IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2-13-404-1196
[2013] NZHC 3050

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 November 2013
Appearances:	D W Grove for the Plaintiff A R Gilchrist and A V Shinkarenko for the Defendants
Judgment:	18 November 2013

(ORAL) JUDGMENT OF WOODHOUSE J
(Leave to amend statement of defence)

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] This, and the next four paragraphs, expand on what I said orally. As I indicated to counsel when delivering the oral judgment I intended to explain the background more fully in the written judgment than had been outlined in Court.

[2] The defendants have sought leave to amend their statement of defence by adding two affirmative defences. The application was effectively made towards the beginning of this hearing, which is set down for five days.

[3] The plaintiff claims that the defendants repudiated a contract made on or about 2 November 2012, with the terms recorded in emails and other communications, and with those terms then recorded in draft formal agreements presented for the defendants for signature.[1] An affirmative defence earlier pleaded by the defendants was that there was no contract because many of the necessary terms on which the plaintiff seeks to rely had in fact not been agreed. Towards the beginning of the hearing this morning Mr Gilchrist, for the defendants, advised that the defendants no longer rely on this affirmative defence. I recorded Mr Gilchrist's advice in a minute issued earlier in the day, 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.
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> In further consequence the defendants do not contest Mr McKay's evidence in his brief at para 215.

[4] Mr Gilchrist advised that the defendants intended to advance two new affirmative defences. These were:

(a) No contract had been made because the parties did not intend to be bound until formal contractual documents had been signed.

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1 The background is set out a little more fully in an earlier judgment, on an application by the plaintiff for further and better discovery: *Kyoto Trustee Limited v Annik New Plymouth Limited* [2013] NZHC 2849.

(b) In any event there was no enforceable contract because of non-compliance with ss 24 and 27 of the Property Law Act 2007 – the requirement for signed documents in respect of agreement for sale and purchase of land and guarantees.

[5] Mr Grove, for the plaintiff, opposed the amendments. Following further discussions with counsel, and adjournments, the proposed amended statement of defence was filed and served and the evidence sought to be relied on by the defendants in support of the affirmative defences was identified. This led to the hearing later in the afternoon resulting in this judgment on the defendants' formal application for leave. The judgment returns at this point to the oral decision, with one modification discussed with counsel as the decision was being delivered, and with the addition of one point for clarification which is noted as such.

[6] For the plaintiff, Mr Grove had an opportunity to consider the draft pleading although it was a fairly brief opportunity. Having done so Mr Grove advised that the application to introduce the defence that there was no intention to be bound until formal documents were signed is not opposed. Mr Grove advised that the amendment to introduce the Property Law Act defence is opposed.

[7] The essence of the reasons advanced by Mr Grove for the opposition – and I emphasise that this is the essence – is that the defence is a technical one and, secondly, that if leave is granted to introduce this defence an adjournment will have to be sought for reasons that he outlined. That adjournment would cause material prejudice to the plaintiff.

[8] At the heart of Mr Gilchrist's submission in reply is a submission that the interests of justice require that leave be granted. That was on the basis that an adjournment could not be opposed and that, in effect, prejudice could be met by an award of costs, although questions of costs had not been addressed in any detail. Mr Gilchrist also submitted that delay, to use his words, is systemic and not the defendants' fault. He also emphasised the point he had made in the morning; that the responsibility for failure to plead the Property Law Act defence is his alone.

[9] As the submissions were being made to me I naturally reflected on the balancing exercise that the Court always has to make in these circumstances. And, of course, I have had an opportunity to reflect on this in a provisional way since the hearing was adjourned at approximately 11:20 am this morning – it is now 3:15 pm.

[10] I am satisfied that the application for leave to amend by introducing the no intention to be bound defence should be granted. And as indicated it is not opposed (which I also record was a responsible approach on behalf of the plaintiff).

[11] I am further satisfied that application to amend by adding the Property Law Act defence should be refused. This is because I am satisfied that an adjournment would be required and that there would be lengthy delay before the plaintiff's claim could get back into Court. With respect to Mr Gilchrist, the reasons for the delay is not the point. Of course it is not the defendants' fault that there are delays in getting hearing dates. But it is the fact of delay that is material. This question also has to be addressed against the procedural background. I have already referred to that in the first minute issued this morning, and that minute in turn referred back to the judgment on the discovery issue which I issued on 29 October 2013. It is unnecessary at this point to go into the detail. The essence is that I am satisfied that the defendants have been dilatory. What the defendants are seeking is an indulgence. A point does come when indulgence must be declined if there will be prejudice to the other party. Weighing one side and the other requires the matters that I have just referred to to be taken into account.

[12] In addition, the defence that the defendants seek to raise is a technical defence. It is quite different in kind from the other defence for which leave has now been granted. The other defence – that there was no intention to be bound – if made out on the evidence but not allowed to be argued could have the anomalous or even unjust results referred to in my first minute. I add, at this point, to what was stated orally. The point was that, if the evidence in fact discloses that the parties did not intend to be bound unless formal documents were signed, but that argument was excluded from consideration, and the Court found in favour of the plaintiff, the Court's conclusion would in effect be founded on a false factual premise. I am not persuaded that that is the likely outcome of refusal of leave to plead ss 24 and 27 of

the Property Law Act.[2] It is unnecessary to go into the historical origins of what are now in ss 24 and 27, the reasons for introducing the provisions into the original statute of frauds, the anomalies that arise where the same provisions do not apply to other contracts, and the ways in which the Courts applying equitable principles have avoided the unjust consequences that may often arise from strict application of this technical argument. And, of course, if the Property Law Act defences are made out it does not establish that there is no contract; it simply establishes that the contract is not enforceable. And it is perhaps that last point which most succinctly explains the distinction between this defence and the other defence for which leave has been granted.

[13] There will be orders accordingly.

Woodhouse J

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2 The defence must be pleaded *Bouviard v Brown* [1975] 2 NZLR 694 at 700-702; *Whiting v Diver Plumbing and Heating Ltd* [1992] 1 NZLR 560 at 569, (1991) 4 PRNZ 702 (HC) at 711.