

Dong v Sun

High Court Auckland
11, 12, 13, 14, 19 February 2014
Faire J

CIV 2013-404-1260; CIV 2013-404-
1259; [2014] NZHC 208

Sale of land — Formation of contract — Property owned by trust — Only one registered proprietor signed sale and purchase agreement — Warranty that all trustees have approved entry into agreement — Whether agreement enforceable — Application that caveat not lapse — Specific performance — Another agreement entered with second vendor personally and as attorney for first vendor — Title transferred to second purchaser — High Court Rules, r 10.15; Trustee Act 1956, s 31.

In 2002 April bought a property. April had two sisters: June and Julie. Sun, a friend of June, and June were trustees of Sun Trust which bought the property from April in 2010. April rented the property from Sun Trust. Two years later April decided to move out. Julie and her husband were interested in buying the property and offered \$750,000. Sun wished to get the best price and so Sun and June listed the property for auction with an agent. The property was passed in at auction.

After the auction, in December 2012, the plaintiff offered to buy the property for \$760,000 and gave a deposit of \$76,000 to the agent. After negotiations over price, Sun signed a memorandum of contract with the plaintiff at a price of \$775,000. Sun did not consult June. Sun sent a copy of the memorandum of contract to June. June told Sun that Julie still wished to purchase the property and Julie would pay \$760,000 once the agency had expired so Sun Trust would get a better deal. However, Sun proceeded with the sale to the plaintiff.

June received legal advice that because she had not signed the agreement for sale and purchase, the agreement with the plaintiff was not enforceable. Despite that advice, Sun proceeded the sale with the plaintiff. The plaintiff's solicitor was then advised by June's solicitors that the agreement was unenforceable. The plaintiff instructed her solicitor to proceed with purchase. The plaintiff's solicitor served a settlement notice and lodged a caveat over property.

In January 2013, Julie and her husband proceeded to sign a formal contract to purchase the property. For the vendors it was signed by June for herself and as attorney for Sun. Settlement of this contract later took place and the title was transferred to the purchasers.

The plaintiff issued proceedings against Julie and husband and sought an order that her caveat not lapse. She also issued proceedings against Sun and June, and Julie and husband seeking, amongst other things: (i) a declaration that her sale and purchase agreement was enforceable; (ii) a declaration that her agreement was a prior identifiable interest in property; (iii) an order directing specific performance of her agreement and/or damages and costs; (iv) a declaration that Julie and her husband obtained interest in property fraudulently and subject to the plaintiff's prior interest.

Held: (entering judgment for the defendants)

(1) As to the alleged agreement between the Sun and the plaintiffs, where one co-owner signed a document, the presumption or presumed intention was that the signature was conditional upon the signature of the other co-owner (see [54], [55]).

(2) The facts did not provide any basis for the invocation of s 31 of the Trustee Act. No power of attorney had been executed which might justify the first-named defendant acting in reliance on s 31, even if it were otherwise permitted (see [57]).

(3) The implied actual or usual authority of a real estate agent or a solicitor did not extend to create a binding agreement for the sale of the property. In addition, neither could have apparent authority to do so. There was no express actual authority given by June to any of the potential agents to enter into the document (see [58]).

(4) For these reasons there was no contract created by the document between Sun and the plaintiffs.

(5) Obiter, express warranty in the contract of sale to the plaintiffs that "all of the persons who are trustees of the trust have approved entry into this agreement" can apply only if the parties have entered into an agreement, and has no application if to the question whether or not the parties have actually entered into an agreement (see [60]).

(6) The Court ordered that the caveat lapse.

Cases mentioned in judgment

Burt v Henry (2007) 8 NZCPR 573 (HC).

Commissioner of Inland Revenue v Newmarket Trustees [2012] NZCA 351, [2012] 3 NZLR 207.

H Clark (Doncaster) Ltd v Wilkinson [1964] Ch 695 (CA).

Insight Legal Trustee v Stokes [2013] NZCA 148, (2013) 14 NZCPR 118.

Quirk v Winter [1920] NZLR 98 (SC).

Martinez v Rowland [1983] 1 Qd R 496 (SC).

Niak v Macdonald [2001] 3 NZLR 334 (CA).

Nowrani Pty Ltd v Brown [1989] 2 Qd R 582.

