IN THE COURT OF APPEAL OF NEW ZEALAND

CA867/2010
[2011] NZCA 577

BETWEEN	MING GU Appellant
AND	XING HUA (DAVID) DU Respondent

Hearing: 27 September 2011

Court: O'Regan P, Randerson and Stevens JJ

Counsel: G P Blanchard for Appellant
C T Patterson and A E M Reid for Respondent

Judgment: 16 November 2011 at 10.30 am

JUDGMENT OF THE COURT

A The appeal is allowed.

B The High Court judgment is set aside.

C A finding is made that the appellant was entitled to avoid the joint venture agreement referred to in the Reasons of the Court due to the respondent's failure to comply with ss 63 and 64 of the Real Estate Agents Act 1976.

D Leave is reserved to either party to apply for a formal order to give effect to the finding made in C.

E The matter is remitted to the High Court for resolution of the issues remaining outstanding between the parties.

F **The respondent must pay the appellant costs for a standard appeal on a band A basis and usual disbursements.**

G **Costs in the High Court should be determined by that Court in light of this judgment.**

REASONS OF THE COURT

(Given by O'Regan P)

Table of Contents

Introduction

[1] This is an appeal against a judgment of Ellis J dealing with a property dispute between the appellant, Ms Gu, and the respondent, Mr Du.[1]

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[1] *Du v Gu* HC Auckland CIV-2009-404-5577, 7 December 2010.

[2] The dispute between the parties concerns a property in Albany of which Ms Gu is the registered proprietor. Mr Du and Ms Gu were parties to an agreement which provided that Ms Gu and Mr Du would jointly develop the Albany property (which was, at the relevant time, a vacant section) by building a house on it.[2] The joint venture agreement provided that a 50 per cent share in the property would be transferred to Mr Du in the event that he asked for a transfer to be effected, and that the parties would have 50 per cent ownership of the land and 50 per cent of the benefits and related risks of the development on the land.

[3] The joint venture agreement provided that the value of the land was equal to the amount owed on the mortgage over the land, and that after the joint venture agreement was signed the parties would be equally responsible for the servicing of this loan. In addition each was required to pay 50 per cent of the costs of building the house.

[4] A dispute arose about compliance with the joint venture agreement and Ms Gu refused to transfer a 50 per cent interest in the Albany property to Mr Du when called upon to do so. There was no dispute in the High Court that this amounted to a breach of the joint venture agreement by Ms Gu, but Ms Gu raised a number of positive defences.

[5] Of particular relevance to the present appeal is the defence that Mr Du had breached ss 63 and 64 of the Real Estate Agents Act 1976. Mr Du was a real estate agent for Ray White Albany, and Ms Gu argued that the Albany property had been listed for sale through Ray White Albany shortly before the joint venture agreement was entered into. There was no dispute that, if the property remained listed with Ray White Albany at the time the joint venture agreement was signed, then ss 63 and 64 of the Real Estate Agents Act applied. Nor was there any dispute that those sections had not been complied with. However, the High Court Judge found that the listing agreement with Ray White Albany was able to be terminated by Ray White Albany on the giving of reasonable notice, and that it had, in fact, been terminated on

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[2] The agreement was referred to in the High Court judgment as the joint venture agreement and we will use the same terminology.

14 February, prior to the date on which the final joint venture agreement was entered into. For those reasons she found that ss 63 and 64 did not apply.

Issue on appeal

[6] The sole issue on appeal is whether ss 63 and 64 applied. To resolve that issue, we need to analyse the listing agreement between Ms Gu and Ray White Albany and the circumstances in which it was entered into so as to determine whether it remained in force at the time the joint venture agreement was signed. In order to provide the context for the legal analysis that is required, it is necessary for us to deal with the facts surrounding the entry into the listing agreement and the joint venture agreement. We do this by reference to the factual findings made by the High Court Judge.

[7] The High Court judgment deals with a number of other issues and the full factual background is set out in that judgment. There were numerous disputed facts in the High Court and the fact that many documents were completed in Mandarin, as well as the absence of some key records of the transactions between Ms Gu and Mr Du, made the High Court Judge's task of deciphering the facts difficult. On appeal, however, neither party sought to challenge the factual findings made by the High Court Judge.

