IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2012-404-007205
[2015] NZHC 1795

BETWEEN	JAMES MESSENGER and JUNE MARY MESSENGER Plaintiffs
AND	STANAWAY REAL ESTATE LIMITED Defendant
AND	GARY MESSENGER First Third Party
	REALTY NZ LIMITED Second Third Party
	SIMPSON WESTERN Third Third Party

Hearing:	15 September - 3 October 2014 and 20 - 22 April 2015
Appearances:	G Blanchard and MHL Morrison for the Plaintiff M Ring QC and K Burkhart for the Defendant GB Lewis and LLC Cooney for First Third Party and Second Third Party P Fee and VS Wethey for the Third Third Party
Judgment:	31 July 2015

JUDGMENT OF WOOLFORD J

This judgment was delivered by me on Friday, 31 July 2015 at 3:30 pm pursuant to r 11.5 of the High Court Rules 1985.

Registrar/Deputy Registrar

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Introduction

[1] In proceedings first filed on 30 November 2012, James Messenger and his wife, June Messenger (Mr and Mrs Messenger), claim that Stanaway Real Estate Limited (Stanaway), the real estate company which acted as their agent in the sale of a beachfront property at 29 Muritai Road, Milford, Auckland, (the property), was negligent in relation to a failed sale of the property in 2006 to John Goodman and Deborah Rattray. They claim a total of $2.77 million for the loss on the resale of the property together with interest and legal costs.

[2] Stanaway applied for orders joining Mr and Mrs Messengers' son, Gary Messenger, as first third party; his real estate company, Realty NZ Limited, as second third party; and the law firm which acted for Mr and Mrs Messenger on the failed sale of the property in 2006, Simpson Western, as third third party. Stanaway asserts that if they are liable to Mr and Mrs Messenger, then they are entitled to a contribution or indemnity from the third parties, who they say were also negligent. The applications for joinder were granted on 22 November 2013.[1]

[3] There have also been a number of other interlocutory applications which have prolonged the proceedings. The trial itself commenced on 15 September 2014. The evidence was completed on 3 October 2014, after three weeks of hearing time. The proceedings were then adjourned for submissions, which took place over four days, on 20 - 22 and 24 April 2015. The evidence and the submissions were both very extensive and covered every aspect of the failed sale and all conceivable legal arguments. It is, however, not possible in this judgment to refer to every issue raised, but I have considered them all.

Factual background

[4] On 27 April 2006, Mr and Mrs Messenger signed a sole agency agreement with Stanaway to sell the property. Stanaway was a Bayleys franchisee. The particular agent with whom they dealt was the manager of the Bayleys Albany office, Sheryl Allis (now Campbell). The sole agency agreement listed Simpson Western as the solicitors acting for Mr and Mrs Messenger. The name of one of the partners of

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1 *Messenger v Stanaway Real Estate Ltd* [2013] NZHC 3096.

Simpson Western, Gary Simpson, together with his contact telephone number, was noted on the sole agency agreement.

[5] On 5 May 2006, Mr and Mrs Messenger signed powers of attorney, drafted by Simpson Western, appointing their son, Gary Messenger, to be their attorney. They live in Guernsey. Their son lives in Auckland. At the time Gary Messenger worked as a real estate salesperson. He had commenced working as a salesperson in the LJ Hooker Albany office two years earlier. His wife, Michelle Messenger, was also employed in the office as administration manager.

[6] In 2005 Gary Messenger and his wife were offered the opportunity to take over the LJ Hooker Albany office. They took up this offer. As neither of them held a real estate agent's licence, a Whangaparoa agent acted as licensee for the business. Gary Messenger and his wife incorporated a company, named Realty NZ Limited, to operate the LJ Hooker franchise.

[7] It was Gary Messenger who recommended to his father that he use Bayleys and, in particular Ms Campbell, to sell the property as Bayleys and Ms Campbell had a good reputation for selling the more expensive waterfront properties on Auckland's North Shore. With his father's approval, Gary Messenger had contacted Ms Campbell and indicated his parents' interest in offering Bayleys a sole agency for the property on the basis that Ms Campbell, as the Albany branch manager, handle all aspects of the sale. Gary Messenger asked Ms Campbell to provide a marketing proposal. He also raised the issue of Bayleys paying a referral fee to LJ Hooker. A referral fee of 20 per cent of the commission was agreed. Ms Campbell sent a marketing and sale proposal to Mr and Mrs Messenger and copied it to Gary Messenger prior to Mr and Mrs Messenger signing the sole agency agreement with Stanaway.

[8] On 22 July 2006 an advertising campaign began. The asking price for the property was set at $5,995,000.

[9] On 6 November 2006 a conditional offer of $5 million was received from Jeremy Dillon (the first Dillon offer). The offer was conditional upon the purchaser

obtaining a builder's report. Mr and Mrs Messenger instructed Gary Messenger, as their attorney, to countersign the offer at $5.4 million. The counteroffer was accepted by Mr Dillon. There was therefore a concluded agreement between the parties, although it remained conditional.

[10] On 20 November 2006, the solicitors acting for Mr Dillon advised Simpson Western that the agreement was terminated as a result of the building report which had been obtained.

