IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2022-404-2356
[2023] NZHC 281

IN THE MATTER	Section 143 of the Land Transfer Act 2017
AND	
IN THE MATTER	of an application that caveats 126191304.1, 12619253.1, 12619312.1 and 12619325 not lapse
BETWEEN	MAREE DAWN MARSH Applicant
AND	GOLDLINE PROPERTIES LIMITED Respondent

Hearing: 14 February 2023

Appearances: T O Rea for Applicant
D G Collecutt for Respondent

Judgment: 23 February 2023

JUDGMENT OF ASSOCIATE JUDGE LESTER
(application that caveats not lapse)

This judgment was delivered by me on 23 February 2023 at 4:00pm
Pursuant to Rule 11.5 High Court Rules

Registrar/Deputy Registrar

Date……..

[1] By four contracts made mid-2020, Ms Marsh purchased four vacant lots from Goldline Properties Limited (**Goldline**). The contracts were subject to a number of conditions.

[2] Goldline had engaged a real estate agency called "Counties Realty Limited", of which a Mr Ian Croft was the director and licensee. Ms Marsh intended to relocate houses on to the lots and on-sell the lots for a profit. However, within a relatively short period of time after entering into the contracts, Ms Marsh realised she would not be able to organise the finance to complete the project.

[3] Ms Marsh explains in her affidavit that she had known Mr Croft for a number of years. Mr Croft had previously acted as Ms Marsh's real estate agent on the sale of properties and she had previously purchased properties where Mr Croft had acted for the vendor. Ms Marsh explains she knew Mr Croft also had experience in property development. At the time Ms Marsh entered into the four contracts, she said she expected Mr Croft would have some involvement in her planned property development but only to the extent that he would advise her as a consultant on developing the properties and that he may well act for her when she came to re-sell the properties. If that was the case, Mr Croft would be paid by way of commission in the usual way.

[4] However, when Ms Marsh realised she was unable to arrange sufficient finance for the project, she contacted Mr Croft some weeks after the contracts were signed. From that contact, a joint venture agreement between them was entered, recorded in a one page document dated 29 July 2020.

[5] Ms Marsh is adamant that at the time of her purchase, there was no intention that Mr Croft or his company would have any legal or beneficial interest in the properties. She maintains that there had been no discussion *prior* to the contracts with Mr Croft about him being involved in the purchase.

[6] I note here that the joint venture agreement, in its original form, is between Ms Marsh and Mr Croft, but that was later amended to refer to Mr Croft's company, One Property & Co Ltd. The amendment seems to have been initialled. Mr Croft's

company was not incorporated until 30 March 2021. Neither counsel saw the amendment as being material to the present application.

[7] The issue of titles to the land took some time which resulted in settlement not being due in respect of the four properties until November 2022. Ms Marsh's solicitor called for settlement statements and repeated that call shortly after, but then received from Goldline's conveyancer, a notice purporting to cancel the four contracts for breach of s 134 of the Real Estate Agents Act 2008 (**the Act**). Ms Marsh had caveated the four titles and on 13 December 2022 Goldline applied to lapse the caveats. Ms Marsh's application to sustain the caveats was heard on 14 February 2023.

[8] While Ms Marsh purchased four properties, it seems the application to lapse the caveats only applied to the caveats over three of the properties. From an abundance of caution, the application to sustain the caveats was made in respect of all four properties. Neither counsel suggested that different results would apply to individual properties, with the issue for determination being a general one applying to all four properties.

What Ms Marsh must establish to have her caveat sustained

[9] Mr Rea, counsel for Ms Marsh, set out in his submissions the following principles:

> 16. The principles are succinctly stated in *Botany Land Development Ltd v Auckland Council*:[1]
>
> 16.1 The onus is on the caveator to demonstrate that it holds an interest in the land which is sufficient to support a caveat.
>
> 16.2 The caveator must put before the Court a reasonably arguable case to support the interest that it claims.
>
> 16.3 The rights of the parties should not be determined on the application. This is particularly so where there are disputed questions of fact.
>
> 17. The role of the Court at this phase is to determine whether there is enough evidence that the caveats should be extended until substantive proceedings.