Rodney Aero Club Inc v Moore [1998] 2 NZLR 192 (HC).

Thorpe v Hannam (2010) 11 NZCPR 471 (HC).

Applications

The plaintiff sought an order that her caveat not lapse and also applied for declarations and for an order of specific performance.

PJ Stevenson for the plaintiff.

GP Blanchard for the first defendants.

MJW Lenihan for the second defendants.

FAIRE J.*Introduction*

[1] Two proceedings have been consolidated for hearing. They both relate to the residential property at 11 Hillstan Place, Royal Oak, Auckland, hereafter referred to as “the property”.

[2] In the first proceeding, the plaintiff seeks an order that her caveat registered against the title to the property, and which is in the name of the second defendants, not lapse.

[3] In the second proceeding, the plaintiff seeks, against the first defendants:

- (a) a declaration that a sale and purchase agreement is enforceable by the plaintiff against the first defendants;
- (b) a declaration that the agreement between the plaintiff and the first defendants is a prior identifiable interest in the property;
- (c) an order directing specific performance of agreement or, in the alternative, or in addition to specific performance, damages in an amount yet to be quantified, plus interest and costs.

[4] The plaintiff seeks against the second defendants:

- (a) a declaration that they have obtained their interest in the property fraudulently and subject to the prior interest of the plaintiff in the property arising by virtue of a valid binding and enforceable agreement between the plaintiff and the first defendants; and
- (b) a declaration that the prior interest of the plaintiff in the property as purchaser pursuant to a valid binding and enforceable agreement with the first defendants should be reflected by the registration of the plaintiff as registered proprietor of the property;
- (c) a declaration that all instruments necessary to enforce the plaintiff’s rights as registered proprietor of the property shall be executed.

Preliminary matters

[5] At the commencement of the trial, counsel raised four preliminary points. I issued a minute making orders in respect of each of the matters raised, the detail of which need not be repeated in this judgment, save for one matter.

[6] The defendants complained about the late introduction of particularisation of damages and evidence relating to damages.

[7] Rather than delay the trial I proposed, and counsel accepted, that I should, in reliance on High Court r 10.15, determine all issues save for those relating to damages and an affirmative defence which the defendants wish to raise to the damages section of the claim. Those matters can be determined, if necessary, when the outcome of the balance of the claim is known. Accordingly, this judgment proceeds on that basis.

Background

[8] The property is a 1960s two-level dwelling of approximately 280 square metres. The upper floor level comprises a three-bedroom main residence. The basement contains two self-contained flats.

[9] Rong Lin Zhang, who is also known as April, and who is the sister of the second-named first defendant and the second-named second defendant, purchased the property in 2002. I shall refer to the three sisters by the European names by which they are known. The second-named first defendant is known as June. The second-named second defendant is known as Julie. April, June and Julie's mother is Ying Xian Liu. She is approximately 76 years of age. She has lived in the property since 2002.

[10] The first-named first defendant, Changmin Sun, whose principal residence is in Hong Kong, is a friend of June. She and June are the trustees of the Sun & Sunbirds Family Trust, which was established by deed on 4 July 2005. In 2010, the Sun & Sunbirds Family Trust purchased the property from April. Changmin Sun says the property was purchased as an investment. She and her family are the beneficiaries of the Sun & Sunbirds Family Trust. June has no beneficial interest in the trust. Changmin Sun says that she has never seen the property during her ownership. She has no personal attachment to it.

[11] At the time of the sale in 2010, April agreed to rent the property from the Sun & Sunbirds Family Trust so that her mother could continue to live there. June managed the property on behalf of the Sun & Sunbirds Family Trust.

[12] In September 2012, April wished to purchase a house for herself. She said that she would move out of the property once she had bought another house.

[13] That signalled a change because the Sun & Sunbirds Family Trust would need to find suitable tenants, particularly for the main dwelling. June says that her sister, Julie, and Julie's husband were interested in buying the property. Julie offered the trust, and this was communicated to Changmin Sun, \$750,000 for the property in early October 2012. Changmin Sun says that she was not sure of the true value of the property and wanted to test the market. At Changmin Sun's request, June obtained a valuation of the property from Morley & Associates Ltd, registered valuers. They valued the property, including chattels, at \$705,000.