Factual background

[8] Mr Du came to New Zealand from China in late October 2006. He formed a friendship with Ms Gu's daughter, Nancy Luo and Ms Luo's husband, Jack Bian. Mr Bian and Mr Du set up a company together to undertake a business unrelated to the Albany property or to Mr Du's work as a real estate agent for Ray White Albany.

[9] Ms Gu bought the Albany property in 2006 as vacant land. In March 2008 it was listed for sale with Ms Luo, who is also a real estate agent, working for Barfoot & Thompson, Albany. The property was purchased for $315,000 and the asking price when it was listed with Barfoot & Thompson was $399,000, subsequently

reduced to $389,000. No offers were received. The property market was in a depressed state at the relevant time, particularly in relation to bare land.

[10] Mr Du claimed that he had discussions with Ms Luo and Mr Bian at various times between October 2008 and February 2009 about jointly developing the Albany property. However, Ms Luo and Mr Bian deny this, and the Judge did not make a factual finding. It does not appear to us to be relevant to the issues before us.

[11] Ms Gu and Ms Luo travelled to China in January 2009, and Mr Bian stayed in New Zealand. While Ms Gu and Ms Luo were in China, a decision was made to list the Albany property with Mr Du's real estate company, Ray White Albany. This did not terminate the listing with Barfoot & Thompson, however. The Barfoot & Thompson listing had initially been a sole agency, but by the effluxion of time had become a general agency.

[12] The listing agreement with Ray White Albany was signed on 4 February 2009 by Mr Du on behalf of Ray White Albany, and by Mr Bian on behalf of Ms Gu (he wrote her name on the form in the space provided for the vendor's signature).

[13] Mr Du's evidence was that he was concerned that Mr Bian did not have authority to sign the listing agreement on behalf of Ms Gu. He said that he discussed this with Mr Bian who told him that Ms Luo could sign on her return to New Zealand. The listing was removed from the Ray White Albany computer system on 13 February 2009. The Judge accepted that Mr Du had doubts about Mr Bian's authority to sign the listing agreement, but also accepted Mr Bian's evidence that he did, in fact, have Ms Gu's authority to sign the listing agreement. Thus, the listing agreement was, despite Mr Du's concerns, a valid agreement, and the agency relationship created by it continued in force until the listing agreement was terminated.

[14] About the same time as the listing agreement with Ray White Albany was entered into, discussions commenced between Mr Du and Mr Bian about the possible joint development of the Albany property. There was a dispute as to whether this was the continuation of earlier discussions or a new initiative, and there

was also a dispute as to who initiated discussions. But it is not necessary to resolve those issues for the purposes of the present appeal.

[15] The discussions that did take place culminated in a draft agreement being prepared and signed by Mr Du and Mr Bian. The document was prepared in Mandarin by Mr Du and was entitled a "Co-operation Agreement".[3] The final joint venture agreement took almost the same form, subject to the inclusion of a provision preventing either party from transferring its rights under the agreement and some adjustment to the figures, was signed on 25 February 2009. Whereas the 14 February 2009 document was signed by Mr Bian and referred to Mr Bian as being a party, the 25 February 2009 joint venture agreement described the parties as Ms Gu and Mr Du. Ms Luo signed for Ms Gu. Like the 14 February document, the joint venture agreement was in Mandarin. Its essential terms were as set out above.[4]

Sections 63 and 64 of the Real Estate Agents Act

[16] In broad terms, ss 63 and 64 of the Real Estate Agents Act prohibit a real estate agent from purchasing, leasing or anyway being interested in the purchase or leasing of any land which he or she is commissioned to sell unless:

(a) the principal has given consent to the transaction in the prescribed form; and

(b) the agent has provided an independent valuation of the land in question.

[17] Any contract made in contravention of s 63 "shall be voidable at the option of the principal", and no commission is payable in respect of the contract whether the principal avoids the contract or not.[5]

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3 This is the English translation of the title to the agreement. As already noted, the High Court Judge called it the joint venture agreement and so will we.