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1 *Botany Land Development Limited v Auckland Council* [2014] NZCA 61 [2014] BLC 205 at [23] and [24].

[10] While in correspondence, Goldline has doubted Ms Marsh's assertion that at the time of her signing the contracts she had no intention that Mr Croft would have any legal or beneficial interest in the properties, Mr Collecutt, counsel for Goldline, acknowledged that was an issue that could not be determined in this application.

[11] Goldline's position is that even if Ms Marsh's version of events is accepted, Goldline was entitled to cancel the contracts pursuant to s 134 of the Act which provides:

> **Contracts for acquisition by licensee or related person may be cancelled**
>
> (1) No licensee may, without the consent of the client for whom he or she carries out real estate agency work in respect of a transaction, directly or indirectly, whether by himself or herself or through any partner, sub-agent, or nominee, acquire the land or business to which the transaction relates or any legal or beneficial interest in that land or business.
>
> (2) No licensee may, without the consent of the client, carry out or continue to carry out any agency work in respect of a transaction if the licensee knows or should know that the transaction will, or is likely to, result in a person related to the licensee acquiring the land or business to which the transaction relates or any legal or beneficial interest in that land or business.
>
> (3) The client's consent is effective only if—
>
> (a) given in the prescribed form; and
>
> (b) the client is provided with a valuation in accordance with section 135.
>
> (4) The client may cancel any contract—
>
> (a) made in contravention of subsection (1); or
>
> (b) brought about by agency work carried out in contravention of subsection (2).
>
> (5) No commission is payable in respect of any contract of the kind described in subsection (4), regardless of whether the client cancels the contract.
>
> (6) The client may recover any commission paid in respect of any contract of the kind described in subsection (4) as a debt.
>
> (7) For the purposes of this section, a person who is the client of an agent in respect of a transaction is also the client of any branch manager or salesperson whose work enables the agent to carry out real estate agency work for that client.

(8) This section and section 135 have effect despite any provision to the contrary in any agreement.

[12] Before addressing counsels' detailed and helpful submissions as to the application of s 134 of the Act, it is helpful to recognise from the outset what s 134 does *not* seek to achieve.

[13] Compliance with ss 134–137 of the Act is not a substitute for a real estate agent complying with their fiduciary obligations to their vendor.[2] A breach by a real estate agent of the fiduciary duties they owe their vendor will not automatically be a breach of s 134 of the Act and vice versa. If s 134 applies, a vendor's right to cancel is not qualified. It is unaffected by whether an agent made full disclosure to their principal if that does not satisfy s 134. If s 134 does not apply but nonetheless an agent has breached their fiduciary duty then whether the vendor will have a right of cancellation or otherwise have a remedy for that breach will depend on all the circumstances. These circumstances include what the vendor was told, that is, did they receive full and frank advice in relation to what might amount to a conflict of interest and notwithstanding that advice, agree to proceed.[3]

[14] Accordingly, a vendor who cannot point to a breach of s 134 may nonetheless have a remedy against their agent for breach of fiduciary duty.

[15] There is authority in respect of the predecessor of s 134, which is ss 62 and 63 of the Real Estate Agent Act 1976, that those provisions have no application to transactions which occur after an agency agreement has been terminated. However, even where the agency agreement has been terminated, an agent's fiduciary duties may continue beyond the termination of the agency.[4]

[16] That s 134 is not the only remedy available to a vendor where there has been a failure by their agent to disclose their involvement in a purchase, in my view, has a bearing on how s 134 should be interpreted. I will return to that point below.

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2 *Barfoot & Thompson Ltd v Real Estate Agents Authority* [2016] NZCA 105, [2016] NZAR 648 at [42]-[48].

3 *Dyas v Diel* [2013] NZHC 2645 at [11].

