IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2013-404-1196
[2014] NZHC 1572

BETWEEN	KYOTO TRUSTEE LIMITED Plaintiff
AND	ANNIK NEW PLYMOUTH LIMITED First Defendant
	ANNIK INVESTMENTS LIMITED Second Defendant
	ROBIN LESLIE EDWARDS and MARY CHRISTINA FORBES-EDWARDS Third Defendants

Hearing:	18, 19 and 20 November 2013
Appearances:	D W Grove for the Plaintiff A R Gilchrist and A V Shinkarenko for the Defendants
Judgment:	7 July 2014

JUDGMENT OF WOODHOUSE J

This judgment was delivered by me on 7 July 2014 at 3:30 p.m. pursuant to r 11.5 of the High Court Rules 1985.

Registrar/Deputy Registrar

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Solicitors / Counsel:
Mr D W Grove, Barrister, Auckland
Mr CCH Allan (plaintiff's instructing solicitor), Grove Darlow & Partners, Solicitors, Auckland
Mr A R Gilchrist, Barrister, Auckland
Mr A V Shinkarenko, Barrister, Auckland
Mr P Ganda (defendants' instructing solicitor), Ganda & Associates, Solicitors, Auckland

[1] The plaintiff (Kyoto) seeks damages from the defendants for breach of contract. The first defendants (ANP) and the second defendants (AIL) are companies owned by the third defendants, Mr Edwards and Mrs Forbes-Edwards. The defendants advanced two affirmative defences in denying liability. They contended that, although all contractual terms had been agreed, there was no intention to be bound until the parties had signed formal contractual documents and this did not happen. They contended, in the alternative that, if there was an enforceable contract, it was repudiated by Kyoto following which the defendants cancelled the contract.

Conclusion in summary

[2] The case turns in large measure on the defences. I am satisfied that neither is made out.

[3] There is no evidence that the parties agreed that they would not be bound until formal documents had been signed. Nor does the evidence justify an inference that there was no intention to be bound until formal documents had been signed. The evidence positively indicates that the parties considered themselves to have concluded a binding agreement before the formal documents were sent to the defendants' solicitor for signature in November 2012. This comes, first, from the fact that the contracts in respect of which Kyoto sues followed an agreement, described as a heads of agreement, entered into by the parties in August 2012. This agreement was binding on the parties. Its terms are not in issue; it is an agreement in writing signed by the parties. The heads of agreement, with an oral variation made a few days later, contains the essential terms of the matters subsequently agreed in detail and incorporated into the formal documents. The written communications between the parties that followed do not support the defendants' argument. They support a conclusion that the parties were working out the detail on the basis that they would be bound once they had done so. The defendants expressly acknowledged that all remaining detailed terms had been agreed before the formal documents were sent to the defendants' solicitor for signature.

[4] The second affirmative defence was that, if there was a binding contract, it was repudiated by Kyoto. The defendants contended that the repudiation arose from a demand by the principal of Kyoto, Mr Ian McKay, for repayment of a loan of $147,796, plus interest, made to the third defendants, Mr Edwards and Mrs Forbes-Edwards. I am satisfied that this defence is not established. The loan had no relevant legal connection to the contracts on which Kyoto sues. The loan was from Mr McKay, not from Kyoto, and demand for repayment was made in accordance with an express provision that the loan was repayable on demand. The demand for repayment did not indicate an intention on the part of Kyoto not to be bound by the agreement that had been entered into on 2 November 2012. Nor did it indicate an intention not to be bound by the heads of agreement.

[5] Kyoto sought damages against one or more of the defendants in a total sum of $2,341,049, plus interest. There were some challenges on points of principle, but these were not made out.

[6] There was no material challenge to quantification. However, having reviewed the various heads of damages and quantification I am satisfied that the claim should be reduced. Kyoto is entitled to judgment in a total sum of $1,133,500.

The facts

The second defendant (AIL) agrees to buy a property in New Plymouth

[7] On 20 March 2012 AIL entered into an agreement to purchase a property in New Plymouth from AXA New Zealand Nominees Ltd (AXA), selling as mortgagee. The property consisted of a leasehold interest in land and buildings used for an accommodation business. There were 144 single bedroom units, two self-contained flats and some communal facilities. The purchase price was $1,400,000.

[8] AXA also granted to AIL a licence to occupy the property. This gave AIL a right of occupation pending settlement and, in consequence, an entitlement to carry on the accommodation business.

[9] AIL borrowed $140,000 for the deposit and sought finance for the balance of $1,260,000. The settlement date in the agreement was 20 July 2012, but the date was extended from time to time because the defendants experienced difficulty in obtaining finance. They engaged a commercial mortgage broker, Mr Brian McKenzie.

[10] At the beginning of August 2012 Mr McKenzie asked Mr McKay if he would provide the finance. Mr McKay was given relevant information. This included a valuation obtained by Mr Edwards from Seagar & Partners assessing the market value of the property at $4,700,000 if the long term average occupancy rate could be increased to 80%. Mr McKay said he was prepared to provide the finance, but on the basis that his finance company became the owner of the property with a right for one of the defendants, to buy the property back at a premium after 12 months. This led, following some further negotiations, to the heads of agreement which was signed on 28 August 2012.

Heads of agreement: 28 August 2012

[11] The heads of agreement is between "Kyoto Trust or nominee" and AIL. The plaintiff, Kyoto, is the trustee of the Kyoto Trust. The preamble to the heads of agreement provides background relevant to this proceeding. It is as follows:

> BACKGROUND
>
> 1. In March 2012 Annik Investments Limited (Annik) signed up to purchase 20 Bell Street Welbourne New Plymouth for $1.4 million plus GST if any (it is assumed that it will be sold as a going concern and therefore the GST exempt or neutral).
>
> 2. They have paid a deposit of $140,000 (via a short term loan that needs to be repaid on or before settlement). The original 5 month settlement is now due / extended to 20th September 2012.
>
> 3. Annik are currently having difficulties in both financing their purchase and in finding a purchaser that can settle in time to ensure that they can save the deal and save their deposit.
>
> 4. It is considered that at this stage any prospective purchaser will also have difficulty in obtaining finance due to the fact that $1,400,000 purchase price is freely known and the fact that the finance deal has been extensively and unsuccessfully already "shopped around" all the usual potential lenders and it has so far been declined.

5. Annik is therefore in potential danger of not being able to conclude a deal in time to save the deal and their opportunity to make a potentially very good capital gain. The uncertain and risky sell now options would yield them a gross margin of $1,350,000 if the sale price was based on the current valuations.

6. Holding on and selling in a few months time at the $4,700,000 / 80% occupancy valuation would give them certainty now, 12 months to sell and a potential gross margin of $3,150,000. (Being $4,700,000 less the $1,750,000 buy back price – which includes the fee) as per the Buy Back clause outlined below.

7. Additionally Annik has paid approximately $150,000 for the chattels on the property: both initially and as subsequent purchases (e.g. beds, TVs etc). These are all to be supported by agreements and invoices.