[14] Julie's offer of \$750,000 had not been made directly to Changmin Sun. Changmin Sun says almost all her contact with Julie was made through June. She said that that made things easier as June was a co-trustee and owner of the property and knew what was going on.

[15] There were emails between the parties in November 2012. June advised Changmin Sun that Julie was still interested in purchasing the property. Changmin Sun's concern was to get the right price. Changmin Sun wanted to have the property listed for sale and she, in fact, listed it for auction sale through Monica Chen at LJ Hooker Real Estate Agents in Ponsonby. In an email to June on 15 November 2012, she advised that she had set the reserve price at \$810,000. She had calculated that that would give her the same amount that she had asked for from Julie, namely \$775,000. In her email, she advised that if the property could not be sold for the reserve she would keep it and spend some more money on renovating it.

[16] On 15 November 2012, June and Changman Sun signed a residential agency agreement with LJ Hooker Real Estate Agents. The terms of that agency provided what is an exclusive/sole agency until 11 January 2013. The agreement instructed LJ Hooker to offer the property for sale by auction at a reserve price to be notified before the auction. It recorded the auction date to be 12 December 2012. It provided for payment of marketing fees. Of some significance for this case is that under the terms and conditions there is recorded that the agent appointed under the authority is not permitted to sign any agreement for sale and purchase for the sale of the property. The property was advertised for sale by auction. An advertisement placed on 6 December 2012 is included in the documents produced. Other promotional information for the purposes of the auction, which had been prepared by LJ Hooker was also produced and requires no particular comment.

[17] On 5 December 2012, Mr David Liu of LJ Hooker sought confirmation as to who the vendors' solicitors would be. A series of emails passed, which resulted in the confirmation that Mr Richard Chen of Short & Partners would be the solicitors for the property's owners.

[18] The plaintiff says that she saw the property advertised in the newspaper with LJ Hooker, Ponsonby as the real estate agent. She went to an open home for the property. She met with one of the agents there, Monica Chen. She was told of the auction on 12 December 2012.

[19] On 10 December 2012, Changmin Sun signed an auctioneer's reserve price authority at \$810,000. Although June did not sign the auctioneer's reserve price authority, she knew about it.

[20] The auction took place on 12 December 2012. The property was passed in because it did not reach the reserve price. Discussions then took place between Changmin Sun and June over the possibility of Julie and her husband purchasing the property.

[21] After the auction, the plaintiff spoke with one of the agents, Monica Chen. She advised Monica Chen that she would buy the property for \$760,000. She gave Monica Chen a cheque for \$76,000 as a deposit. She signed an agreement which was prepared based on the auction forms, that is the form approved by the Real Estate Institute, Fourth Edition 2012, for Auction Sales and which contains as part of that document, a document headed *Memorandum of contract*. The document in itself does not correctly describe the position that had been reached because the purchaser is described as being the highest bidder, or by agreeing with the vendor to purchase the property. Clearly, what this document was intended to start was an offer process by the plaintiff to the vendors after the auction and in respect of the property. The memorandum of contract describes the purchase price as \$760,000. The two references to GST, somewhat surprisingly, have been crossed out. The deposit is described as \$76,000. That document was signed on 12 December 2012 by the plaintiff.

[22] Negotiations then occurred between the agent, the plaintiff and Changmin Sun by email. That resulted in Changmin Sun receiving advice that the plaintiff was prepared to offer \$775,000 for the property. Changmin Sun signed the memorandum of contract, which had been signed by the plaintiff with a price of \$775,000, on 16 December 2012.

She did not consult June before she signed the contract. She said that she knew that June did not know or consent to her signing the contract. It is common ground that June, in fact, did not sign the contract.

[23] Changmin Sun's position in signing the document requires some comment. She says that her family situation had changed. Her mother was diagnosed with lung cancer and that caused her a lot of anxiety. She was anxious to get the property sold. She was reasonably happy with the price. She was happy for it to be sold either to Julie, or the highest bidder. She said that her concern was simply to get rid of the headache. After the auction, LJ Hooker continued to conduct open homes. June told her that there was a family gathering and she would come back to her with advice as to whether Julie would proceed with the purchase or not. Changmin Sun said that she was concerned with the way that Julie appeared to her to be delaying making a decision.

