of $985,000.00. The agreement of the sale of the property for $985,000.000 has not been put in evidence but Ms Janes has put in other evidence to prove the sale, including a solicitor's settlement statement and an invoice from the land agents who acted on the sale.

[16] Ms Janes has two causes of action against Ms Benney: breach of contract and misrepresentation. I will focus on the claim for breach of contract.

[17] The claim for misrepresentation alleges that Ms Benney made representations through her lawyer that the contract was unconditional and that the deposit would be paid. As to the first part, there cannot be any misrepresentation in a statement declaring a contract unconditional. That is performative and cannot be true or false. It does something rather than state a fact. It therefore involves no element of misrepresentation. The allegations about representations as to payment of the deposit are not contractual misrepresentations because they were made after the parties entered into the agreement. Any liability for misrepresentations after the agreement was entered into can only sound in tort, presumably either in deceit or negligence. A statement as to an intention to make a payment can be a misrepresentation only if the person making the statement did not have the intention at the time they made the representation. Ms Janes' evidence does not establish to the summary judgment standard that Ms Benney had no intention of paying the deposit, even though her lawyer communicated that she did intend to. Accordingly, the claim for summary judgment for misrepresentation fails.

[18] Ms Janes' claim for breach of contract is stronger. There was undoubtedly a breach of contract when Ms Benney failed to pay the deposit as required under cl 2 of the agreement for sale and purchase. The contract gave a remedy of cancellation for non-payment of the deposit. Through her lawyer, Ms Janes properly exercised that remedy by giving notice allowing time for payment and giving notice of cancellation.

Ms Janes is entitled to damages for Ms Benney's breach of the contract. She has claimed these matters:

(a) payment of the deposit,

(b) compensation for the loss on the resale,

(c) further damages which are to be quantified,

(d) damages of $25,000 for distress and inconvenience,

(e) the costs of bridging finance to buy 1 Hector Street.

[19] Ms Janes must prove her entitlement to damages for breach of contract to the summary judgment standard. I must be satisfied that there can be no argument as to the amount claimed. In vendor/purchaser cases, where a vendor has cancelled an agreement because of a default by a purchaser after service of a settlement notice under cl 11 of the agreement for sale and purchase, the vendor has the benefit of a special contractual provision under which damages, almost equivalent to liquidated damages, may be claimed.[3] That does not apply here, because the agreement was cancelled for non-payment of the deposit, not for failure to comply with a settlement notice.

[20] In his text, *Sale of Land,* Dr D W McMorland deals with resale and the measure of damages under the general law. He notes that there is no absolute right to recover the difference in price between the original sale and a resale, but goes on:[4]

> The resale price may be taken into account in the calculation of general law damages. Provided the resale price can be seen to be a reasonable figure for the property as at the appropriate assessment date, that price will usually be accepted as evidence of the value of the land recovered by the vendor… The onus of establishing a value to observe the duty to mitigate lies on the purchaser.
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> A vendor who resells following cancellation for repudiation or breach by the purchaser does not owe a duty of care to the purchaser based on proximity; there is no analogy between such a vendor and a mortgagee selling and the exercise of the power of sale. The vendor is in the same position as any other

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3 Clause 11.4(3).

4 D W McMorland *Sale of Land* (3rd edition, Cathcart Trust, Auckland, 2011) at 12.57(a).

> person seeking damages to the cancellation of a contract; the duty is the ordinary common law duty to mitigate the loss. The duty to mitigate requires only that the vendor takes such steps to obtain a proper price as are reasonable in the circumstances, including those in which the vendor is placed by the purchaser's default. In assessing what is reasonable in those circumstances "the conduct of the vendor is not to be weighed in nice scales" and "the urgency of the need of a vendor to sell his property and receive the proceeds of sale will often have appealing features". A vendor is not obliged to delay a sale in the hope, or even expectation, that market prices will increase. On the other hand, adequate steps must be taken in relation to advertising information of the resale and the property must be kept in reasonable order and condition to encourage such a sale.

[21] In the absence of any evidence from Ms Benney and any opposition from her, I am satisfied that Ms Janes took reasonable steps in the circumstances to mitigate the loss caused by Ms Benney's failure to pay anything under the agreement. Her evidence is that she relisted Clifton Road for sale with land agents (not with Unlimited Potential) and she was presented with offers at $930,000.00 and then at $950,000.00. She did not accept those offers. She relisted the property with other land agents who produced a purchaser willing to pay $985,000.00. The property sold at that price.

[22] The other offers she received between $900,000.00 and $1,000,000.00 give a useful indication as to the likely market value of the property. I bear in mind that Ms Janes was caught in difficult circumstances, because she had been required to complete the purchase of the Hector Street property and needed to recover what she could to reduce her liabilities as quickly as possible. For summary judgment, I am satisfied that the resale of Clifton Road at $985,000.00 was reasonable in the circumstances.