[12] Provisions of the heads of agreement include the following:

(a) AIL was to provide full documentation for the purchase of chattels for approximately $150,000, with Kyoto to purchase the chattels for $150,000 or the invoice value, whichever was less.

(b) Kyoto was to take an assignment of the AXA agreement, if possible, or to purchase the property from AIL "by a contemporaneous settlement".

(c) On the assignment, or contemporaneous settlement, Kyoto was to pay AIL "approximately" $290,000 (plus any GST), being the deposit paid by AIL of $140,000 plus $150,000 for the chattels. At the same time Kyoto was to pay the balance of the purchase price of "approximately" $1,260,000. Figures were referred to as approximate because of the possibility of adjustments, including the possibility of an adjustment in the balance owing for the purchase price payable to AXA.

(d) Kyoto agreed to lease the property to ANP for one year at a rent of $5,000 plus GST per week plus all usual tenants' outgoings. Further provisions set out the other essential terms of the lease.

(e) Kyoto agreed to sell the property "back to" ANP after 12 months at a purchase price of $1,750,000 (plus any GST). Further provisions of this "buy-back" agreement are noted in the next paragraph.

(f) AIL agreed that Kyoto could use the Seagar & Partners' valuation.

(g) The heads of agreement concluded with the following:

> There shall be full cooperation between the parties at all times. This will include [AIL] sending regular monthly reports showing the turnover or occupancy levels and any other relevant information that Kyoto should know about.

[13] The buy-back agreement recorded that ANP was entitled to lodge a caveat against the property, then continued:

> This will give Annik up to 12 months to find a buyer for the property (or to purchase back themselves) and be able to use the very likely updated valuation of $4,700,000 based on 80% occupancy to achieve a sale at that level or close to it : rather than the current $2,900,000 valuation.
>
> It is also agreed that Annik is not permitted to on sell or assign its rights under any part of these agreements without the written consent of Kyoto. This includes but is not limited to the overall leasing of 20 Bell Street: the overall control and management of the lodge.
>
> The only permitted "exit strategy" for Annik is for either Annik to purchase the property itself or to arrange a sale of the property.

Refinancing AIL's loan for the deposit: 4 September 2012

[14] The deposit of $140,000 paid by AIL to AXA was borrowed from Mr Spencer Black, with AIL's liability guaranteed by Mr Edwards and Mrs Forbes-Edwards. The loan was due to be repaid on 5 August 2012. Mr Black extended the term for one month, but declined to extend it any further.

[15] Mr McKenzie, the defendants' broker, asked Mr McKay if he would be willing to refinance this loan. Mr McKay discussed this with Mr Edwards and Mrs Forbes-Edwards on 4 September. Mr McKay said that they were concerned about the demand for repayment because security had been granted by them over six vehicles they owned. He said that he agreed to lend the money to Mr Edwards and Mrs Forbes-Edwards in anticipation that it would be repaid on settlement with AXA,

and the related settlements between the parties to this proceeding, all then scheduled for 20 September.

[16] Mrs Forbes-Edwards said, in effect, that the loan was part of the arrangements recorded in the heads of agreement. She said that, before the heads of agreement was signed, "it was everyone's clear understanding that Mr McKay would cover the loan from Mr Black". She said this understanding came from "previous correspondence and discussions with Mr McKenzie" and that there was never any mention of a loan of $140,000 from Mr McKay.

[17] I do not accept Mrs Forbes-Edwards' evidence. She did not produce any correspondence preceding or accompanying the heads of agreement which indicated that Mr McKay had an obligation to refinance the loan from Mr Black. The only document Mrs Forbes-Edwards referred to is an email of 3 September 2012 to Mr Edwards and Mrs Forbes-Edwards from Mr McKenzie. This in fact confirms Mr McKay's evidence to the effect that he was contacted by Mr McKenzie about Mr Black's loan on 3 September, after the heads of agreement was signed. Mr McKenzie's evidence is consistent with that of Mr McKay.

[18] Fundamentally, Mrs Forbes-Edwards' evidence is contrary to what is recorded in the written loan agreement. The agreement is a handwritten document prepared by Mr McKay in the presence of Mr Edwards and Mrs Forbes-Edwards and which was then signed by the three of them in their personal capacities. The document is dated 4 September 2012. Its terms are as follows:

> Upon payment of $140,000 circa to Spencer Black, Robin and Mary Edwards undertake to repay the loan on demand pledging the Fleetwood motor home as security. 10% interest.

[19] With the written consent of Mr Edwards and Mrs Forbes-Edwards, the money was paid directly by Mr McKay to Mr Black. The total paid, including interest, was $147,796. Mr McKay said that it was his intention to "call back" the loan contemporaneously with settlement of the purchase from AXA and the on-sale to Kyoto expected to take place on 20 September 2012, just over two weeks later. In the event Mr McKay did not seek repayment until November 2012, in circumstances outlined below.

Completion of contractual documents

[20] Four formal contractual documents were contemplated by the heads of agreement. These are summarised below. In addition, at around the time the heads of agreement was being completed, Mr Edwards proposed to Mr McKay that Mr McKay become a joint venture partner with Mr Edwards and Mrs Forbes-Edwards in the property and its business. An agreement to this effect was reached at a meeting on 4 September 2012. The essence of this was that Kyoto, or its nominee, would have an option for six months from the settlement with AXA to acquire 50% of the shares in ANP in consideration of a reduction of $200,000 in the buy-back price, and some other consideration.

[21] There was a reasonable amount of evidence about dealings between the parties through to agreement on matters of detail. It is unnecessary to summarise this and make findings of fact because it is not relevant: the defendants acknowledged that all terms had been agreed, in direct negotiations between the parties, by 2 November 2012. Following this Kyoto's solicitors sent the formal documents to the defendants' solicitors. There were five separate contractual documents. These, and the essential provisions of each, are summarised under the following sub-headings.

(1) Agreement for sale and purchase ANP to Kyoto

[22] ANP had been nominated by AIL as purchaser from AXA. It was not possible for the AIL agreement with AXA to be assigned to Kyoto. In consequence there was to be a contemporaneous on-sale from ANP, as the purchaser from AXA, to Kyoto. The purchase price was $1,400,000.[1]

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[1] The balance of the purchase price payable on settlement, after allowing for the deposit of $140,000, was to be reduced by the amount of any credits from AXA to AIL/ANP recorded in AXA's settlement statement. Having regard to the way in which this is expressed in the agreement for sale and purchase this is plainly a reference to conventional adjustments on a settlement for items like rates. I was not referred to any evidence on this, and in any event it is not of consequence for the assessment of damages.

(2) Deed of lease from Kyoto to ANP

[23] The terms were those recorded in the heads of agreement, with the addition of schedules listing chattels, payments for chattels, and sums spent on the property. Mr Edwards and Mrs Forbes-Edwards guaranteed the obligations of ANP under the lease.