[24] Changmin Sun forwarded a copy of the document that she had signed to June on 17 December 2012. June replied by email advising that she was upset. There were further discussions by email between June and Changmin Sun. The purport of that was that June told Changmin Sun that if they waited until the LJ Hooker agency had expired, Julie could buy the property for \$760,000 with the result that the trust would get more than would be the net return at a sale to the then purchaser, the plaintiff, for \$775,000. June told Changmin Sun about her mother's attachment to the property and that that was Julie's reason for considering the purchase. She said she was told by June, that if Julie could purchase the property at \$760,000 they would have it settled on or about 14 or 15 January 2012.

[25] In the emails that took place, the analysis of the two potential purchase positions, taking into account responsibility for real estate commissions, was set out. The net proceeds, leaving aside other costs, after payment of real estate commission, if the first defendants proceeded with the plaintiff's offer was \$753,709.75, compared with what was proposed by Julie and her husband's potential offer to purchase of \$760,000.

[26] Changmin Sun said that June had advised her that she would forward the relevant information to a lawyer to see if Julie could still purchase the property.

[27] Whilst the above discussions were going on, Changmin Sun and the plaintiff signed a document produced by the real estate agents, in the following form:

Pursuant to the Real Estate Agents Act 2008, this authority is to authorise you to realise forthwith from your trust account deposit of \$76,000 from 2.7 HAO in respect of the above transaction and to disperse the funds to the persons lawfully entitled thereto.

[28] The next day, on 17 December 2012, LJ Hooker issued a receipt for \$76,000 to the plaintiff, which describes the payment as "deposit for 11 Hillstan Place, Royal Oak". Both first defendants and the plaintiff are recorded on that document.

[29] Also on 17 December 2012, the lawyers for the first defendant received the agreement form from LJ Hooker. Meanwhile, the exchange of emails between June and Changmin Sun continued. On 18 December 2012, June emailed Changmin Sun. Two passages from the email have a bearing on the issue that needs resolution on this case. It provides:

I will forward all the relevant information to lawyer and find out whether I will still able to purchase 11 Hillstan or not ...

For the meantime you do not need to do anything and hope this will cause minimum hassle for you. From your side, the house is definitely sold, either to “Dong” or to me. So please relax ...

I notice the settlement date from Dong is 10/1/13. As the sole agent right will expire on 11/1/13 (Friday). I would like to have the settlement date either on the following Monday – 14/1 or Tuesday 15/1. If you feel comfortable, I would like to sign an agreement with you and pay 10 per cent deposit once lawyer confirm I still can purchase the house.

[30] There next followed a breakdown in communication in that an engagement letter that was intended for the first defendants from Short & Partners, their appointed lawyers, was misaddressed and they did not receive it. That has a consequence because steps were taken by the lawyers without specific knowledge of the first defendants.

[31] June says that on or about 18 or 19 December 2012, she sought advice from Richard Chen, the lawyer at Short & Partners. She said that she told him the agreement for sale and purchase had only been signed by Changmin Sun and that the trust deed required both trustees to sign. She said that Richard Chen told her that the agreement for sale and purchase was not enforceable. She said that she made it clear to Richard Chen that she did not approve of the sale and did not want it to proceed.

[32] Richard Chen was called. In his evidence-in-chief he records that he had a call from June on 17 or 18 December 2012. His description of the discussion is rather loose. In chief he said that he advised June that as there were two trustees and they were both registered proprietors, the agreement for sale and purchase was not enforceable as only Changmin Sun had signed it. He recorded that June made it clear that she did not approve the sale and did not want it to proceed.

[33] He was cross-examined by Ms Stevenson. It is apparent from that that he kept no file notes and certainly gave no instructions to members of his staff to desist from proceeding with the agreement which discloses Dong as the purchaser. He claimed to have no direct involvement with the receipting process by his firm. He acknowledged that he had signed the client authority letter which the two first defendants did not receive but, in which there is recorded the existence of an agreement, and, again, said that that was something that had been prepared by somebody else.

[34] When challenged as to why he did not refer to the discussion with June about the enforceability of the contract in an earlier affidavit that he had sworn in the caveat proceeding, his response was simply to say that the affidavit was a mistake. The casualness with which Mr Chen’s

instructions from the first defendants were received and acted upon was further exemplified by the fact that he sent an email to the legal executive acting on the plaintiff's behalf of 19 December 2012, requesting that the settlement date be put back to 17 January 2013 as he was returning from holiday in China on 16 January 2013.