[23] If the sale to Ms Benney had gone ahead as planned, Ms Janes would have received the proceeds of the sale, less the costs incurred on the sale. Those costs are the land agent's commission of $28,750.00, legal fees and any miscellaneous expenses. We do not know what Ms Anderson would have charged as her fee because in the circumstances of this case she waived charging any fee. The evidence is silent as to any other miscellaneous expenses. To ensure that some relief can be given, I suggest $4,000.00 to cover any legal fees plus any other miscellaneous costs. I leave it open to Ms Janes to prove that any sum might have been lower than $4,000.00. I find that it will not be arguable for Ms Benney that any costs would have been higher than the $4,000.00 I have allowed. I therefore take the entire costs of sale at

$32,750.00 so that Ms Janes would have netted $1,217,250.00. I have not taken into account the bank mortgage. There is no evidence as to how much it secured, but I assume for summary judgment purposes that the amounts owing to the BNZ would have remained constant.

[24] On the resale at $985,000.00, Ms Janes incurred a land agent's commission of $34,068.75 and legal fees of $1,637.50. The cost of sale was accordingly $35,706.25. She therefore netted $949,293.75 on the resale. The difference between the two net sale prices is $267,956.25. I am satisfied to the summary judgment standard that those are recoverable damages.

[25] I am not, however, satisfied for summary judgment that Ms Janes has made out a claim for damages for other heads of loss. The non-payment of the deposit has been taken into account in assessing the damages for the loss on the resale. Ms Janes has claimed the costs of bridging finance. In some cases vendors have been able to claim the costs of bridging finance.[5] In those cases, vendors have been able to recover bridging finance costs when they have succeeded under the second limb in *Hadley v Baxendale,*[6] that is, where they have shown that the costs of bridging finance would have been in the contemplation of both parties as a probable result of the breach when they made the contract. In this case the evidence does not satisfy me that Ms Benney would have known that Ms Janes was going to buy another house and that she would incur bridging finance costs if Ms Benney could not complete the purchase of Clifton Road. While the claim may be arguable, I cannot say that any opposition by Ms Benney on this point is unarguable.

[26] Ms Janes has also claimed mental distress damages. There is evidence that she was subject to undue stress, given her pregnancy and Ms Benney's failure to perform the agreement. I am, however, not clear that such damages are available against a defaulting purchaser under an agreement for sale and purchase of land. The general rule appears to be that such damage is not recoverable. I refer to the discussion in Burrows, Finn and Todd on *The Law of Contract in New Zealand*.[7] Moreover, the

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5 *Wadsworth v Lydell* [1981] 1 WLR 598 (CA); *Callander v Murphy* [1986] 1 NZLR 202 (HC).
6 *Hadley v Baxendale* (1854) 9 Exch 341.
7 Burrows, Finn and Todd *The Law of Contract in New Zealand* (6th ed, Lexis Nexis, Wellington, 2018) at 859-867.

assessment of such damages tends to be something of a jury award. It cannot be said that there is a single right figure. It is not possible to specify what the amount of any damages should be without at the same time giving another figure which may be equally arguable. I cannot give summary judgment for damages for mental distress, even if it is recoverable at law.

[27] In summary, I give judgment to Ms Janes against Ms Benney on the cause of action for breach of contract of $267,956.25, while reserving leave to Ms Janes to continue her claim against Ms Benney for additional damages.

[28] Mr Vatselias was shown as a plaintiff for the claim for bridging finance costs. Only Ms Janes has recovered judgment, not Mr Vatselias. The question of damages for bridging finance costs remains at large. It seems, however, that Mr Vatselias cannot have a claim for breach of contract against Ms Benney because he was not a party to the contract and the contracts privity provisions of the Contract and Commercial Law Act 2017 have not been satisfied for him to claim a benefit under the contract.[8]

Ms Janes' application for summary judgment against Mr Reed

[29] As already mentioned, Mr Reed is the United Potential salesperson. He took the listing, marketed the property and introduced Ms Benney as a purchaser willing to buy the property for $1,250,000.00. He says that he also followed up with attempts to collect the deposit from Ms Benney once the agreement became unconditional. I will look more closely at what Mr Reed did when I consider Ms Janes' claims against Unlimited Potential. Here I am concerned only with her claims against him personally. She has two causes of action against him: breach of contract, the breach being the duty to collect the deposit forthwith and a failure to notify when it was not paid, and a claim in negligence.

[30] United Potential is the real estate agent in this case. Mr Reed is the salesperson. Under the Real Estate Agents Act 2008 there are separate provisions for licensing real estate agents and licensing salespersons.[9] An agent's licence allows the licensee to

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8 Contract and Commercial Law Act 2017, Part 2, subpart 1.