(3) Agreement for sale of chattels

[24] This was an agreement between ANP and Kyoto by which the former sold to Kyoto the chattels and other items specified in the deed of lease for $55,458 (plus any GST).

(4) The buy-back agreement: Kyoto to ANP

[25] The buy-back price to ANP was $1,750,000, as recorded in the heads of agreement. Mr Edwards and Mrs Forbes-Edwards guaranteed performance of ANP's obligations, consistently with a provision in the heads of agreement.

(5) Option and joint venture agreement

[26] The agreement is between Mr Edwards and Mrs Forbes-Edwards as grantors of the option and Kyoto as the grantee. Mr Edwards and Mrs Forbes-Edwards owned the shares in ANP. The option was for Kyoto to buy 50% of the shares and was exercisable within six months of the date of the agreement. The price to be paid directly by Kyoto was $1, but further consideration was provided by reduction of the buy-back price from $1,750,000 to $1,550,000 and a requirement that Kyoto provide vendor finance to ANP of $1,550,000 at 6% per annum. Upon exercise of the option a joint venture agreement between Mr Edwards and Mrs Forbes-Edwards and Kyoto would immediately come into effect, with the terms of that joint venture agreement fully set out in the option document. Mr Edwards was to resign as a director and Mr McKay was to be appointed a director.

Solicitors' correspondence 5-6 November 2012

[27] The formal contractual documents were sent by Kyoto's solicitor, Mr Chris Allan, to the defendants' solicitor, Mr Parry Ganda, with a letter dated 5 November 2012. The documents were stamped "DRAFT". Mr Allan said in his covering letter:

> The documents are tendered without prejudice and will not be binding unless signed by our client.

[28] There were the following email communications between the solicitors on 6 November 2012:

(a) Mr Ganda:

> We have received your letter ... with the attached **draft** documents. We were advised that the documents were to be in final format for execution by our respective clients. Why are the documents in draft and when can we expect to receive the non draft documents?

(b) Mr Allan:

> Parry, I take it that they are now in a form that can be signed

(c) Mr Ganda:

> Chris, so long as you have made the amendments that our respective clients agreed to. Iain [sic - McKay] has all the details.

(d) Mr Allan:

> Your response ... is as unhelpful as it is dangerous. You act for your clients, I don't, so you need to advise your clients on whether the documents reflects their position. I do not make any representation that they do.

(e) Mr Ganda:

> I have already advised my clients on your draft documents that you had previously sent to us.
>
> Your client had advised my clients that to avoid legal costs they would reach agreement as to the final wording between themselves. (We were not involved in these negotiations apart from advising our clients as above mentioned).

> I understood that this was done last week and that your client was to have instructed you and we were to receive the final version for execution.
>
> It is for this reason that we can't understanding [sic] why we are still receiving **draft** documents, when our respective clients have reached agreement as to the final version.
>
> Has your client not instructed you in relation to the final version for execution?
>
> In view of the same I can't understand why you consider my response to be unhelpful or dangerous.

[29] Mr Allan then sent the same documents to Mr Ganda, except that the word "DRAFT" had been removed. The covering letter concluded:

> As previously advised, the documents are tendered without prejudice and will not be binding unless signed by our client.

Were all contractual terms agreed? The defendants' original contentions

[30] Mr McKay's evidence was that all outstanding matters requiring agreement arising from the heads of agreement, together with the details of the subsequently agreed option and joint venture, had been agreed by 2 November 2012. This is borne out by the emails between the solicitors recorded above. However, and notwithstanding what is clear from the emails from the defendants' own solicitor, the defendants' original response to Kyoto's claim was that there was no enforceable contract because terms in the documents drafted by Kyoto's solicitors had not been agreed. The pleading in the statement of defence had two pages of particulars setting out 26 matters which were said not to have been agreed. The defendants did not contend on any other basis that there was no enforceable contract.

[31] The defendants maintained this carefully pleaded contention until the morning of the first day of the trial, 17 months after the statement of defence had been filed, when the defendants sought leave to file an amended statement of defence. Following a discussion with Mr Gilchrist, counsel for the defendants, I recorded the defendants' position in a minute as follows:

> The defendants do not dispute that the documents sent by Grove Darlow on 6 September 2012, with the Grove Darlow letter of that date, at page 666 of the bundle of documents, contained all the terms that had been agreed by the

> parties. But the defendants contend that there was no enforceable contract because it was also agreed that the parties were not to be bound unless and until the documents had been signed. In consequence the defendants no longer advance the defence relating to the particulars in para 17 of the statement of defence.
>
> In further consequence the defendants do not contest Mr McKay's evidence in his brief at para 215.[2]

[32] The defences the defendants sought to introduce, for the first time, were: (1) the contention that the parties did not intend to be bound until the formal contractual documents had been signed; and (2) a contention that, if the parties were bound, the contracts were unenforceable for non-compliance with ss 24 and 27 of the Property Law Act 2007 which require signed documents in respect of agreements for sale and purchase of land and guarantees.

[33] Kyoto did not oppose the first amendment. It did oppose amendment to introduce the Property Law Act defences. Leave was granted to add the first defence and declined in respect of the Property Law Act defences.[3]

Relevant events after 6 November 2012

[34] There was a substantial amount of evidence relating to events after Mr Allan sent the final documents to Mr Ganda. However, the events relevant to the defendants' two affirmative defences are the only matters requiring consideration in relation to liability. To the extent that the matters recorded in the next paragraphs were the subject of conflicting evidence, the summary that follows records my findings.

[35] The parties agreed to settle on 9 November 2013. Mr McKay pressed the defendants to sign and return the documents. The documents were not signed by the defendants. Mr McKay, in his own words, became annoyed with the delay. On 12 November Mr McKay sent an email to Mrs Forbes-Edwards, with a copy to Mr Ganda. He had experienced difficulty contacting Mr Edwards. Mr McKay said, amongst other things:

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2 Paragraph 215 of Mr McKay's brief of evidence contained a detailed response to the pleading in paragraph 17 of the original statement of defence, which contained the particulars of terms said not to have been agreed.

3 *Kyoto Trustee Ltd v Annik New Plymouth Ltd* [2013] NZHC 3050.

> It is my concern Mary that both you and Robin are being less than truthful in seeking ways of delaying the signing of the contracts while you seek alternative funding. Despite Annik Investments Limited being contractually bound.
>
> On the 4th September, 2012 I advanced to you and Robin $147,796. This loan was to be repayable upon demand with interest at 10%.
>
> I hereby call up the loan for immediate payment with interest.

[36] Mr Ganda responded on 13 November 2012:

> ... our clients have requested that to take the heat out of the current situation, they wait for a few days before they respond to you.

[37] On 20 November 2012 Mr Edwards and Mrs Forbes-Edwards, by email from Mrs Forbes-Edwards, advised Mr McKay that the loan, with interest as sought, had been paid into the bank account stipulated by Mr McKay. The email concluded:

> The Heads of Agreement is now at an end.