4 At [2]–[3].

5 Section 63(3).

[18] In the present case there was no dispute that, if a listing agreement between Ms Gu and Ray White Albany remained in force at the time the joint venture agreement was signed on 25 February 2009, then ss 63 and 64 applied and were not complied with. That would mean the joint venture agreement was voidable at Ms Gu's option.

The listing agreement

[19] The listing agreement was a Ray White standard form, but it was not completed properly by Mr Du. It is split into six parts. Part A provides as follows:

> **A APPOINTMENT OF AGENT**
>
> - (Delete one – if neither option is deleted then Ray White is appointed General Agent on the terms set out below.)
> - I/We appoint Ray White our EXCLUSIVE/AUCTION AGENT on the terms set out below.
> - I/WE appoint Ray White our GENERAL AGENT on the terms set out herein.

[20] In the present case, neither option was deleted so, on the strict terms of part A, the agency was a general agency.

[21] Part B was headed "**EXCLUSIVE/AUCTION AGENCY APPOINTMENT**" and set out four clauses dealing with exclusive agencies. On the face of it these provisions were not relevant because the parties had agreed to a general agency. However, part of the section had been filled in. The first of the four clauses in part B (cl B1) provided for the insertion of the date on which the agency commenced, and the clause then provided that the exclusive agency would expire 90 days from that commencement date, and thereafter the agency would continue as a general agency until cancelled by notice in writing to the agent by the principal. The space for insertion of the date had been completed – by writing 4 February 2009 in the relevant space. As cl B1 was relevant only to exclusive agencies, it was argued that the fact that cl B1 was completed provided some support for the contention that the agency was an exclusive agency.

[22] Part C provided as follows:

> **C GENERAL AGENCY APPOINTMENT**
>
> IN CONSIDERATION of Ray White using its best endeavours to effect a sale of the property, at the best price in the shortest time, I/we hereby appoint Ray White our General Agent for the sale of the property on the following terms:
>
> 1 This agency shall commence immediately on signing and shall continue until cancelled by notice in writing to the Agent, which notice may become effective not earlier than midnight on the 14th day after delivery of the notice.
>
> 2 Ray White will be entitled to be paid fees and commission plus GST as set out below in the event of:
>
> – My/Our entering into a binding agreement to sell the property through Ray White; or
>
> – A sale being achieved during period of this agency through Ray White; or
>
> – A sale is achieved (after this agency has expired or been terminated) to a purchaser introduced by Ray White, whether that contract becomes unconditional and binding during or after the period of the agency and whether or not the contract required extensions or alteration.

[23] Clause C1 is important. It is clearly intended to be the definitive clause about commencement, term and termination for general agencies, just as cl B1 is for exclusive agencies.

[24] Part D set out a number of provisions applying to both exclusive and general agencies. Part E provided for agreement on the amount to be spent on a marketing programme (the space for insertion of a dollar amount was not filled in), and part F provided for the commission payable to Ray White Albany if a sale was made.

[25] The contract form has four bold headings across the top of the page, each with a box next to it to allow for a tick or cross to indicate that one of the four options has been selected. The four options are: "Exclusive", "Auction", "Tender" and "Joint". The option that was selected in this contract was "Joint" and the words "with Barfoot" had been written immediately above that option.

Was the agency agreement in force on 25 February 2009?

[26] In the High Court, the focus of the argument and of the Judge's decision was on whether Mr Bian had authority to sign the listing agreement and, if so, whether the listing agreement had been terminated prior to 25 February 2009, when the joint venture agreement was signed. The Judge found that the listing agreement was valid, but also found that it was terminable on reasonable notice by Ray White Albany and that Mr Du had effectively terminated the listing agreement on or before 14 February 2009. She considered that the 11 days between 14 and 25 February was an adequate period of notice in the circumstances of the case, and therefore concluded that the listing agreement was not in force at the time that the joint venture agreement was signed, and therefore ss 63 and 64 did not apply. She accepted that the factual position was less than clear cut, but noted that it was Ms Gu who had the burden of proving her affirmative defence under ss 63 and 64. She had not discharged that burden.