4 *McNeill v Real Estate Institute of New Zealand Incorporated* (2008) 9 NZCPR 511 at [52]-[53].

The issue for determination

[17] The focus of the submissions was on the meaning of s 134(4) which entitles a client to cancel their contract if it was:

> (a) *made* in contravention of subsection (1); or
>
> (b) *brought about* by agency work carried out in contravention of subsection (2).
>
> (my emphasis)

[18] Mr Rea submitted that the focus in both s 134(4)(a) and (b) is on the agent's actions leading up to when the contract was entered.

[19] Mr Rea's submission was as follows. Given Ms Marsh says she had no discussions with Mr Croft about him acquiring any interest, legal or beneficial in the properties until some weeks after she signed her contracts, Goldline had no right to cancel under s 134(4)(a) as Ms Marsh's contracts were not *made* in contravention of s 134(1).

[20] The contracts Mr Croft *brought about* on behalf of Goldline were not made in contravention of s 134(2) as to at the time those contracts were made, nothing was in place between him and Ms Marsh whereby Mr Croft would obtain any interest at all in the land. That is because the joint venture arrangement was only entered into some weeks later.

[21] In short, Mr Rea submitted that "made" should be given its ordinary meaning. A contract, whether conditional or otherwise was *made* when it was signed. What happens thereafter does not alter when the contract was made. A contract is not made multiple times, that is, when it becomes unconditional or when it may be varied. It is made once.

[22] Mr Collecutt, faced with the conflict on the evidence as to Mr Croft's involvement with Ms Marsh's project prior to the contracts being entered, developed an argument based on a wide interpretation of "made". He submitted:

> The original agreements accordingly were "made" in contravention of s 134(1) by Mr Croft acquiring a beneficial interest in the land pursuant to the original agreements and the JV.

[23] Mr Collecutt submitted that while arguably initially compliant, the contracts were "made" that is, they become non-compliant by virtue of the later joint venture agreement.

[24] On this basis, and while not put exactly in this way by Mr Collecutt, the joint venture agreement had a retrospective effect in that what was initially compliant on Ms Marsh's case was rendered in breach of s 134(1) as the joint venture agreement converted the original contracts into ones whereby Mr Croft obtained an interest in the land. I do not accept that as the correct interpretation of s 134(4)(a). This would mean the contracts were made for the purposes of s 134 after it was entered. Presumably, on Mr Collecutt's submission, if the joint venture was cancelled, the contracts would revert to their original status. Ms Marsh's original contracts were not re-made upon Mr Croft indirectly acquiring a beneficial interest in the land via the joint venture.

[25] In my view, "made" in s 134(4)(a) requires Mr Croft's involvement to be assessed at the time when the contracts were entered. If Mr Croft had an interest in the land at that time, s 134(4)(a) would apply. If he did not, then cancellation under s 134(4)(a) was not available.

[26] From Ms Marsh's position, it is correct that she had a funding issue which she addressed through the joint venture, but as regards to the contracts between her and Goldline, those contracts did not change.

[27] As I will discuss below, at this time Mr Croft continued to act as agent for Goldline after he entered the joint venture with Ms Marsh. I have reached the view that the joint venture agreement does not retrospectively mean the contracts were *made* in contravention of s 134(1), only means that as between Goldline and Ms Marsh, Goldline could not cancel the contracts as of right under that section. Whether Mr Croft entering the joint venture amounted to a breach of fiduciary duty is an entirely separate matter and unaffected by my view of the meaning of s 134(4)(a).

Section 134(4)(b) of the Act – Mr Croft's continued involvement in the contracts

[28] The joint venture agreement is dated 29 July 2020. As at that date, all the contracts remained conditional. In September/October 2020, three of the contracts were varied with all contracts being varied in September 2021.

[29] Goldline says these variations occurred after Mr Croft obtained an interest in the land via the joint venture agreement and at a time when Mr Croft continued to carry out real estate agency work for Goldline.