[38] By email of 21 November to Mr Edwards and Mrs Forbes-Edwards, Mr McKay, after acknowledging repayment of the loan, stated that the loan had nothing to do with AIL or Kyoto or the heads of agreement and that the loan was called up in accordance with its terms. Mr McKay said that it was not accepted that the heads of agreement was at an end, he sought execution of the formal contractual documents and recorded that time was of the essence. He also sought information about occupancy levels of the property and compliance with other matters recorded in the heads of agreement relating to payment of legal costs and fees.

[39] The defendants rejected Kyoto's contentions. By email of 26 November to Mr Edwards and Mrs Forbes-Edwards, with a copy to Mr Ganda, Kyoto confirmed, in effect, that it remained ready, willing and able to settle. Then on 29 November 2012 Kyoto's solicitors advised that their instructions were to accept repudiation by the defendants, reserving Kyoto's rights and remedies.

Subsequent events

[40] ANP, as AIL's nominee, settled the purchase from AXA in December 2012. The balance payable had been reduced from $1,260,000 to $1,060,000, therefore

reducing the total price from $1,400,000 to $1,200,000. No interest was payable for late settlement.

[41] On 21 January 2013 ANP entered into an agreement to sell the property to Jack Enterprises Ltd for $1,550,000, a capital gain of $350,000. The sale was settled on 8 February 2013. Jack Enterprises Ltd is a company owned by Ms Jacqueline Fenning. Ms Fenning's partner, Mr David Bridgeman, gave evidence for Kyoto on matters relevant to quantification of damages. It is apparent from Mr Bridgeman's evidence that he had substantial involvement in advising Ms Fenning on the purchase and on steps then taken to make some relatively modest improvements which substantially increased the average occupancy. Relevant aspects of this are noted below when discussing damages.

Other matters

[42] It was unnecessary to resolve conflicts between the written briefs of evidence because substantial points of difference arose from statements that were not admissible as evidence, or because admissible evidence was not relevant to the issues which in the end required determination. However, in case I am wrong in those conclusions, I record that, where there was a conflict of evidence on any material matter, I preferred the evidence for Kyoto. In addition to the evidence from Mr McKay, this was the evidence from Mr McKenzie, the defendants' mortgage broker, and the evidence from Mr Bridgeman, just noted. On almost all matters where there was a conflict there was no effective challenge in cross-examination, of any consequence, to the plaintiff's witnesses. Mr Bridgeman's evidence does not require further mention at this point because it is relevant only to quantification of damages. On questions of liability the evidence of Mr McKay and Mr McKenzie was consistent with contemporaneous documentary evidence, and with much of that being communications between Mr McKay, and Mr Edwards and Mrs Forbes-Edwards.

[43] The only evidence for the defendants was from Mrs Forbes-Edwards. Evidence on matters of consequence was contradicted by contemporaneous documents, with no defence challenge being made to those contemporaneous

documents. On matters in respect of which there was no relevant documentary evidence, with a conflict between Mr McKay and Mrs Forbes-Edwards, or between Mr McKenzie and Mrs Forbes-Edwards, I preferred the evidence of Mr McKay and Mr McKenzie as more reliable.

Discussion: the first affirmative defence: no intention to be bound until formal contracts were signed

[44] In *Fletcher Challenge Energy Ltd v Electricity Corporation of New Zealand Ltd* the majority in the Court of Appeal said:[4]

> [53] The prerequisites to formation of a contract are therefore:
>
> (a) An intention to be immediately bound (at the point when the bargain is said to have been agreed); and
>
> (b) An agreement, express or found by implication, or the means of achieving an agreement (e.g. an arbitration clause), on every term which
>
> (i) was legally essential to the formation of such a bargain; or
>
> (ii) was regarded by the parties themselves as essential to their particular bargain.

[45] In this case there is no issue on (b). As expressly acknowledged by the defendants, all terms in both categories referred to in (b) were agreed. This was achieved on 2 November 2012.

[46] The issue in this case concerns (a). On the amended pleadings and the submissions there were two possibilities:

(a) The parties intended to be immediately and unconditionally bound on Mr McKay's acceptance on 2 November 2012; or

(b) They intended that the heads of agreement, and the remaining matters agreed in their negotiations from September to November, would only have legal effect if and when the formal documents were signed.

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[4] *Fletcher Challenge Energy Ltd v Electricity Corporation of New Zealand Ltd* [2002] 2 NZLR 433 (CA) (the judgment of Richardson P, and Keith, Blanchard and McGrath JJ delivered by Blanchard J).

The second alternative – the essential argument for the defendants – is commonly referred to as an agreement "subject to contract".[5]

[47] An agreement subject to contract is usually found when the parties have recorded in their agreement words to that essential effect. There was no provision to that effect, written or oral. However, the absence of an express provision is not determinative. On this point Mr Gilchrist cited the Court of Appeal's decision in *Carruthers v Whitaker*.[6] The Court summarised the facts and the principles as follows:[7]

> It is established by the evidence to which I have earlier referred that at the time when the parties instructed their respective solicitors they all had in mind only one form of contract which would govern the sale and purchase of the farm, namely, a formal agreement in writing to be prepared and approved by the solicitors. When parties in negotiation for the sale and purchase of property act in this way then the ordinary inference from their conduct is that they have in mind and intend to contract by a document which each will be required to sign. It is unreasonable to suppose that either party would contemplate that anything short of the signing of the document by both parties would bring finality to their negotiations. Furthermore both parties would expect their solicitors to handle the transaction in a way which would give them proper protection from the legal point of view. There is no evidence whatever in the present case to rebut this prima facie inference. On the contrary, and as found by Wilson J, the parties in fact expected that the contract would eventually be signed by both vendor and purchasers. The Judge then observed that this expectation was "merely a reflection of common practice". With respect, I would prefer to put it that the parties intended to contract in accordance with common practice, which in New Zealand is to obtain the signatures of both vendor and purchaser to both copies of the agreement, one copy being of course for the vendor and the other for the purchaser.

[48] The Court was not declaring a general rule. As it made clear, it was referring to the inference that would ordinarily be drawn in circumstances of the sort that arose in that case. The circumstances of the present case are markedly different.

[49] The general rule was stated in *Carruthers* as follows:[8]

> [I]n every ... type of case where the evidence shows, in one form or other, that the parties had in mind the execution of a formal contract, the true test

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5 Burrows, Finn & Todd *Law of Contract in New Zealand* (4th ed, LexisNexis, Wellington, 2012) at [8.2.2(a)], pp 282-285.

6 *Carruthers v Whitaker* [1975] 2 NZLR 667 (CA).

7 *Carruthers v Whitaker*, above n 6, at 671-672.

8 *Carruthers v Whitaker*, above n 6, at 672.

> must be to ascertain the intention of the parties as to the time when and the manner in which they will become bound by contract.