[35] The next matter of some significance is that he noted that he received a call from the solicitor acting for the plaintiff in which he was asked for a settlement statement and e-dealing number. His response was that he told the solicitor concerned to get in touch with his assistant. He said the reason for this was that he was about to fly to China on 20 December 2012.

[36] I am satisfied that there was a discussion of some sort between June and Richard Chen in which June received advice to the effect that, in a general way, that if a trust deed required two trustees to sign a contract, the contract would not be enforceable if only one signed it. Apart from that, however, Richard Chen's mind seemed to be distracted when acting for the first defendants in this matter because his office continued to proceed as if there was an enforceable contract with the result that on 21 December 2012 Short & Partners sent e-dealing details and a request for the purchasers' information to the purchasers' solicitors. They also prepared what I shall call a draft statement with an attached fee statement. The statement is clearly incomplete because it omits any reference to the repayment from any purchase moneys, of moneys owed to the then mortgagee, the Bank of New Zealand.

[37] June, however, sought further advice concerning the enforceability of the agreement. That came from her daughter, Tracey, who has a law degree. Tracey emailed her mother on 21 December 2012. She gave a general description of trustee liability and then added the following:

Trusts aren't a separate legal entity (like a company). It's just you and Changmin, as individuals, carrying out a transaction. So if you didn't sign, and you are a co-owner of the property, then there isn't really a contract.

[38] The plaintiff instructed solicitors, Loughlin McGuire & Roud Lawyers Ltd. The principal is Mr Serge Roud. He received his legal training and qualifications in Russia. He was admitted as a barrister and solicitor of the High Court of New Zealand in 2006 and has been practising in New Zealand since. He gave his evidence with the assistance of an interpreter. He employs, as a consultant, Eliza Ngan. She has accounting and business qualifications and is in the process of completing her legal executive qualifications. She was the contact point for the plaintiff.

[39] Mr Roud says that on obtaining instructions he obtained a search of the title of the property. He established that the registered proprietors shown in the document as the agreement were, in fact, the registered proprietors. He referred to the request to defer the settlement date that he received from Short & Partners. He also referred to instructions that he had received on the plaintiff's behalf from the ANZ Bank. He said that insurance was arranged through the ANZ Bank, and produced a certificate to that effect. He recorded his receipt of the

conveyancing details from Short & Partners. He recorded the receipt into his trust account of \$380,000 from the ANZ Bank on 16 January 2013, which was clearly advanced with a view to completing the purchase. Also on that date, \$307,727.28 was paid in to his trust account, again for the purposes of completing the settlement.

[40] He then says that later on 16 January 2013, he received advice from Short & Partners that their clients considered that the agreement was unenforceable. The letter from Short & Partners was produced. It concludes:

... our clients believe that the agreement does not exist at all. They instruct us to refund the deposit to your client. Please provide your trust account deposit slip.

[41] In the meantime, the plaintiff had visited the property. Some significance was placed by the plaintiff on the fact that on one visit, the property appeared to have evidence that contents had been packed in respect of the main and upstairs flat. Mrs Liu, who was the occupant, was called and denied that she had any intention of moving out of the main unit.

[42] Meanwhile, Mr Roud having received advice from the first defendants' solicitors informed the ANZ Bank of the allegation and, as a result of further correspondence with the Bank, the loan advance was refunded to the Bank. He said that he nevertheless received instructions from the plaintiff to proceed and settle the purchase. He arranged for the service of the settlement notice. He also arranged for a caveat to be lodged. There is no contest about these steps. On 24 January 2013, in the course of a telephone discussion with Mr Richard Chen about another matter, Mr Chen arranged for \$53,816 to be paid to Mr Roud's trust account. He says that he wrote to Short & Partners, noting that payment and recording that the contract was still in force. I record, at this stage, that the payment was a payment of only part of the deposit because the real estate commission had been retained by the real estate agents.

[43] The next development from his perspective was receipt of a letter from the first-named second defendants on 4 February 2013 which, in short, demanded that the caveat that had been lodged must be removed and advising that if it was not removed within the next day, instructions would be given to the High Court to have it removed.