9 See Real Estate Agents Act 2008, s 36(1) for licensing of agents and branch managers and s 36(2) for licensing of salespersons.

carry out real estate agency work on their own account.[10] A salespersons' licence authorises the licensee to carry out real estate agency work on behalf of an agent.[11] Salespersons must be supervised.[12] Section 51 deals with the employment status of salespersons:

> **51 Employment status of salesperson**
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> (1) A salesperson may be employed by an agent as an employee or may be engaged by an agent as an independent contractor.
>
> (2) Any written agreement between an agent and a salesperson is conclusive so far as it expressly states that the relationship between the agent and the salesperson is that of employer and independent contractor.
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> (3) An agent who engages a salesperson as an independent contractor is liable for the acts and omissions of the salesperson in the same manner, and to the same extent, as if the agent had employed the salesperson as an employee.

Salespersons do not carry on real estate work on their own behalf but only on behalf of somebody else, a licensed real estate agent.

[31] A licensed real estate agent can take listings to sell properties. The listing agreement in evidence is consistent with that. The agreement shows Ms Janes as the vendor, also referred to as the "client". Clause 1.0 says:

> Appointment
>
> ("The Client") Kim Emily Janes appoints Unlimited Potential Limited, licensed real estate agent REAA 2008 ("the Agent") as the Client's real estate agent for the sale of the property at 2/34 Clifton Road …

[32] Mr Reed prepared the listing form and signed it on behalf of Unlimited Potential (although he signed in the wrong place) but that does not make him a party to the agreement. He signed only as agent of Unlimited Potential. The only parties to the listing agreement are Unlimited Potential and Ms Janes. Ms Sheehan referred to the agreement for sale and purchase with Ms Benney which has the usual provision identifying Unlimited Potential as the agent responsible for bringing about the sale. Those provisions also name the manager of the branch and Mr Reed as the salesperson,

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10 Section 48.
11 Section 49(1).
12 Section 50.

but they are not effective to make Mr Reed the real estate agent for that agreement. It could hardly do so because that would involve him in the conduct of real estate agency work rather than acting as a salesperson and would put him in breach of the legislation. The agreement is not intended to do that. Accordingly, because Mr Reed was not a party to the listing agreement, he cannot be sued for breaching it and he therefore has an arguable defence to the claim for breach of contract.

[33] There is a separate question: whether he owes Ms Janes a personal duty of care aside from any duty that Unlimited Potential might owe Ms Janes in contract or in tort. Mr Andrews responsibly referred to Robertson's J decision in *Fund of New Zealand Nominees Ltd v Campbell*.[13] In that decision, Robertson J cited *Stewart v Hooker* where Tipping J recognised that an employee of a real estate agency may owe a tortious duty of care to the agency's client.[14] That decision may, however, have been overtaken by later developments in the law. If Mr Reed were an employee of Unlimited Potential, he may have an arguable defence to a tort claim by Ms Janes. He could say that he had not assumed responsibility to her. He could point to the dictum of William Young and Arnold JJ in *Body Corporate 202254 v Taylor*:[15]

> In a situation where assumption of responsibility is an element of tortious liability, an employee who is acting on behalf of a principal can only be liable if there is a personal assumption of responsibility by that employee. Further, picking up points already made, to preserve the existing framework of the law of contracts and the idea that a corporation has a legal identity which is separate from those of the individuals involved in it, considerable caution is required before concluding that an employee has assumed personal responsibility.

[34] In this case, however, Mr Reed says that he was a contracted salesperson, that is, he was an independent contractor, not an employee. Normally it is easier to find that independent contractors have assumed responsibility to a plaintiff than it is for employees working in their employment. But the Real Estate Agents Act is significant in that it tends to blur the distinction between employees and independent contractors. Under s 51(3) the agent is responsible for their actions, whether they are employees or independent contractors. It is not clear whether s 51(3) states a rule of vicarious liability or a rule of attributed liability. Where a real estate agent has contractual

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13 *Fund of New Zealand Nominees Ltd v Campbell* (1989) 1 NZ Conv 190 (HC) at187.
14 *Stewart v Hooker* [1988] 2 NZBLC 103, 446.
15 *Body Corporate 202254 v Taylor* [2008] NZCA 317, [2009] 2 NZLR 17 at [33].

responsibility to a client, it is likely that the actions of its sales people are considered to be its own actions as a matter of attributed liability, rather than vicarious liability. At this stage it is arguable for Mr Reed, that even though he was an independent contractor, he was doing no more than acting for Unlimited Potential under its listing agreement with Ms Janes in marketing her property at Clifton Road. I do not regard the point that Mr Reed owed a duty of care to Ms Janes as clear cut, given these developments in the law. Accordingly, the duty of care claim is contestable and should be argued more fully.

[35] On that basis, I dismiss the application for summary judgment against Mr Reed. That does not mean that Unlimited Potential is free from responsibility. The claim against it requires closer consideration of the facts.

Ms Janes' application for summary judgment against Unlimited Potential

[36] There are two causes of action against Unlimited Potential. The first is called "Obligation to collect the deposit and/or inform and/or notify." The second is a claim for vicarious liability for the acts and omissions of Mr Reed.