[50] This brings the enquiry in this case back to the broader statement of principles outlined in the *Fletcher Challenge* case.[9] At the outset of its discussion the majority said that the question of intention to be bound cannot be divorced from consideration of what was agreed.[10] The point was discussed more fully by Gleeson CJ in *Australian Broadcasting Corporation v XIVTH Commonwealth Games Ltd*, in a passage cited in *Fletcher Challenge*:[11]

> It is to be noted that the question in a case such as the present is expressed in terms of the intention of the parties to make a concluded bargain: see, eg, *Masters v Cameron* [(1954) 91 CLR 353, 360]. That is not the same as, although in a given case it may be closely related to, the question whether the parties have reached agreement upon such terms as are, in the circumstances, legally necessary to constitute a contract. To say that parties to negotiations have agreed upon sufficient matters to produce the consequence that, perhaps by reference to implied terms or by resort to considerations of reasonableness, a court will treat their consensus as sufficiently comprehensive to be legally binding, is not the same thing as to say that a court will decide that they intended to make a concluded bargain. Nevertheless, in the ordinary case, as a matter of fact and commonsense, other things being equal, the more numerous and significant the areas in respect of which the parties have failed to reach agreement, the slower a court will be to conclude that they had the requisite contractual intention.

[51] It seems to be implicit from what Gleeson CJ said in the final sentence, and what was said in *Fletcher Challenge*, and in event it is my opinion, that the converse also applies: in the ordinary case, where the parties have agreed on all matters requiring agreement, being those regarded by the parties themselves as essential as well as those that are legally essential to the formation of a contract, the parties will also have intended to be immediately bound at that point.

[52] The discussion of principles by the majority in the *Fletcher Challenge* case is directed to the proper approach to determining whether all terms have been agreed as well as to contractual intention. The factors discussed by the Court as relevant to contractual intention, in addition to those already noted, may be summarised as follows:

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9 *Fletcher Challenge Energy Ltd v Electricity Corporation of New Zealand Ltd*, above n 4, at [50]-[67].

10 *Fletcher Challenge Energy Ltd v Electricity Corporation of New Zealand Ltd*, above n 4, at [50].

11 *Australian Broadcasting Corporation v XIVTH Commonwealth Games Ltd* (1988) 18 NSWLR 540 (CA) at 548 per Gleeson CJ; cited in the *Fletcher Challenge* case, above n 4, at [59].

(a) Whether the parties intended to enter into a contract is a question to be determined objectively. For this purpose it is permissible to look beyond the words of the parties' agreement to the background circumstances, including oral and written statements made in negotiations and draft contractual documents.[12]

(b) It is also permissible to look at the parties' subsequent conduct.[13]

(c) It is important to bear in mind the dynamics of the negotiation process and the internal interrelationship of the terms of a commercial bargain.[14]

[53] The reasons why I am satisfied that there was a binding and unconditional contract made on 2 November 2012 are set out in the following paragraphs.

[54] The starting point is to add a little detail relating to the negotiations from the signing of the heads of agreement on 28 August and the agreement on all terms by 2 November. Most of the essential terms for all parts of the overall agreement, including the option and joint venture agreement, were contained in the heads of agreement or in the oral agreement on the option and joint venture. The terms discussed over the following two months or so were on matters of detail. None of these related to terms legally essential to the formation of a contract. A matter that appears to have occupied a substantial proportion of the attention of the parties related to the agreement for sale of the chattels, rather than the major items in terms of cost or consequence. The final point of difference was whether there should be a guarantee from AIL in respect of liabilities of ANP, Mr Edwards and Mrs Forbes-Edwards to Kyoto. The defendants did not want AIL to provide a guarantee and this was recorded in an email from Mrs Forbes-Edwards to Mr McKay of 1 November. By email of 2 November from Mr McKay to Mrs Forbes-Edwards Kyoto agreed that there should be no guarantee from AIL. Agreement on all terms was reached at that point.

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12 At [54]-[55].
13 At [56].
14 At [57].

[55] The defendants' contention that the agreement reached on 2 November was subject to contract contained within it the necessary proposition that, at that point, either party was free simply to walk away without any legal repercussions, in spite of the signed heads of agreement, in spite of the fact that the heads of agreement was contractually binding in respect of the matters recorded in it, and in spite of the subsequent agreement between the parties on every outstanding matter of detail. When the defendants' contention is expressed in those terms, the difficulty for them in sustaining it becomes reasonably apparent. It is an argument which takes no account of everything that had gone before the making of an agreement on 2 November; it ignores "the dynamics of the negotiation process", as the Court of Appeal put it in *Fletcher Challenge*; it ignores the critical relationship between the legally binding heads of agreement and the nature of what was being dealt with in the subsequent negotiations. It is an argument which has to be founded almost entirely on a single fact divorced from all other relevant facts, the single fact being that the parties made provision for the completion of formal contractual documents. These matters, apart from the last, provide a strong indication that the parties intended to be legally bound once they had agreed, in their direct negotiations, on all outstanding matters, notwithstanding the fact that the parties also intended that formal documents were to be signed. These points are further developed in the following discussion.

[56] The agreement on all outstanding matters flowed from the heads of agreement. The defendants did not contend that the heads of agreement was not contractually binding. They in fact purported to cancel it. Apart from the option and joint venture proposal, which came shortly after the heads of agreement was signed, the heads of agreement recorded most of the essential terms. In other words, most of the essential terms are recorded in a signed contract. The option and joint venture agreement, in respect of which no issues arose as to its terms, was an oral variation of the heads of agreement.

[57] The existence of the contractually binding heads of agreement, preceding the agreement on detail reached on 2 November, is not of itself determinative of the ultimate issue, but it presents difficulties for the defendants in their argument. If the defendants are correct it would mean that, although the parties had, by the heads of

agreement, already agreed that AIL would assign its agreement with AXA, or contemporaneously sell to Kyoto, that agreement in some way became non-binding on 2 November even though at that point all details had been agreed. The same applies to the other central elements of the already contractually binding agreement – the lease, the buy-back, the option and joint venture, and the sale of chattels.

[58] These considerations, arising from the fact that the 2 November agreement was preceded by the signed heads of agreement, distinguish the circumstances of this case from the circumstances in *Carruthers v Whitaker*. But they also distinguish the circumstances of this case from cases where there is an express provision that an agreement is subject to contract.

[59] The heads of agreement does provide for the completion of formal documents and formal documents were prepared. These facts provide the main plank for the defendants' argument. These facts, standing alone, would provide substantial support for the defence if the only reason for providing for completion of formal documents would be an intention, on both sides, not to be bound without signing formal documents. But there are other reasons for such provision unrelated to contractual intention, including the following: it is prudent to put agreements in writing, especially where there is a degree of complexity; signed documents are necessary to meet the requirements of the Property Law Act in respect of agreements relating to land and guarantees; and signed documents are a conventional means of providing a comprehensive record of all of the terms of an agreement which would otherwise be contained in numbers of documents or communications, or which may have been agreed orally. All three are quite distinct from the question whether there is no intention to be legally bound until formal documents have been signed.[15] I am satisfied that provision was made for the completion of formal documents for one or more of these reasons and not as an indirect "subject to contract" provision.