[27] In this Court, counsel for Ms Gu, Mr Blanchard, raised three alternative arguments. These were:

(a) The listing agreement created an exclusive agency (subject to carve outs for the continuing agency arrangement with Barfoot & Thompson and the possibility of a private sale) and therefore continued in force for a 90 day period. Thus, that must have still been in force when the joint venture agreement was signed.

(b) As a fallback from that argument, he argued that even if the listing agreement provided for a general agency, the fact that the parties had completed cl B1 of the listing agreement (which dealt with exclusive/auction agency appointments) indicated that they intended the time period provided in that clause to apply to the general agency, even though the clause was expressed as applying only to exclusive agencies. If that argument were accepted, then the same outcome would arise: the listing agreement would be for a term of 90 days and

therefore would have clearly still been in force when the joint venture agreement was signed.

(c) As a further fallback, Mr Blanchard said that if the Court found that the listing agreement provided for a general agency, and that the 90 day term did not apply (i.e. cl C1 governed the term and termination), nevertheless the agency continued in force on 25 February 2009 because either Ray White Albany did not have a right to terminate the agreement or, if it did, it had not given the required notice of termination.

[28] We will deal with each of these arguments in turn. We record that it was not argued that the listing agreement had been terminated by agreement between the parties. So the ultimate issue turns entirely on the ability of Ray White Albany to terminate the listing agreement unilaterally.

Was the agency an exclusive/auction agency appointment?

[29] This argument had not been raised in the High Court and did not therefore feature in the Judge's decision.

[30] Mr Blanchard said that the agency was a sole agency because:

(a) The parties had inserted the date of the commencement of the agency in cl B1 of the listing agreement, which applied only to exclusive/auction agency appointments. He said this indicated that they must have intended that the agency appointment was an exclusive/auction agency appointment.

(b) The computer records of Ray White Albany recorded the listing date as 10/02/2009, and the listing expiry as 2/05/2009, which indicates that the employee of Ray White Albany responsible for keeping its records was under the impression that the agency was for a 90 day period.

[31] Mr Blanchard argued that, if the agency was for a term of 90 days, with a right of earlier termination by notice by the principal, it could not have been terminated by Ray White Albany as agent. He argued that the inclusion of a specific term with a right of earlier termination by the principal excluded the possibility of earlier termination by the agent. He said given that the term was only 90 days and the parties had obviously turned their minds to termination provisions, there was no proper basis for implying a term giving the agent a right of termination on notice before the expiry of the 90 day period provided for in cl B1.

[32] We do not consider that the listing agreement, properly interpreted, made an exclusive/auction agency appointment. We say this because:

(a) Part A makes it clear that if the parties do not delete one of the options set out in that part, then the agency is a general agency.[6] That provision is designed to ensure that, where the parties omit to select one of the options, the contractual position is nevertheless clear. We do not see any reason to go behind the clear words of part A.

(b) One would have expected the parties to select the "exclusive" box at the top of the page if the listing agreement was intended to create an exclusive agency. They did not do so, instead ticking the "joint" box and writing "with Barfoot". One of the other terms under the "Exclusive Agency" section, cl B3, required any other agency to be cancelled on signing of the agreement. The parties clearly did not contemplate an exclusive agency, since Barfoot & Thompson was acknowledged as also marketing the property.

(c) We do not see the entry in the Ray White Albany computer system as particularly significant. The person who made the entry did not give evidence, and there was no evidence to indicate that the entry was intended to record anything other than the relevant employee's own view about the contract. The fact that one employee of Ray White Albany thought that the contract continued for 90 days (an

[6] Reproduced at [19] above.

understandable view given that cl B1 had been filled in) does not seem to us to be of great significance.

(d) The completion of the date on which the listing agreement came into force in cl B1 did no more than state the contractual position that already applied to a general agency because of the terms of cl C1, which made it clear that the agency commenced on the date on which the listing agreement was signed. There is nothing to indicate that the parties intended the entry of the date in the relevant spaces in cl B1 to have any other contractual force.

(e) It was not put to Mr Du in the High Court that the agency was an exclusive agency and that possibility was not traversed in the evidence in that Court.