[44] Mr Roud was cross-examined as to whether he had reviewed the contract document that had been received. He thought that the first time that he had reviewed it was on 19 December 2012. When asked whether he had noticed that only one of the vendors had signed the agreement, he simply responded that:

No, I didn't notice that ... I didn't have to pay attention to that particular point.

He also said that he felt that the contract had been affirmed by the solicitors' request to agree to a deferred settlement date.

[45] I now return to events surrounding the signing of the contract which led to registration of a transfer of the property to the second

defendants. The basis for that contract was not actually concluded until about 8 or 9 January 2013. It was on that day that the emails disclose a basis for contracting which provided for a payment of \$300,000 on 14 January 2013 and interest on the balance of \$460,000. Advice was also given:

If no hassle from purchase side, we can settle the property in a month time say 14/2.

That position, in principle, was confirmed by Changmin Sun in an email on 9 January 2013. The formal contract was signed on 13 January 2013 and title was transferred to the second defendants on 16 January 2013.

[46] The formal agreement was brought to completion by new solicitors acting for the first defendants, namely William Gong. His conveyancing file appears to have opened on 14 January 2013 with the receipt of the \$300,000 first payment. Steps were taken very quickly by William Gong, which included contact with the then mortgagee, the BNZ so that a discharge of mortgage could be arranged. A power of attorney was prepared. It was signed by Changmin Sun and it appointed June as Changmin Sun's attorney. June signed the A&I form for the transfer of the property from the trust to the purchasers. She also signed an acknowledgement and indemnity, indemnifying William Gong in respect of the financial arrangements for the transaction on behalf of the first defendants. June was also instrumental in the instruction of the solicitors who acted for the purchasers, that is, for her sister and her brother-in-law, Mark Lee Lawyers. That solicitor received no funds from the purchasers. That is not surprising because the \$300,000 payment had been made direct to William Gong and the balance was covered by an on-demand loan, which was covered by a separate document.

[47] There are some unsatisfactory and, certainly, unhelpful steps taken by June in this matter. One, of course, was the instruction to Richard Chen to delay sending what was the notification of claim that the first contract document was unenforceable or did not exist. I do not regard those actions, however, as being actions which directly affect the legal liability of the parties in relation to their contractual obligations. The reason for that will be shortly explained.

[48] Ms Stevenson cross-examined the second defendants as to their financial viability and, in particular, whether they had the wherewithal to complete the purchase. The figures presented in evidence were not precise, but it does seem that the total borrowing by the second defendants would have been met by the rental income from the property provided the three units were fully tenanted. Having said that, there is nothing in the material presented to me to suggest that this second agreement was a sham, or that it was executed by parties who had no real financial ability to complete the transaction. The contrary, in fact, is the case. Having regard to the answers given by both second defendants to cross-examination by Ms Stevenson, I was left with the impression that they had sufficient equity in the combined properties to complete the purchase. Although their own incomes were modest, the income from rent for the property when received enabled them to meet their obligations.

The pleadings

[49] The plaintiff pleads as against the first defendants:

- (a) breach of an agreement dated 16 December 2012 and seeks the relief earlier referred to; and
- (b) breach of the same agreement which the plaintiff says has been part-performed by:
 - (i) the first defendants authorising commission to be paid to LJ Hooker, real estate agents;
 - (ii) the second-named first defendant emailing the first-named first defendant describing the events as a sale of the property; and
 - (iii) although not specifically pleaded, by the following steps:
 - (1) authorising the agent to deduct commission from the deposit;
 - (2) authorising the solicitors to take various steps aimed at leading to a completion of the contract;
- (c) that the first defendants, by their actions, represented that there was a contract to purchase the property between them and the plaintiff, with the result that they are estopped from resiling from the representations so made, and with the consequence that the plaintiff is entitled to the same relief as if a contract had been entered into.

[50] The plaintiff pleads against the first and second defendants that the actions of the first and second defendants in entering into the agreement on or about 14 January 2013 were undertaken with the shared purpose and intention of defeating the interests of the plaintiff in the property pursuant to the agreement which the plaintiff alleges was entered into with the first defendant on 16 December 2012. It is pleaded that, in all the circumstances, the second defendants obtained a registered interest in the property pursuant to Land Transfer Act 1952 fraudulently and that, accordingly, a declaration to that effect should be made so that the title position can be appropriately corrected.