[30] Mr Collecutt submitted that Goldline's strongest argument was that Mr Croft was in breach of s 134(2), at least from the time of the joint venture, because Mr Croft continued to carry out agency work for Goldline when he knew or ought to have known that the sales contracts would result in him, or at least his company, acquiring an interest in the land via the joint venture.

[31] Section 134(2) prevents a licensee carrying out or continuing to carry out agency work in respect of a transaction if they know or should have known that the transaction will result in a person related to them acquiring an interest in the land. "Related Person" is defined in s 137 of the Act. It will be recalled that the joint venture agreement was amended to include the name of Mr Croft's company. A person is related to a licensee if the person is "an entity in which the licensee has an interest".[5]

[32] Mr Collecutt submitted that the contracts in their final form, that is, following the variations referred to above, were *brought* about by Mr Croft in breach of s 134(2). Mr Collecutt submitted the words "brought about" in s 134(4)(b) should look to the final effect of the contracts and not, as Mr Rea submits, the state of affairs when the contract was made, that is, when it was brought into existance.

[33] Mr Rae's response was that a contract may be conditional or unconditional but in either case it is *made* or *brought about* at the time that it was entered into. When a contract becomes unconditional or is varied, it is not a new contract, it is not brought about for a second or third time or however many times it is varied.

[34] Mr Rae submitted the reason for the use of the alternative terms "made" and "brought about" was because s 134(1) and 134(2) prohibit different conduct. He submitted that s 134(4) necessarily used the different words "made" and "brought about" for the two provisions to make sense semantically. He submitted one could not find an intention to give a wider temporal meaning to s 134(4)(b) as opposed to s 134(4)(a).

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5 Real Estate Agents Act 2008, s 137(2)(i).

[35] Mr Rae's submission is that s 134(2) does not apply as Mr Croft did not have the necessary mental element at the time in question, that is, when the contracts were brought about.

[36] Mr Collecutt submitted that s 134(4) should be given a purposive interpretation. Section 134 was, on his submission, primarily aimed at protecting vendors from their agent acquiring interest in the land they were engaged to sell and "brought about" should be read in the widest of terms.

[37] Mr Rae submitted that s 3 of the Act, stated that the purpose of the Act was to protect consumers and not just clients ("clients" being a defined term in s 4). Ms Marsh was a consumer and accordingly the approach to s 134(4) needed to be balanced. Mr Rae submitted the need to achieve that balance, coupled with a vendor retaining all their other rights against their agent for breach of fiduciary duty, favoured giving '*brought about'* its ordinary meeting.

Decision

[38] In my view, when s 134(4)(b) refers to a contract being 'brought about' in breach of s 134(2), it is referring to conduct in breach of s 134(2), a breach that led to that contract being made. Section 134(4)(b) in my view, cannot be read as applying to a contract that was not in breach of s 134(2) when it was made, but where an agent only *after* the contract was made, acquires an interest in the land.

[39] Eichelbaum J, as he then was, in *Were Real Estate Ltd v Keenan*, when referring to s 134's predecessor, said:[6]

> The mischief under consideration in ss 63 and 64, and the intent of the legislation, are I think clear enough. Real estate agents who seek to purchase property on their own account are to be prevented, as far as possible, from taking advantage (innocently or otherwise) of their own clients.

[40] The risks inherent in real estate agents purchasing from their clients do not arise if the agent only becomes interested in the land *after* the contract. When an

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6 *Were Real Estate Ltd v Keenan* [1984] 2 NZLR 650, at 652.

agent's interest arose will be a question of fact. As noted in *MacLennan Realty Ltd v Court*, Miller J said:[7]

> It will be a rare case in which the acquisition of an interest on completion of the very transaction in respect of which the agent is taking a commission does not reflect a conflict of interest that existed at the time the contract was executed.

[41] If Ms Marsh is correct, then at the time the contracts were brought about by Mr Croft, there was no prospect of him having an interest in the land at that time. If that is the case, then this may be one of the rare cases noted by Miller J.