[33] We conclude, therefore, that the argument that the listing agreement was an exclusive/auction agency appointment to which cl B1 applied fails.

Was the listing agreement nevertheless for a 90 day term?

[34] Mr Blanchard's second argument was, even if the agency was a general agency, the completion of cl B1 by the parties indicated an intention on their part that the general agency would continue in force for 90 days, subject to any earlier termination on notice by the principal.

[35] This argument requires us to interpret the agreement as a general agency agreement, but not to apply cl C1 (which applies only to general agencies) and instead to apply cl B1 (which applies to exclusive/auction agency appointments). There is no reason to do that. If it is accepted that the agreement is a general agency, as we believe it must be, then the term of the agreement is clearly described in cl C1. We do not see any reason to go behind that clause.

Could Ray White Albany terminate the listing agreement on reasonable notice and, if so, was there reasonable notice?

[36] That brings us to the last of Mr Blanchard's arguments. In essence, his argument was that, if the agency was a general agency then cl C1 of the listing agreement applied. The only right of termination provided for in this clause is a right for the vendor to terminate upon giving 14 days notice. He said that, even if it was accepted that Ray White Albany had a right to terminate the listing agreement on reasonable notice, there was no proper basis for finding that reasonable notice of termination had been given by Ray White Albany or Mr Du on its behalf.

[37] As already noted, cl C1 provided for a right of termination by the principal, but did not provide for a right of termination by the agent. Thus, any right of termination by Ray White Albany has to be founded on an implied term that Ray White as agent was entitled to terminate the contract on the giving of reasonable notice.

[38] The High Court Judge rejected the argument made on behalf of Ms Gu that the only way Ray White Albany could terminate the agency agreement was if Ms Gu agreed. Her reasoning was as follows:

> [46] Mr Blanchard submitted that the agency agreement could only be revoked by Ming Gu (by giving the notice required in the listing document) or by agreement between the parties. I do not agree with that submission. It cannot be correct that (where the relevant agreement is silent on the point) an agent can only terminate a listing if the principal agrees. As is stated at [49] of *Luxford's Real Estate Agency*:[7]
>
> > [49] **Duration of the agency**
> >
> > ... Where no time limit has been fixed or where it is not specified that the agency is to continue until revoked in a manner which has been prescribed, it will be taken that the agency will continue in force for a reasonable time after its commencement or after the last occasion on which the principal, by words or conduct, recognises that it was still in force. The question of what is reasonable time is one of fact and must be determined in the light of all the surrounding circumstances. ...
> >
> > The general rule is that an agent's actual authority comes to an end ... (v) by notice of revocation given by the principal to the agent or

[7] *Luxford's Real Estate Agency* (Butterworths, Wellington, 1979).

by the agent to the principal, it being immaterial whether it amounts to a breach of contract.

[47] And similarly see Fridman *The Law of Agency*:[8]

> Since the relationship of principal and agent has been created by agreement between them, it follows that the relationship may be determined by both parties agreeing to the discharge of that relationship. It will also be determined if either party withdraws from his original agreement. This will occur where the principal gives the agent notice of revocation of the agency or the agent gives the principal notice of renunciation. Any such notice may be given in any form: a deed or document in writing is unnecessary, even if the original authority was contained in a deed...

[48] The question therefore becomes whether the agency was renounced by Mr Du, either by words or by conduct, a reasonable time prior to the execution of the final joint venture agreement on 25 February 2009.

[49] I have already indicated my acceptance that Mr Du did genuinely have concerns about Mr Bian's authority to sign the listing agreement. Notwithstanding Mr Bian's denial of this I consider it likely that Mr Du raised the issue with Mr Bian at some point just before or on 14 February.

[50] Perhaps more importantly, Mr Bian did not deny that discussions occurred between them at that time about the joint venture proposal. The joint venture proposal was in itself inconsistent with the continued listing of the property with Ray White. The reality is that neither party *ever* acted as if the listing was in force. The property was never advertised by Ray White; no query was raised about this by Ming Gu or her daughter or son-in-law. There is no evidence to suggest that either Mr Bian or Mr Du considered the possibility of Mr Du receiving a real estate agent's commission in relation to the proposed joint venture. And once the building of the house had commenced the listing with Barfoot and Thompson was also withdrawn by Ms Luo.