[37] Before dealing with these causes of action, it may be helpful to understand the basis for Ms Janes' complaint. She had agreed to sell her property to Ms Benney conditional on due diligence, and the initial settlement date was 27 November 2018. She agreed to extend the time for due diligence and agreed to extend the settlement date to 5 December 2018. While her agreement to Ms Benney was still conditional, on 3 November she and Mr Vatselias entered into the agreement to buy Hector Street. That was conditional with the conditions to be satisfied within five working days. 3 November 2018 was a Saturday, so the five working days expired on 9 November 2018. Her lawyer confirmed the Hector Street agreement as unconditional on 9 November 2018 after having discussed the matter with Ms Janes.

[38] Ms Janes says that if she had known the true state of the problem with Ms Benney, she would never have confirmed the Hector Street agreement as unconditional on 9 November 2018. It appears from discussion during the hearing that if she had instructed her lawyer that the conditions for the agreement had not been satisfied, she would not have been challenged because the vendors for Hector Street

had a backup agreement in place. In those circumstances it may not have mattered whether she was entitled to declare that the agreement had not been satisfied. The effect of declaring Hector Street unconditional was disastrous for her, because Ms Benney never completed and she was forced to complete the purchase of Hector Street but under real financial stress. She faces the problem that she may not be able to repay the bridging finance in December this year. She looks to the land agent for not having followed up on payment of the deposit and not having informed her of the non-payment. She also looks to her lawyer for bad advice given when the decision was made to declare the Hector Street agreement unconditional.

[39] It appears from the evidence that Ms Janes' lawyer knew about the non-payment of the deposit. Unlimited Potential had sent an email on 8 November 2018 to Ms Benney's lawyer following up on non-payment of the deposit. Ms Anderson was copied into that email. Ms Janes' own evidence shows that Ms Anderson was aware of the non-payment of the deposit, but on her account, Ms Anderson tended to gloss over the matter. Ms Anderson does not necessarily accept that version of the events.

[40] Land agents do not guarantee performance of an agreement by purchasers they introduce to vendors, and Ms Janes does not claim that Unlimited Potential gave any such guarantees in this case. Her case is that land agents have a duty to collect deposits and they may lose their right to commission if they fail to do so. Moreover, they have duty to advise their vendor clients if the deposit has not been paid. As authorities, Ms Sheehan cites Cooke J's decision in *McLennan v Wolfsohn*[16] and the Court of Appeal's decision in *Pemberton v Action Realty Ltd.*[17] There McMullin J said:[18]

> But the decisions seem also to recognise a second principle, namely, that an agent is entitled to receive his commission only if he has carried out that which he bargained to do and that all the conditions of the contract must be fulfilled.

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16 *McLennan v Wolfsohn* [1973] 2 NZLR 452 (SC) at 458.
17 *Pemberton v Action Realty Ltd* CA166/85, 15 April 1986.
18 At 9.

The decisions recognise that collection of a deposit is part of what a land agent contracts to do. In *Pemberton* McMullin J observed:

> ... if the agent failed to inform Mr Pemberton of the dishonour of the cheque he cannot claim the plaintiff to have made substantial performance of the contract.

These authorities cited by Ms Sheehan concern payment of the commission and whether an agent has done everything required to earn his commission. That may relevantly go to whether proper steps have been taken to obtain payment of a deposit.

[41] In this case the claim is slightly different. There is a claim for damages said to have arisen from failure to take adequate steps to collect the deposit and to advise Ms Janes when payment was not forthcoming. That aspect has some novelty. It is one thing to deny a real estate agent commission for not having taken enough steps to collect a deposit. It is another thing to say that the real estate agent is liable for substantial damages if the agent has not taken adequate steps to collect the deposit or to advise the vendor that the deposit has not been paid. The claim is for professional negligence. Claims for professional negligence are usually supported by evidence as to the appropriate professional standards. Claims for professional negligence, where the Court needs to assess the standard of care, whether the agent has complied with the standard and the effects of breach, are very much factual matters which are usually not well-suited summary judgment. I am handicapped here because the claim seems to be a novel one in which a breach of a professional duty is alleged.

[42] Unlimited Potential accepts that it was under some duty to take reasonable steps to contact Ms Benney with a view to encouraging her to pay the deposit, and it was under a similar duty to inform Ms Janes about the non-payment of the deposit, once it was aware of any difficulties in obtaining payment. It says, however, that it did comply with those duties.

[43] The deposit did not become payable until 5 November 2018, when the agreement to sell to Ms Benney became unconditional. Mr Reed appears to have known that Ms Janes had made an offer to buy the Hector Street property. The evidence includes a text message from him congratulating them on buying the Hector

Street property, but it is not clear that he knew all the details of the agreement. He says that he was unaware of any conditions relating to the purchase of Hector Street. On 5 November 2018, Mr Reed sent an email to Ms Benney giving Ms Benney account details for payment of the deposit. Ms Benney acknowledged the email, saying "Email and attachment received, thanks. We'll pay it within this week and forward you the receipt". She sent that at 11.33 am. On the same day Ms Benney's lawyer confirmed to Unlimited Potential that the agreement was unconditional and that the settlement date was 5 December 2018.