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[15] As to the distinction between the Property Law Act requirements for contracts for the sale of land and guarantees to be in writing and signed by the parties and the question whether an agreement is "subject to contract": see *Tiverton Estates Ltd v Wearwell Ltd* [1975] Ch 146 (CA).

[60] If the parties made provision for formal documents because they intended that they would not be bound until they had signed formal documents, they could have recorded their intention in the heads of agreement. The absence of such a provision is telling because both parties obviously had a reasonable amount of commercial experience, the heads of agreement was prepared by a mortgage broker who was acting for the defendants, the draft was carefully scrutinised by the parties, and numbers of amendments were made in successive versions, including handwritten amendments in the final version, before the document was signed.

[61] The "dynamics of the negotiation process", as referred to in the *Fletcher Challenge* case, are important.[16] Before the heads of agreement was signed the defendants had been in difficulties because they had been unable to secure finance. They were at risk of losing the deposit of $140,000 (with a corresponding debt which had increased with interest on the money borrowed for the deposit). And they were at risk of losing a real prospect of making a handsome profit. The financial predicament of the defendants, before the heads of agreement was signed, is made abundantly clear by the preamble to the heads of agreement. By securing Kyoto's commitment to lend the money the defendants had avoided the risk of loss and enhanced the prospect of substantial gain. Kyoto was well aware of these factors influencing the defendants, and at the same time had made the commitment to provide the funds, but in circumstances which offered the prospect of substantial added benefits for Kyoto. These are the "dynamics" which resulted in the heads of agreement and the option and joint venture agreement. These circumstances indicate positively that the parties considered themselves to be contractually bound when they entered into the heads of agreement, and the option and joint venture variation, subject only to reaching further agreement on the matters of detail. From the defendants' perspective, given the financial predicament, it was essential that Kyoto was legally bound to provide the funds. I am satisfied that the reason the defendants did not, in the end, proceed with their agreement with Kyoto was not because of a failure by Kyoto to perform, or because they believed that their agreement with Kyoto was subject to contract, but because they had secured alternative funding on terms which they thought were more favourable. I am satisfied that, if the

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16 *Fletcher Challenge Energy Ltd v Electricity Corporation of New Zealand Ltd*, above n 4, at [57], noted above at [52](c).

defendants had not found alternative funding which they assessed was more favourable than the arrangements with Kyoto, they would have insisted on Kyoto's completing the contracts and providing the finance they had been desperate to secure.

[62] There was no written communication between the parties after the heads of agreement was signed through to final agreement on 2 November which supports the defendants' argument. The documentary evidence is consistent with a conclusion that the parties were seeking to conclude a binding agreement on all matters. There was no other admissible and reliable evidence to the contrary. Mrs Forbes-Edwards said that the parties did not intend to be bound without signing documents, but this amounted to an assertion, in the nature of a submission, unsupported by any other evidence relating to the entire course of the dealings between the parties from the outset through to 2 November.

[63] The assertion by the defendants is also inconsistent with their original affirmative defence that there was no agreement because many essential terms had not been agreed. It is relevant, on the question now being dealt with, that the defendants did not argue until the commencement of the trial that there was no intention to be bound until the formal documents had been signed. If that is what the defendants considered the position to have been at the time, it is to be expected that the defence belatedly advanced would have been advanced from the outset.

[64] The email of 6 November from Mr Allan to Mr Ganda stated that the documents were tendered without prejudice and would not be binding unless signed by Kyoto.[17] This does not assist the defendants. Because all terms had been agreed by 2 November it was not possible for one of the parties unilaterally to seek to vary the agreement already reached by adding a term. This applies both ways. If the defendants had sought to enforce the agreement, Kyoto could not have argued that it was unenforceable because of Mr Allan's letter. There is an additional point. This is that it is not apparent that Mr Allan had any authority, as agent of Kyoto, to negotiate any of the terms, with this point also applying to Mr Ganda on behalf of the defendants. The parties agreed to negotiate the final terms directly between

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[17] See above at [29].

themselves, and did so. Both Mr Allan and Mr Ganda acknowledged this in the exchange of emails on 5 and 6 November.

[65] Mr McKay, after 2 November, endeavoured to get the defendants to sign the documents. The defendants submitted that this was evidence that there was no intention to be bound until the documents were signed. I do not agree. I am satisfied that Mr McKay wanted the documents signed because they were a convenient record of everything that had been agreed in the heads of agreement, the option and joint venture oral variation, and the matters of detail subsequently agreed and recorded in voluminous email correspondence between the parties. Furthermore, the way Mr McKay approached this was consistent with an agreement having already been reached that included within it an obligation on all three defendants to sign the documents, with every word in those documents having also been agreed. There is also Mr McKay's email of 12 November to the defendants in which he objected to the defendants delaying the signing of contracts "[d]espite Annik Investments Limited being contractually bound".[18]

[66] One further argument for the defendants was based on a provision in each of the formal documents that the agreement was conditional upon the "collateral agreements being concluded, executed and completed". This does not assist the defendants. The purpose of the reservation in each of the documents was to make clear that there was, in substance, a single agreement recorded in five separate documents. This provision would have the effect, for example, of preventing a party from signing one only of the documents, after it had been signed by the other party, and then seeking to enforce it without regard to the collateral agreements contained in the remaining documents. This is not a "subject to contract" provision, or a provision which otherwise establishes that there was no intention to be contractually bound.

Discussion: the second affirmative defence: repudiation by Kyoto

[67] The defendants argued that, if an enforceable agreement on all matters had been reached on 2 November 2012, that agreement was repudiated by Kyoto when

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[18] See above at [35].

Mr McKay demanded repayment of the loan of $147,796 from Mr McKay to the defendants. The defendants contended that there was no right to demand repayment because provision of the loan was an obligation of Kyoto under the heads of agreement and, in consequence, Kyoto repudiated the heads of agreement when it demanded repayment.

[68] I do not agree. An essential premise for this defence is that Kyoto had an obligation under the heads of agreement to lend $140,000 to Mr Edwards and Mrs Forbes-Edwards to refinance the original loan from Mr Black to AIL. Mrs Forbes-Edwards' evidence included a proposition that there was such an obligation on Kyoto. This evidence illustrates a general point earlier made about parts of Mrs Forbes-Edwards' evidence – it is contradicted by the contemporaneous documents. The heads of agreement does not contain any obligation on Kyoto, or any party associated with Kyoto, to lend $140,000 to any of the defendants to refinance the Black loan. The $140,000 loan agreement is, in legal terms, an independent contract and one made between Mr McKay (not Kyoto) as the lender and Mr Edwards and Mrs Forbes-Edwards as the borrowers. The loan agreement is also unambiguous as to the terms of the loan – it was repayable on demand.

[69] For these reasons the demand for repayment could not constitute repudiation of the heads of agreement, or of the final agreement between Kyoto and the three defendants which had been concluded on 2 November.