The issues for determination in this judgment

[51] I have not specifically referred to the affirmative defences raised under the pleadings section because, for the purposes of this judgment, it is possible to list the specific issues that require determination without further analysis of the defendants' pleadings. In summary they are:

- (a) Was the document dated 16 December 2012 a binding and enforceable contract between the plaintiff and first defendants?
- (b) Alternatively, was the document of 16 December 2012, taken in conjunction with other steps taken by the parties, an oral agreement which, by reason of the doctrine of part-performance, was a binding and enforceable contract between the plaintiff and the first defendants?
- (c) Alternatively, are the first defendants estopped by virtue of the representations allegedly made to the effect that there was an

existing contract between them and the plaintiff, from denying the document of 16 December 2012 represents such an agreement with the result that the plaintiff is entitled to the contractual relief claimed in the first and second causes of action?

- (d) If the plaintiff is successful in any of the three alternative causes of action, is she also entitled to an order for specific performance?
- (e) Does the conduct of the defendants justifying an order that title to the property vested in the plaintiff?

Analysis

Was there an agreement made on 16 December 2012?

[52] What is clear from the evidence is that June never agreed to sell the property for \$775,000 and, in particular, never agreed to sell the property to the plaintiff. She did not sign the 16 December 2012 document. She did not even know of its existence or of the negotiation that had preceded it being signed by the plaintiff and the first-named first defendant.

[53] Nowhere in the evidence is there anything that suggests that June authorised her co-owner to make the decision to sell to the plaintiff on the terms of the 16 December 2012 document alone. Indeed, Changmin Sun, on the day following, sent the agreement to June for consideration.

[54] It is unfortunate that neither solicitor for the plaintiff, nor the first defendant expressly considered whether the document of 16 December 2012 had been signed by both registered proprietors. At least the plaintiffs' solicitor was aware of the fact that June was a registered proprietor. He had obtained a search.

[55] Where a co-owner signs a contract document, the presumption or presumed intention is that the signature is conditional upon the signature of the co-owner.¹ That position is consistent with the analysis that I carried out in *Burt v Henry*.²

[56] The registered proprietors are trustees of a trust. In *McMorland, Sale of Land* the learned authors said:³

Where either the vendor or the purchaser is a “trust”, the parties to the contract must be the trustees of the trust, the trust itself not being a legal person. The trustees of a trust are subject to their unanimity (all trustees must act in unanimous agreement) and non-delegation (a trustee may not delegate his or her powers or duties to a co trustee or to a stranger) principles, and each trustee must sign the agreement in the absence of a power for fewer to do so conferred by the trust deed, or under s 31 of the Trustee Act 1956.⁴

[57] The facts simply do not provide any basis for the invocation of s 31 of the Trustee Act 1956 to this case. No power of attorney has been

1 *Martinez v Rowland* [1983] 1 Qd R 496 (SC).

2 *Burt v Henry* (2007) 8 NZCPR 573 (HC).

3 DW *McMorland Sale of Land* (3rd ed, Cathcart Trust 2011) at 3.02.

4 Principle applied in *Rodney Aero Club Inc v Moore* [1998] 2 NZLR 192 (HC) at 195–196, *Niak v Macdonald* [2001] 3 NZLR 334 (CA) at [16], *Thorpe v Hannam* (2010) 11 NZCPR 471 (HC) at [18]–[28], *Insight Legal Trustee v Stokes* [2013] NZCA 148, (2013) 14 NZCPR 118 at [20], *Commissioner of Inland Revenue v Newmarket Trustees* [2012] NZCA 351, [2012] 3 NZLR 207, [2012] NZCCLR 29 at [49] and [51], and *Burt v Henry*, above n 2, at [23].

executed which might justify the first-named first defendant acting in reliance on s 31, even if it were otherwise permitted.

[58] It is apparent that the real estate agent, or salesman concerned, advised the plaintiff of the first-named defendant's execution of the document on 16 December 2012. That, however, does not address the question of whether one of the registered proprietors had accepted what was a counter-proposal. I accept Mr Blanchard's submission that the implied actual or usual authority of a real estate agent⁵ or a solicitor⁶ does not extend to create a binding agreement for the sale of the property. In addition, neither can have apparent authority to do so.⁷ I have already recorded that there was no express actual authority given by June to any of the potential agents to enter into the document which was signed on 16 December 2012.