[44] By Wednesday 7 November 2018 Ms Benney had not paid the deposit to Unlimited Potential. Mr Reed sent Ms Benney a text. Some of his texts are in evidence. One of the texts is an explanation from him that he was following up because she had not been specific as to when she was going to pay. He told her that the vendor had put an offer on the property and there would be a time delay between payment of the deposit and when the deposit could be released to the vendor. Ms Benney replied, "I understand".

[45] On the morning of 8 November 2018, Unlimited Potential's office manager sent an email to Ms Benney's lawyer, to Ms Anderson, the lawyer for Ms Janes, to Mr Reed and to another person in the real estate agency. The email said:

> We were advised by your office on 5 November that the agreement was unconditional, at which time your client was due to remit the deposit to our trust account.
>
> As yet, and after some attempts by ourselves first then Dan Reed, to contact with the purchaser, we have not received the deposit.
>
> Are you able to advise when your client will be remitting the funds?

[46] Ms Sheehan takes a technical approach to that email. She says that that was not a notice by the land agent to Ms Janes. It was certainly notice to Ms Janes' lawyer. I will come shortly to the point whether that also amounted to a notice to Ms Janes. Ms Sheehan argued that this was not the way that notices were to be given under the agreement for sale and purchase between the parties to the Clifton Road property agreement. That submission is beside the point. The issue here is how notice was to be given under the listing agreement. In fact, any means of passing information from

the land agent to the vendor or her lawyer would surely suffice. The important thing was to pass the information on. The way it was communicated would not matter so long as it was received and understood. In the circumstances of this case, the message was received and understood.

[47] On 9 November, Ms Benney's lawyer sent a response. That was by email to all who had received the email the date before. The lawyer expressed his regret that the deposit had not been paid. He explained that his client was supposed to receive funds last Friday. He was aware that she had to present documentation to the bank, including a death certificate. She had advised him earlier in the week that the bank had all the documentation it required. He was not sure why the funds had not yet come through. He would make further enquiries and report when he had some useful information. Later that day he sent another email saying:

> My client has emailed me saying that she anticipates being in funds next Tuesday.

[48] Later that day on 9 November, as I have already noted, Ms Janes spoke with her lawyer. It is apparent from Ms Janes' own evidence that the non-payment of the deposit was made known to her, although she claims that Ms Anderson tended to downplay its significance. Ms Janes gave instructions for the Hector Street agreement to be made unconditional. Mr Reed did not necessarily know about that. He made further attempts to follow Ms Benney up. He says that he tried to contact her through her lawyer. He also tried to contact Ms Benney through her daughter although Ms Benney resented the contact in that way. For Unlimited Potential the point is taken that any attempts to contact Ms Benney after 9 November do not count because by then Ms Janes was locked into the agreement for Hector Street.

[49] On that evidence, it is arguable for Unlimited Potential that it did take reasonable steps, once the agreement became unconditional, to follow up on payment of the deposit. Its actions are readily understandable because land agents are invariably motivated to see that the deposit is paid into their trust accounts. That provides the funds from which their commission can be deducted. On this evidence, Ms Janes' claim that Unlimited Potential did not take proper steps to collect the deposit is clearly contestable.

[50] The next part of Ms Janes' complaint is that the agent did not inform her of the non-payment. Unlimited Potential says that it did notify her because it told Ms Janes' lawyer on 8 November 2018. Here it refers to the listing agreement. Clause 14.1 says:

> Any notices given under or relating to this agreement may be served or given by hand, mail, fax or email. If there is more than one set of contact details for the Client, then a copy of this agreement and any notices may be sent to any one of them and notice to any person that is listed as a Client will be notice to all of them. Notices to the Client may also be sent to the Client's lawyer unless otherwise instructed.

There is, in my view, some ambiguity in the last sentence. It may mean that notices may be sent to the lawyer instead of being sent to the client; or it may mean that if a notice is sent to the client, it can be sent to the lawyer as well. The second meaning may be appropriate to address privacy questions, in showing that there will not be a breach of privacy principles because a client has authorised the land agent to give personal information about the client to the client's lawyer. The ambiguity is significant here, because Unlimited Potential gave notice only to the lawyer, but not to Ms Janes personally; at least not until 15 November 2018, when Mr Reed spoke to Ms Janes and told her about non-payment of the deposit. He had understood that she would have known about the non-payment before then.