[70] If the loan agreement for the $140,000 can be seen, contrary to the conclusion already reached, to be linked in some relevant legal way to the heads of agreement, and the final agreement reached in November, I would not be satisfied that it amounted to repudiation. A party repudiates a contract when it makes clear, expressly or impliedly, that it does not intend to perform its obligations under the contract. This entitles the other party to cancel the contract if it wishes.[19] Mr McKay's demand for repayment of the debt did not indicate that Kyoto did not intend to perform its obligations under the heads of agreement, which is what the defendants purported to cancel, or under the final agreement reached on 2 November. All other steps taken by Kyoto, and by Mr McKay personally, negate that

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[19] Contractual Remedies Act 1979, ss 7 and 10.

interpretation. Kyoto, and Mr McKay, both before and after the demand for repayment, made it abundantly clear that Kyoto wanted to proceed to settlement and was urging the defendants to do so. It is also sufficiently clear that, if the defendants had themselves made clear that they wished to settle, immediately following the demand for repayment, Kyoto would then have settled and Mr McKay would have applied the $140,000 towards the payment required from Kyoto to ANP.

The defendants' liability

[71] Kyoto established that the defendants repudiated the agreement when they purported to cancel the agreement after Mr McKay called up the loan. The notice of cancellation, in its express terms, was cancellation of the heads of agreement, but it was clear that the defendants did not intend to perform their obligations under the final agreement concluded on 2 November. This gave Kyoto an option of seeking specific performance or cancelling and suing for damages. Kyoto elected the latter course.

Damages

[72] Kyoto claims damages based on the proposition that, on settlement with AXA and with the defendants in November 2012, it would have exercised the option to acquire 50% of the ANP shares and enter into the joint venture. There are two main parts to the claim:

(a) Loss of net income from rent for 12 months under the lease from Kyoto to ANP.

(b) Loss of its share of profits as a shareholder of ANP on exercise of the option. This claim is under three headings:

(i) Profits accumulated by ANP in the six month period before exercise of the option in November 2013.

(ii) Profit for the first 12 months following exercise of the option.

(iii) Profit from an increase in value of the property at the end of the first 12 months.

[73] The relevant legal principles may be stated in broad terms. Damages for breach of contract are calculated by determining what the plaintiff expected to receive if the contract was not breached. The Court of Appeal summarised the position as follows:[20]

> There is no doubt that the general rule is that damages for breach of contract should be assessed as at the time of breach. It is equally clear that this rule is not of universal application, and must yield where necessary to the overriding principle that as far as possible the injured party is to be placed in the position it would have been in if the breach of contract had not occurred.

[74] Kyoto's claim for a share of profits as a shareholder of ANP requires determination of what would have happened if the defendants had not repudiated the contract. This requires proof of two things: whether Kyoto would have exercised the option and, if so, the amount of the profit, if any, that would have been gained. The first matter – whether the option would have been exercised – requires proof on the balance of probabilities. However, the amount of the loss does not require proof on the balance of probabilities. Evaluation is a matter of informed estimation.[21]

[75] The defendants submitted that damages based on exercise of the option to purchase the shares are too speculative to be recoverable. To the extent that that argument was directed to uncertainty as to whether the option would have been exercised, it is not supported by the evidence. Mr McKay's evidence was that the option would have been exercised immediately on settlement. There was no challenge to this evidence. Weighing Mr McKay's evidence in the relevant factual context I am satisfied, on the balance of probabilities, that Kyoto would have exercised the option on settlement which was to have taken place in November 2013. To the extent that the defendants' submission was one directed to the quantification of the loss, I will address that below.

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20 *McElroy Milne v Commercial Electronics Ltd* [1993] 1 NZLR 39 (CA) at 49.

21 *Sellars v Adelaide Petroleum NZ* (1994) 179 CLR 332 at 368, cited in *Martelli McKegg Wells & Cormack v Commbank International NV* CA75/96, 7 November 1996 at [12]. See also *Benton v Miller & Poulgrain* [2005] 1 NZLR 66 (CA).

[76] The defendants submitted that the damages are not recoverable because the plaintiff did not provide any consideration. The argument is misconceived. The quantification of damages must take into account any consideration that would have been required from Kyoto, or expenses that may have been incurred by Kyoto, in making the net profit that it seeks to recover. This also is dealt with below.

[77] The third argument for the defendants was that Kyoto failed to mitigate its loss by reinvesting the money that it would have paid under the agreement, but which it did not pay because of cancellation. This is not a failure to mitigate. The money Kyoto would otherwise have invested needs to be brought into account in the quantification of damages as a *cost* to Kyoto to be deducted from any profit that it might otherwise have obtained. In relation to mitigation there is no legal principle supporting the defendants' argument.

[78] The quantification was set out in reasonable detail in evidence from Mr McKay, in particular, and from Mr Bridgeman, and in documentary evidence. The defendants did not challenge the detail of quantification. There was no argument for the defendants that there was no evidential foundation for the damages claimed. It is nevertheless appropriate to review the assessment of damages.

Lost rental income

[79] On settlement Kyoto would have taken title to the property and leased it to ANP for 12 months for a total rent of $260,000. These were obligations of both parties independent of Kyoto's option to buy shares in ANP.

[80] Kyoto acknowledged that this sum would be reduced by an expense from the holding cost, or cost of finance, calculated on the price payable by Kyoto to ANP on purchasing the property. This was calculated at 6% per annum on $1,060,000, a total of $63,600. The figure of $1,060,000 is the sum paid by ANP to AXA on settlement. However, the relevant figure is the purchase price as between Kyoto and ANP which was $1,400,000. The holding cost at 6% per annum calculated on $1,400,000 is $84,000, resulting in a net loss to Kyoto of $176,000.

[81] There was a further claim by Kyoto for late payment interest at 18% per annum. This appears to be based on the provision in the lease for default interest for late payment. The rate specified in the lease is 15% per annum, not 18%. Contractual interest at 15% per annum would have been recoverable on the rent in terms of the lease. However, the claim now being advanced is damages for breach of contract, not recovery of a sum payable under a contract entered into. In addition, one of the further claims is the claim for the 50% share of ANP's net profit for 12 months. As discussed below, the net figure is calculated by deducting expenses, which include rent payable by ANP to Kyoto. If there was a proper basis to effectively charge ANP with the contractual interest recoverable under the lease, that interest expense to Kyoto would need to be brought into account on the other side of the ledger by increasing ANP's expenses and therefore reducing Kyoto's share of the net profit. The items cancel each other out. Accordingly, this claim is disallowed. However, Kyoto is entitled to interest on damages, as claimed, pursuant to s 87 of the Judicature Act 1908.

Retained earnings of ANP available on exercise of the option

[82] The claim is for $77,385, being half of the net profit earned by ANP for a seven month period from April to October 2013. The calculation is based on financial statements prepared by accountants for the six months from April to September 2013.