[51] For these reasons I consider that it can on balance be concluded that by his words and/or conduct Mr Du impliedly gave notice of his intention to terminate the listing on or before 14 February. While I acknowledge that care must be taken in inferring revocation by conduct, Mr Du's conduct here was unambiguous. Not only is there evidence that the steps he took (together with Mr Bian) were inconsistent with the continuation of the listing, but there is also no evidence that he took any steps whatsoever that were consistent with the continuation of the listing.

[52] Bearing in mind that under the listing agreement Ming Gu was required to give 14 days notice of termination I consider that the 11 days between 14 and 25 February was an adequate period of notice in the particular circumstances of this case.

[39] Counsel for Mr Du, Mr Patterson, supported the High Court Judge's reasoning. He amplified on her reasoning by arguing that the basis on which a right

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8 *The Law of Agency* (7th ed, Butterworths, London, 1996) at 389.

of termination on the part of the agency existed was that there was an implied term to that effect. He said the implication of a term to that effect (that the agent may terminate the contract on giving reasonable notice) met the five point test for the implication of terms in a contract laid down by the Privy Council in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings.*[9]

[40] Mr Blanchard's argument that Ray White Albany could terminate only by agreement with Ms Gu was predicated on his earlier argument that the agency agreement had a 90 day fixed term, followed by an indefinite term. In essence his argument was that the agent could not terminate during the 90 day fixed period. But he did not seriously contest the proposition that an agent could terminate the agency agreement on giving reasonable notice if the agency had no fixed term. However, he strongly argued that the period of notice required would be at least as long as the period of notice stipulated in the contract for termination by the principal, namely 14 days.

[41] As the High Court Judge found that the notice, if given, was given on 14 February, the consequence of adopting Mr Blanchard's argument would be that the agency agreement would have remained in force at the time the joint venture agreement was signed, and therefore ss 63 and 64 of the Act would have applied.

[42] Mr Patterson argued that 11 days was "reasonable notice" because the principal could terminate on 14 days notice in circumstances where the agent needed a period of grace to allow it to conclude any pending sale and claim its commission. No similar protection is needed for the principal given the listing was not exclusive (and Barfoot & Thompson was already engaged as an agent in this case). He said neither party had taken action pursuant to the listing agreement.

[43] We think it is necessary to be clear about what is, and is not, in issue in relation to this aspect of the case.

[44] The end point sought by Mr Blanchard is a finding that ss 63 and 64 were breached by Mr Du in entering into the joint venture agreement. Such a breach

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9 *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 16 ALR 363 at 376.

would have occurred only if Mr Du/Ray White Albany was "commissioned .... to sell" the property.[10]

[45] We are not required to decide whether the parties agreed to terminate the listing agreement as Mr Du does not suggest this happened.

[46] Nor are we required to determine whether the listing agreement can be terminated by the agent as Mr Blanchard for Ms Gu accepted that it cannot be that the agent remains bound until the property is sold or the property sells. We think that is a realistic position given the authorities on agency arrangements that make it clear that an agency under which the agent has an ongoing contractual commitment (in this case, the obligation to use its best endeavours to sell the property[11]) is unlikely to be intended to continue indefinitely, so the implication of a right to terminate on reasonable notice is justified.[12]

[47] We are also not required to determine whether a valid notice of termination was given by Ray White Albany. Ellis J found a valid notice was given on or before 14 February and that finding is not challenged on appeal.

[48] Our starting point, then, is that the listing agreement creates a general agency with no 90 day minimum term but that Ray White Albany has the contractual right to terminate on giving reasonable notice. The only issue we have to decide is whether 11 days notice was reasonable notice in the circumstances.