[51] Unlimited Potential says that it was appropriate to notify the lawyer alone. It relies on an English decision, *Strover v Harrington*.[19] In that case Sir Nicholas Brown-Wilkinson VC referred to our Court of Appeal's decision in *Blackley v National Mutual Life Association of Australasia Limited*[20] and said:

> In this, as in all other normal conveyancing transactions, after there has been a subject to contract agreement the parties hand the matter over to their solicitors who become the normal channel for communication between vendor and purchaser in all matters relating to that transaction. In so doing, in my judgment, the parties impliedly give actual authority to those solicitors to receive on their behalf all relevant information from the other party relating to that transaction. The solicitors are under an obligation to communicate that relevant information to their own clients. At the very least, the solicitors are held out as having ostensible authority to receive such information. Whether there be express or ostensible authority, the purchaser is, in my judgment, estopped from denying that he received the information relating to the transaction which has been

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19 *Strover v Harrington* [1988] 1 All ER 769 at 779-780.

20 *Blackley v National Mutual Life Association of Australasia Limited* [1972] NZLR 1038.

> communicated to his solicitors acting in the same transaction. In my judgment, such knowledge should be imputed to the principal.

Unlimited Potential Limited also referred to Venning J's dictum in *Lester v Greenstone Barclay Trustees Limited*:[21]

> The underlying rationale for imputing the knowledge for an agent to a principal is to protect an innocent third party who may reasonably presume an agent will fulfil his or her duty and report all facts that affect the principal's interests. If the principal wishes to transact his business through the use of an agent then a third party dealing with that agent should not be troubled to ensure that the agent passes on to the principal relevant information held by the agent concerning the transaction, and, equally, the third party should be able to accept the agent's representation (within the scope of his or her authority) will bind the principal.

[52] With that I accept that it is arguable for Unlimited Potential that to the extent that it was under a duty to notify Ms Janes of non-payment of the deposit, it did so by advising her lawyer. That is arguable in terms of New Zealand conveyancing practice, given the central role of the conveyancing lawyer in carrying out an agreement for the sale and purchase of land. The lawyer is invariably the one who receives and gives formal notices under the contract and is best placed to understand and advise the client on the implications of any information given or received. The same point may be seen in Ms Benney's response to one of Mr Reed's attempts to contact her, when she directed him to contact her through her lawyer, resenting his attempt at personal contact.

[53] Unlimited Potential also ran a causation argument. Earlier knowledge that Ms Benney had not paid the deposit would not have allowed her to get out of the Hector Street agreement. The counter-argument for Unlimited Potential analysed the provisions of the sale and purchase agreement for cancelling non-payment of the deposit. Any notice requiring payment of the deposit under clause 2.2 could not have been given until 6 November 2018. Ms Benney would then have three working days' in which to comply with the notice. Time to comply would have expired at 5.00 pm on Friday, 9 November. No notice cancelling the agreement could have been given any earlier than the following Monday, 12 November. That would have been too late

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[21] *Lester v Greenstone Barclay Trustees Limited* [2010] 3 NZLR 67 (HC) at [326].

because the date for any decision whether to make the Hector Street agreement conditional or not had already passed.

[54] That is an argument against liability, but I do not regard it as decisive. It remains arguable for Ms Janes that if she had been advised directly during the week of 5 November (even if it had not been possible to go through the formalities leading to cancellation), she might still have decided not to declare the Hector Street agreement unconditional. She could have taken a chance whether Ms Benney would pay the deposit or not. The key thing was whether she should get out of the Hector Street agreement, not whether she should continue to be bound by the Clifton Road agreement. All the same, Unlimited Potential has arguable defences that it did not fail to comply with any duty to collect the deposit and to notify Ms Janes of non-payment.

[55] Ms Sheehan contended that Unlimited Potential had a duty to check up on Ms Benney and to investigate whether she was a bona fide purchaser. Such a duty was not specifically pleaded in the statement of claim. No authority for such a duty was cited, and I am not aware of any precedent for it. It is usually a matter for the vendor to decide whether to accept a purchaser introduced by the agent. On that the principal invariably has an unrestricted discretion. The underlying principle in agency law for commission claims is that you can lead a horse to water but you cannot make it drink.

[56] Unlimited Potential has an argument that in the circumstances as it knew them, it had no reason to doubt the bona fides of Ms Benney. Mr Reed says that she conducted herself as someone who is familiar with buying real estate. She had engaged an apparently reputable lawyer, and she took the steps expected of a prudent purchaser in requiring a due diligence clause and undertaking an inspection with an independent building inspector. When approached for payment she gave seemingly plausible assurances as to payment. Even if a land agent were held to be under any duty to check out potential purchasers, this agent has arguable defences.

[57] The claim for vicarious liability for the actions of Mr Reed adds nothing to the case. The claim against Unlimited Potential turns on the way it performed under the listing agreement and that includes all actions taken on its behalf, not only by its

employees but also by its contract sales staff. It has the same defences to the claim of vicarious liability as for the actions alleged to be in breach of contact. Accordingly, for her causes of action against Unlimited Potential, Ms Janes' summary judgment application fails. Instead, questions of liability and damages are matters for trial.