[83] As a matter of broad principle a claim of this nature might be available and the defendants did not argue to the contrary. However, I am not persuaded that Kyoto can recover under this heading. I was not referred to any contractual provision that would have entitled Kyoto to a share of profit earned before it became a shareholder. Although the net figure may have been earned, I am also not aware of any evidence that an available surplus would have been retained. This claim is too remote and is not allowed.

50% share of ANP net profit for 12 months

[84] The claim is for a sum of $247,264 calculated as follows:

(a)	Income for 12 months until buy-back:	$986,341
(b)	Less expenses, other than lease costs:	($231,812)
(c)	Less rent payable to Kyoto:	($260,000)
(d)	Net profit before tax:	$494,529
(e)	50% share of profit to Kyoto as shareholder:	$247,264

[85] The various components are recoverable in principle and are supported by evidence. The gross income – item (a) – is based on the figures provided by the defendants for November and December 2012 and January 2013 and on figures provided by the purchaser from ANP, Jacks Enterprises Ltd, for February to October 2013 (apart from seven days in February). The income figures from Jacks Enterprises Ltd show a substantial increase. The evidence from Mr Bridgeman makes clear that this occurred as a result of the efforts made by him for the new owner to increase occupancy levels and that occupancy levels were increased significantly. What is uncertain is whether similar occupancy levels could have been achieved if Kyoto had become a shareholder and Mr McKay a director. Although there was no material challenge from the defendants to the quantification, there is evidence indicating that the divided shareholding of ANP might not have been able to achieve the same success as had been achieved by Jacks Enterprises Ltd under the direct, undivided, and plainly efficient and enterprising guidance of Mr Bridgeman.

[86] The figure for expenses is extrapolated without adjustment from the financial statements for the defendants for six months to September 2012. There are uncertainties in this figure in addition to the inherent uncertainties in making a calculation as to expenses that would have been incurred, as opposed to a calculation of expenses that were in fact incurred. The expenses figure is not related to the income figure, because the expenses were those for ANP operating in a particular fashion, whereas the income was that of Jacks Enterprises Ltd operating in a different fashion. The substantial increase in income achieved by Jacks Enterprises Ltd clearly came, in considerable measure, from the increased occupancy rate achieved by Jacks Enterprises Ltd. Increased revenues generally require increased

expenditure in operating expenses. And Mr Bridgeman said that Jacks Enterprises did incur additional costs.

[87] The rental expense of $260,000 is not an uncertain figure. The other elements of the calculation, for the reasons outlined, and because of inherent uncertainty, require an appropriate discount. This is appropriately assessed not by recalculating the individual figures but by reducing the claim by a percentage for risk. In my judgment the damages for this item should be reduced to $170,000, which is a reduction of just over 30%.

Profit on sale of the property

[88] Under the buy-back agreement between Kyoto and ANP, ANP was to buy the property from Kyoto on 9 November 2013, and on the terms earlier recorded. On that date, on the basis of Kyoto's unchallenged evidence that the option would have been exercised, Kyoto would have become a 50% shareholder of ANP. Kyoto would therefore have received the consideration it was entitled to under the buy-back agreement, with the adjustment required in that regard under the option/joint venture agreement. Kyoto, as a shareholder, would also indirectly share in any capital gain or capital loss arising from the difference between the buy-back price for ANP and the market value of the property at the date of the buy-back. Kyoto claimed that there was a substantial capital gain arising in this way.

[89] Kyoto claimed a loss of $1,820,000 calculated as follows:

(a)	Market value on buy-back in November 2013:	$4,700,000
(b)	Less purchase price:	($1,060,000)
(c)	Net gain to ANP:	$3,640,000
(d)	Kyoto's share of 50% of profit:	$1,820,000

[90] The market value – $4,700,000 – is based on the valuation evidence that, if long term occupancy levels could be increased to 80%, the market value of the property would be $4,700,000.[22] The evidence of occupancy for the 12 months to October 2013 establishes an average of at least 80%. This includes evidence from Jacks Enterprises Ltd relating to its nine months of ownership from February to October 2013. The occupancy levels for the nine months period were appreciably above 80%. There is some support for Kyoto's use of the valuation at $4,700,000 because of the significance attached to this potential market value in the heads of agreement.[23] However, the assessment is again one related to a future possibility, with reasonably significant areas of uncertainty. This element of the calculation will also require a substantial overall discount from the arithmetical calculation.

[91] The sum to be deducted from the market value is the cost to ANP of buying the property from Kyoto in November 2013. The figure of $1,060,000 in Kyoto's calculation was not the cost to ANP of buying the property in November 2013, but the sum payable by ANP on settlement with AXA. The cost to ANP to buy the property back from Kyoto, following Kyoto's exercise of the option, was $1,550,000.

[92] The re-calculation of the loss on the basis advanced by Kyoto should therefore be:

Market value:	$4,700,000
Less cost of purchase:	($1,550,000)
Capital gain to ANP:	$3,150,000
50% share of Kyoto	$1,575,000

[93] Even if these figures were certain, it does not automatically follow that Kyoto would have recovered 50% of what is referred to as the capital gain. The property was an asset of ANP. It was not an asset owned by Kyoto, and by Mr Edwards and Mrs Forbes-Edwards. Sale of the property for a price of $4,700,000 was by no

22 The evidence from the Seagar & Partners valuation, noted above at [10].

23 See above at [11], in clause 6 of the "BACKGROUND" to the heads of agreement, and above at [13] with the defendants clearly anticipating the increased market value.

means certain, notwithstanding the unchallenged valuation evidence on an assumed 80% occupancy rate. Given the history of the building a market sale at the Seagar & Partners valuation could have been difficult to achieve by ANP even if there were long term occupancy rates at 80% or more. There are uncertainties as to whether ANP could have achieved the occupancy levels that were achieved by Jacks Enterprises Ltd. It is unnecessary to add to the areas of uncertainty. In my judgment this claim, given its nature, should be reduced by 50%. This results in damages recoverable by Kyoto of $787,500.

Result

[94] The judgment sums on the claims are, in summary:

(a)	Loss on the lease	$176,000
(b)	Share of 12 months net income	$170,000
(c)	Share of capital gain	$787,500
		$1,133,500

[95] The total of $1,133,500 is recoverable by Kyoto from Mr Edwards and Mrs Forbes-Edwards. Their liability for the loss on the lease arises because they had undertaken to guarantee the liability of ANP. Their liability for the other items arises directly for breach of the option and joint venture agreement.

[96] There is judgment against ANP for $176,000 for the loss on the lease. ANP's liability arises for breach of its obligation to lease the property.

[97] Kyoto is also entitled to interest on $176,000 for the loss on the lease pursuant to s 87 of the Judicature Act 1908 at the prescribed rate, calculated from 1 December 2013. There is no interest on the other items through to entry of judgment.

[98] Kyoto is further entitled to costs on a 2B basis. Any issue as to quantification is to be determined by the Registrar.

Woodhouse J