[59] It is appropriate that I refer to cl 17 of the 16 December 2012 document. I do this, even though no claim for breach of warranty has in fact been pleaded. Nevertheless, I note, for the purposes of this case, that part of cl 17 of the document which was raised in argument. It is as follows:

Limitation of liability

If any person enters into this agreement as trustee of a trust then

- i) That person warrants that:
 - (d) all of the persons who are trustees of the trust have approved entry into this agreement.

[60] Mr Blanchard submitted, correctly in my view, that the clause can only apply if the parties have entered into an agreement. It does not apply to the question of whether or not the parties have actually entered into the agreement. Once an agreement is established, then the parties are bound by the clauses in it, including cl 17. There is before me no foundation for the proposition that Ms Changmin Sun intended to sign this agreement unconditionally. Accordingly, I conclude that cl 17 does not apply. I further conclude that the document of 16 December 2012 is not an agreement. In addition, I conclude that there is no evidence which would suggest that document plus some other oral evidence constitutes an oral agreement which, in turn, might be the subject of a part-performance claim. It was not suggested by counsel that the cases, which have been described as the authenticated signature fiction cases, might cover the present situation. For that reason, I do not analyse it further. Nor do I analyse whether that fiction survives the passage of the Property Law Act 2007 in any event.

[61] Additionally there is no evidence to support the suggestion that June has acted fraudulently or breached her obligation to act for the proper purpose of the trust. Rather the evidence establishes that June had been informed that the plaintiff had no enforceable interest in the property and

5 *Quirk v Winter* [1920] NZLR 98 (SC).

6 *Nowrani Pty Ltd v Brown* [1989] 2 Qd R 582.

7 *H Clark (Doncaster) Ltd v Wilkinson* [1964] Ch 695 (CA).

that based on this she acted to secure a contract for higher consideration than the original proposed sale. This clearly was in the interest of the trust.

[62] The above disposes of the first two causes of action pleaded. In short, there was no agreement created by the document of 16 December 2012.

Has there been an estoppel by representation?

[63] The problem for the plaintiff with this pleading is that, in reality, no steps have been taken by her that would not have been undertaken by a person attending an auction and being prepared to make a bid that could lead to the entry into an unconditional contract of purchase.

[64] The plaintiff was advised of the unenforceability of the contract prior to settlement. She was never at risk of having to pay the balance of the purchase price without receiving the property in return. There was an early refund of the deposit. Counsel gave an undertaking to the court that the balance, representing the real estate commission, would be paid by the first defendants irrespective of whether the agent agreed to refund it. It is difficult in the circumstances to see why equity should be asked to intervene to put this plaintiff in a better position than she would be in under orthodox principles of contract and agency, which leads to the conclusion that no agreement was ever formed.

[65] Undoubtedly the plaintiff is disappointed that she has not been able to proceed with the purchase that she anticipated. That, however, is not sufficient to justify the invocation of equity in this case. The learned author of *Equity & Trusts in New Zealand* observes:⁸

The representee must have acted or abstained from acting in such a way that he or she will suffer harm over and above his disappointed expectation.

[66] That, by itself, is sufficient to answer this plea. The circumstances surrounding the plaintiff's involvement in the property have disclosed shortcomings so far as both sets of solicitors are concerned in their failure to carefully read the agreement. I do not consider, however, that the circumstances of this case justify the intervention of equity having regard to the fact that I have found that the circumstances give rise to no completed contract of purchase.

Conclusion

[67] The conclusions that I have reached in this analysis mean that the plaintiff is entitled to no relief and there is therefore no point in pursuing the damages section of this claim. In addition, there is no justification for the caveat that has been lodged against the title to the property remaining on that title.

Orders

[68] Accordingly, I enter judgment for both defendants. The plaintiff's claim is declined. I order that Caveat No 9300103.1 in respect of Identifier NA14A/1317 North Auckland Registry be removed from that title.

8 A Butler, *Equity & Trusts in New Zealand*, (2nd ed, Brookers, Wellington, 2009) at 616.

Costs

[69] I reserve costs. If counsel are unable to agree within three calendar weeks of the date of issue of this judgment, memoranda in support, opposition and reply shall be filed and served at seven-day intervals. On receipt of the reply memorandum, the file shall be referred to me to consider the appropriate order for costs.

Reported by: Rachel Marr, Barrister and Solicitor