Mr Reed's applications for summary judgment against the plaintiffs

[58] I have dismissed the applications for summary judgment against the second and third defendants because those defendants have reasonably arguable defences. Mr Reed and Unlimited Potential say, moreover, that the plaintiffs' cases against them are bound to fail at trial, and that assessment can be made now without the need for any interlocutory steps or for a full trial with witnesses giving evidence and being cross-examined.

[59] I deal first with the applications against Mr Vatselias. Mr Reed's summary judgment application against Mr Vatselias is sound because there was never any contract between Mr Reed and Mr Vatselias. Mr Vatselias can accordingly not sue Mr Reed for breach of contract. Mr Reed was not a party to the listing agreement and Mr Vatselias was not a party to the listing agreement. There is no evidence that Mr Vatselias had any legal interest in Clifton Road or that Ms Janes was acting as his agent. Similarly, there is no provision in the listing agreement allowing Mr Vatselias to claim benefits under it under the privity provisions of the Contracts and Commercial Law Act.

[60] Likewise, it is not reasonably arguable for Mr Vatselias that Mr Reed could assume responsibility to him. While it is conceivable that a salesperson might assume responsibility to a vendor who has listed a property with the real estate agent, it does not follow that the salesperson also assumes responsibility to others who live in the property owned by the vendor. I regard the suggestion that Mr Reed might owe Mr Vatselias a duty of care as so remote and speculative that it does not need to be taken seriously. Mr Reed's application for summary judgment against Mr Vatselias succeeds. Neither of Mr Vatselias' causes of action against Mr Reed have any prospect of success.

[61] The matter is otherwise with Mr Reed's application for summary judgment against Ms Janes. The claim against him for breach of contract is misconceived because he was not a party to a contract with her.

[62] On the other hand, her claim against him for breach of a duty of care cannot be said to be hopeless. Here the authority cited by Mr Andrews, *Fund of New Zealand Nominees Ltd v Campbell* provides some support for the suggestion that Mr Reed could owe a duty of care to Ms Janes.[22] Her pleadings do not set out clearly how he assumed a duty of care to her and her evidence is also silent on that. But she should not be denied the opportunity to amend her pleadings and to give evidence to show that Mr Reed assumed a duty of care to her. That is consistent with the principles set out in *Westpac Banking Corporation v M M Kembla Limited.*[23] While the claim against Mr Reed for breach of contract is to be struck out, the application for summary judgment against him is dismissed.

[63] Mr Reed says that he has other grounds for his summary judgment application against Ms Janes, but those are better considered with Unlimited Potential's application for summary judgment.

Unlimited Potential's application for summary judgment against the plaintiffs

[64] The first cause of action against Unlimited Potential Limited is for breach of contract. That is consistent with the authorities which Ms Sheehan cited to me. Mr Vatselias cannot sue Unlimited Potential for breach of contract because he was not a party to the listing agreement and did not take any benefits under it.

[65] In the second cause of action Mr Vatselias sues Unlimited Potential for vicarious liability. Mr Vatselias does not have any reasonable cause of action against Mr Reed in tort. Likewise, there cannot be any vicarious liability on the part of Unlimited Potential. Accordingly, Unlimited Potential's application for summary judgment against Mr Vatselias succeeds.

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22 *Fund of New Zealand Nominee Ltd v Campbell* (1989) 1 NZ ConvC 190, 187.
23 *Westpac Banking Corporation v M M Kembla Limited* [2001] 2 NZLR 298 (CA).

[66] For its application for summary judgment against Ms Janes, Unlimited Potential accepts that it was under a duty to take reasonable steps to keep Ms Janes informed of its efforts to obtain payment of the deposit and to inform her that payment had been made. But it says that it did comply with that duty and any breach of duty did not cause any loss. It says that it complied when its office manager sent the email to Ms Jane's lawyer on 8 November 2018. Unlimited Potential does not, however, say that it ever advised Ms Janes directly. While the email of 8 November 2018 gives Unlimited Potential an arguable defence, I do not regard it as necessarily conclusive against Ms Janes. I come back to the ambiguity in cl 14.1 of the listing agreement. That ambiguity may count in Ms Janes' favour. The provision that "notices to the client may also be sent to the client's lawyer unless overwise instructed" may mean that any notice to the client may be copied to the lawyer, without meaning that the client can be kept out of the loop. If that interpretation is accepted, then notification to the lawyer without advising Ms Janes may leave it arguable for Ms Janes that there was a failure to notify under the listing agreement. That is not so clear-cut that summary judgment can be given at this stage.