[49] We do not see the fact that the listing agreement provides the principal can terminate on giving 14 days notice as automatically requiring "reasonable notice" in the circumstances of this case to be 14 (or more) days notice. Mr Patterson submitted that the 14 day period is designed to enable the agent to complete any pending sales and for that reason does not apply to a termination by the agent itself. However, it seems unlikely that that is the reason for the 14 day notice period because, under cl C(2) of the listing agreement Ray White Albany would be entitled

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10 Real Estate Agents Act 1976, s 63(1)(a). That Act has been repealed and the equivalent provision in the current legislation is s 134 of the Real Estate Agents Act 2008.

11 Part C of the listing agreement, reproduced at [22] above.

12 *Paper Reclaim Ltd v Aotearoa International Ltd* [2006] 3 NZLR 188 (CA).

to its commission even if a sale that was pending before termination was not completed until after termination. It seems more likely that the 14 day period is designed to give Ray White Albany time to identify and sign up buyers whose interest in the property has been attracted by marketing efforts made by Ray White Albany while the listing agreement remained on foot.

[50] Mr Patterson argued that a long period of notice was not required by the principal in this case because the listing agreement was not exclusive (and Barfoot & Thompson were also commissioned to sell the property). We accept the force of that argument but we think it needs to be qualified by the fact that the principal has a contractual entitlement to have Ray White Albany use its best endeavours to sell the property and, while the agreement is in force, an entitlement that the agent will not seek to purchase or otherwise take an interest in the property personally (other than under the procedure required by ss 63 and 64). In our view the best endeavours obligation is such that the principal can expect an agent to have undertaken some marketing effort in relation to the property and that also gives the principal an interest in having a reasonable period before the agreement ends so that it can arrange for a replacement agent if it still wishes to sell the property. It may be different if the agency agreement simply offered a commission to the agent if the agent found a buyer, without the agent accepting any obligation to use best endeavours to find a buyer, but that is not the case here.

[51] Mr Patterson also argued that the fact that Ray White Albany had not taken any steps towards meeting its obligation to use its best endeavours to sell the property was indicative of the parties acting as if the listing agreement was terminated. We do not see that as a significant factor: it may have been relevant to an argument that the listing agreement was terminated by agreement, but it does not help identify what period of notice was required for a unilateral termination by the agent.

[52] In all the circumstances, we conclude that reasonable notice in the present context is not less than 14 days. We see such a period of notice being required in this case because the listing agreement is not simply a commission agreement, offering a commission to the agent if it sells the property. Rather the principal is entitled to

expect the agent to take positive steps to achieve a sale. Having taken on that obligation, we believe the agent is required to give sufficient notice to the principal to allow the principal to make new arrangements (for example to appoint an alternative real estate agent) if he or she believes that it is necessary to do so. Setting the required period of notice at not less than 14 days has the consequence that the notice period applying to termination by the agent is symmetrical with the period of notice fixed by the express terms of the listing agreement required in the case of termination by the principal. And the outcome also has the consequence in the present case of avoiding a potential undermining of the protective policy of ss 63 and 64. Of course, the parties could have agreed to an earlier termination, but it is not suggested that happened.

[53] As only 11 days notice was given, Mr Du and Ray White Albany remained commissioned to sell the property when the joint venture agreement was signed and, as ss 63 and 64 of the Real Estate Agents Act were not complied with, the joint venture agreement was voidable at Ms Gu's option.[13] Ms Gu has voided the agreement and Mr Du will need to make a new claim for repayment of the amounts he contributed to the property. He will need to file an amended pleading to that effect or make a fresh claim. Mr Blanchard made it clear that Ms Gu did not dispute Mr Du's right to restitution of the amounts he paid under the joint venture agreement and interest.

Result

[54] We allow the appeal and quash the High Court judgment. We find that Ms Gu's cancellation of the joint venture agreement was a valid exercise of her rights under s 63(3) of the Real Estate Agents Act. We reserve leave to either party to apply for formal order to give effect to that finding. The matter is to be remitted to the High Court for resolution of the issues remaining outstanding between the parties.

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[13] Real Estate Agents Act 1976, s 63(3).

Costs

[55] We award to Ms Gu costs for a standard appeal and usual disbursements. Costs in the High Court should be decided in that Court in light of this judgment.

Solicitors:
Ross Holmes Lawyers, Auckland for Appellant
Bute Law, Auckland for Respondent