[42] Section 134(4) of the Act does not need to be read as if it were intended to entitle a vendor to cancel for any breach of fiduciary duty owed by an agent, resulting in that agent gaining an interest in that land. The section creates an absolute right to cancel, irrespective of an agent's actions. Neither the language of s 134(4) nor the danger it is aimed at preventing, require that absolute right to cancel to be expanded to apply when a contract was made or brought about when no conflict of interest existed.

[43] Accordingly, we come back to the factual question. If Ms Marsh was, as she says, an arms-length purchaser who dealt with Mr Croft simply as the vendor's agent, then there was no risk of the mischief at which s 134 of the Act is aimed. Whether Mr Croft's subsequent action was a breach of his fiduciary duties or s 134(2), are matters for Goldline to take up with him. It follows that I do not accept the purposive approach called for by Mr Collecutt requires reading s 134(4) other than as referring to the state of affairs that existed at the time the contract was made or brought about.

[44] In my view, this conclusion is consistent with both ss 134(1) and (2) which prohibit an agent's involvement in a *transaction* which sees them obtaining an interest in the land. A 'transaction' is widely defined in s 4 of the Act. The relevant part of the definition is: "The sale, purchase, or other disposal or acquisition of a freehold estate or interest in land". Section 134(4)'s focus is much narrower as it applies only to contracts.

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[7] *MacLennan Realty Ltd v Court (20040 5 NZPR 256 (HC) at* [25].

[45] Section 134(4) does not permit a vendor to cancel a *transaction* which results in an agent acquiring an interest in the vendor's land. Had s 134(4) been intended to have the effect submitted by Mr Collecutt, then it would have empowered the cancellation of transactions.

The status of the variations

[46] Mr Collecutt submitted that the variations to the contracts which occurred were "brought about" by agency work carried out in contravention of s 134(2). That may well be right, however, the fact a contract is varied does mean the time it was brought about or made changes. At the risk of labouring the point, whether Mr Croft's actions in respect of the variations involved him in a breach of fiduciary duty is not the point. Goldline retains all its rights in relation to Mr Croft's involvement as its agent in relation to the variations.

[47] The circumstances in this case are unusual in that the contracts in question are not between the vendor and the agent directly, or a relative of the agent, as defined in s 137 of the Act. Mr Collecutt submitted that if his submissions were not accepted, there would be a loophole with illogical results. He submitted that if Mr Rea's submissions were accepted, it would not be possible to cancel an agreement where a property was initially sold on favourable terms, the purchaser then decided it was going to exit the agreement, the agent stepped in obtaining a hidden beneficial interest in the property, and the agent then persuaded the vendor to further vary the agreement to the benefit of the "purchaser" who had in fact become the agent.

[48] I do not accept this submission as it assumes a vendor's only source of relief where their agent has become the true purchaser is under s 134 of the Act.

[49] Where an agent learnt that a purchaser wished to exit a contract they had entered into on favourable terms if, at that time the agent was no longer engaged by the vendor, s 134 of the Act would not apply. A vendor may well have rights against their agent arising from a breach of fiduciary duty owed by the agent. Section 134 does not need to be interpreted as if it was intended to give a vendor the right to cancel in respect of any breach of fiduciary resulting in the agent obtaining an interest in the land.

[50] Mr Collecutt also submitted that if Mr Rae's submission was correct, it meant there was an inadvertent lacuna in the legislation which the Court should fill. I do not accept there is a gap. With respect to Mr Collecutt, his argument that there is a lacuna is somewhat circular as it assumes that however an agent gained an interest in the vendor's land, s 134 must be engaged.

[51] The application to sustain the caveats referred to in the application dated 16 December 2022 is *granted*.

Costs

[52] I see no reason why costs should not follow the event on a 2B basis together with disbursements as fixed by the Registrar. Counsel did not make submissions in respect of costs. Unless submissions on costs are filed within five working days, the order of the Court shall be that the applicant is entitled to costs on a 2B basis plus disbursements as fixed.

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Associate Judge Lester

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