[67] There is also Unlimited Potential's causation argument. It says that Ms Janes' lawyer knew by Friday 9 November 2018 that the deposit had not been paid; after the lawyer had discussed the matter with Ms Janes, the Hector Street agreement was declared unconditional. Unlimited Potential had no part in those matters. Again, while that offers an arguable defence for Unlimited Potential, it is not necessarily a knock-out blow for its summary judgment application against Ms Janes. On her evidence, her lawyer led her to believe that she need not be concerned about the non-payment of the deposit. On the other hand, if the land agent had told her directly that the deposit had not been paid after it contacted the purchaser on the Monday and again on the Wednesday, the position might have been different. Being advised by the land agent of non-payment of the deposit may have given Ms Janes greater cause for concern. While that possible argument remains open to her, I cannot say that her case is completely without merit. The matter should be better explored at trial. I readily acknowledge that Ms Janes' case looks weak, but I cannot say that it is completely hopeless. More evidence may come to light at trial. The application by Unlimited Potential as a defendant is dismissed.

Unlimited Potential Limited's application for summary judgment on its counter-claim for commission

[68] Unlimited Potential applies for summary judgment on its counterclaim for commission. Unlimited Potential has claimed commission of $28,750.00 including GST payable under the listing agreement. The listing agreement was made on 10 October 2018. It was a sole agency for six weeks, that is, until 24 November 2018. It included terms for payment of the commission under the sole agency. It was not necessary for the agency to introduce the purchaser. The mere fact of sale during the period of sole agency was enough to trigger the requirement to pay the commission. As it happens, of course, Unlimited Potential was instrumental in bringing about the sale. The listing agreement includes these terms:

> **5.1 Payment of commission**
>
> The Client must pay the Agent the commission, on the terms set out in this agreement, if:
>
> 5.1.1 In the case of a sole agency, the client enters into an agreement to sell or exchange the Property (or part of it) at any time during the term of the agency and the agreement is or becomes unconditional (whether during or after the term of the agency) …
>
> 5.2. Unless otherwise stated the commission will become payable immediately upon the contract for the sale of the Property becoming unconditional.

The commission was 2 per cent of the purchase price.

[69] Clause 7.2 of the listing agreement provides that the agent is entitled to deduct its commission from the deposit and that the agent is entitled to receive the deposit on behalf of the client. Clause 7.1.3 provides that if the deposit is not received by the agent, the client will pay the agent the commission and expenses immediately on receipt of an invoice. The invoice was not sent until May 2019.

[70] Mr Andrews accepted that if Unlimited Potential's summary judgment applications as defendant against Ms Janes failed, then its summary judgment application on its counterclaim could also not succeed. The fact that Ms Janes may have arguable claims which should be taken to trial was sufficient to prevent judgment being entered on the counterclaim for payment of commission. That makes sense under the principles laid down in *Mondel v Steele*, under which a claim for payment

for performance of services, the price may be abated because of defective performance by the party supplying the services.[24] In this case, arguably, the commission was entirely abated, as the losses suffered by Ms Janes exceeded the amount of the commission. Accordingly, the application for summary judgment on the counterclaim is also dismissed.

Summary

[71] Ms Janes obtains summary judgment against Ms Benney for $267,956.25 plus interest at the contract rate from 5 December 2018 being the date of settlement for the sale of Clifton Road. The interest rate is the interest rate for late settlement under the agreement, 14 per cent per annum. That is without prejudice to Ms Janes' right to continue the proceeding for any other damages she has suffered because of Ms Benney's failure to pay the deposit. It is not necessary to make any separate order for non-payment of the deposit because the damages that Ms Janes has recovered are greater than the deposit.

[72] Ms Janes is entitled to costs of the summary judgment application against Ms Benney. That will include costs of starting the proceeding.

[73] Ms Jane's applications for summary judgment against Mr Reed and Unlimited Potential are dismissed because they have arguable defences to her claims.

[74] Mr Reed's and Unlimited Potential's applications for summary judgment against Mr Vatselias are granted. He remains in the proceeding as a plaintiff for the claims against the fourth defendant but not as a plaintiff against any of the other defendants.

[75] Ms Janes' cause of action for breach of contract against Mr Reed is struck out but his application for summary judgment against her is dismissed. She can continue her claim against him for breach of duty in tort.

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[24] *Mondel v Steele* (1841) 8 M & W 858, 151 ER 1288.

[76] Unlimited Potential's applications for summary judgment against Ms Janes as defendant and as counterclaim plaintiff are dismissed.

[77] As for costs, the parties will need time to consider the judgment. I encourage them to discuss costs. If they cannot agree costs, memoranda should be filed. If costs are sought, I suggest that Unlimited Potential file its memorandum within ten working days and Ms Sheehan file her memorandum within a further ten working days, but I do encourage the plaintiffs to confer.

[78] I direct the Registrar to arrange a case management conference for further directions to be given.

[79] The parties have advised me that the fourth defendants will file and serve a statement of defence shortly.

[80] I direct that ahead of the conference Ms Janes, and the second and third defendants are to make standard discovery with the affidavits of documents to be filed and served by 9 September 2019.

[81] The second and third defendants are to file statements of defence by 19 August 2019. The plaintiff is to file and serve a statement of defence to the counterclaim by 19 August 2019.

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Associate Judge R M Bell