[11] On 29 November 2006, Ms Campbell presented two further offers to Mr and Mrs Messenger through their son, Gary Messenger. The first was an unconditional offer of $4 million received from Mr Dillon (the second Dillon offer). A deposit of $300,000 was payable with the balance of the purchase price to be paid in cash in one sum on the date of possession, being 15 December 2006.

[12] The second was an unconditional offer of $4.7 million received from Rebecca Eele (the Eele offer). A deposit of $400,000 was payable, with the balance of the purchase price to be paid in one lump sum by way of cash or bank cheque on settlement date. The possession date was to be on or before 17 January 2007. After discussions, Mr and Mrs Messenger instructed their son, Gary Messenger, to countersign the Eele offer at $5.2 million.

[13] On 30 November 2006, Ms Eele increased her offer to $4.8 million by countersigning the draft agreement at that sum. That evening, Ms Campbell brought the revised Eele offer to the home of Gary and Michelle Messenger. She also had with her another offer from Mr Goodman and Ms Rattray (the Goodman and Rattray offer). This offer was conditional on the purchaser being satisfied, after taking such advice as the purchaser may wish, that the property was in all respects suitable for the purchaser (a due diligence clause). It also contained two price options, either $6,017,275 or $5,995,000, both of which involved payments extending over two years. In both instances, however, only the sum of $2.75 million was payable on the possession date, 18 December 2006.

[14] Three pages of the Goodman and Rattray offer were faxed by Gary Messenger to his father in Guernsey at approximately 10:00 pm. Following telephone discussions with his father, Gary Messenger countersigned the Goodman and Rattray offer after selecting the second payment option of $5,995,000 and deleting the due diligence clause.

[15] Ms Campbell delivered the countersigned offer to Mr Goodman and Ms Rattray's real estate agent, Wayne Marmont, at his offices. Ms Campbell then followed Mr Marmont to Mr Goodman and Ms Rattray's home. Mr Goodman and Ms Rattray came outside to Mr Marmont's car to consider the countersigned offer. They reinstated the due diligence clause, recording the time as being 11.00 p.m, and initialled the agreement next to the selected payment option.

[16] Ms Campbell then rang Gary Messenger and told him that Mr Goodman and Ms Rattray had reinstated the due diligence clause. It was decided that they would discuss the matter further with Mr Messenger in the morning.

[17] On 1 December 2006, Ms Campbell rang Mr Messenger at approximately 6.30 a.m. Ms Campbell suggested the insertion of two additional clauses, being a confidentiality clause and an escape clause. Mr Messenger then rang Gary Messenger and asked him to countersign the offer with the additional clauses and accept the reinstated due diligence clause. Ms Campbell brought the agreement to Gary Messenger for signature. After signature she delivered the agreement to Mr Marmont. The additional clauses were initialled by Mr Goodman and Ms Rattray signalling their acceptance of them. Ms Campbell then telephoned Mr and Mrs Messenger and informed them that Mr Goodman and Ms Rattray had accepted the additional clauses and that the agreement was now concluded. It remained conditional, however, because of the reinstated due diligence clause.

[18] On 4 December 2006, Ms Campbell sent a copy of the agreement to Simpson Western and to the lawyer acting for Mr Goodman and Ms Rattray, Andrew Stokes of The North Shore Law Practice. On 8 December 2006, Mr Stokes sent a facsimile to Simpson Western confirming that the agreement had become unconditional.

[19] A dispute then arose as to the settlement date. On 11 December 2006, Simpson Western wrote to Mr Stokes asserting that the settlement date was 18 December 2008. On 13 December 2006, Mr Stokes wrote to Simpson Western stating that Mr Goodman and Ms Rattray expected settlement to occur on the possession date of 18 December 2006. On 15 December 2006, Simpson Western and Mr Stokes corresponded regarding possible variations to the agreement. Settlement did not occur on 18 December 2006. On 20 December 2006, Mr Goodman and Ms Rattray placed a caveat over the title to the property to prevent any dealing with the land.

[20] On 13 April 2007, Mr Goodman and Ms Rattray filed proceedings in the High Court at Auckland seeking rectification of the agreement so that it ought to be read and construed as if it contained terms that the settlement date was 18 December 2006 and that Mr Goodman and Ms Rattray were, on settlement, entitled to register a first mortgage to the property prior to the lodging of a caveat in favour of Mr and Mrs Messenger. These proceedings were, however, discontinued on 21 May 2008.

[21] The last payment under the agreement was due to be made on 18 December 2008. Settlement did not occur on that date either. On 21 January 2009, Mr and Mrs Messenger applied for the caveat to lapse. On 12 February 2009, Mr and Mrs Messenger appointed Premium Real Estate, as their agent, to re-sell the property. On 26 March 2009 an agreement was reached to re-sell the property to a third party for $4,450,000 (subsequently reduced to $4,430,000 for early settlement). On 27 March 2009, Simpson Western formally cancelled the Goodman and Rattray agreement on behalf of Mr and Mrs Messenger. On 4 May 2009 the sale of the property to the third party was settled.

[22] Mr and Mrs Messenger filed proceedings in the High Court seeking recovery of their losses on the resale from Mr Goodman and Ms Rattray. Following a High Court hearing heard in July 2011, Priestley J issued a judgment in which he dismissed the claim by Mr and Mrs Messenger on the basis that Mr Goodman and Ms Rattray were not in breach of the agreement.[2] They were entitled to take title on

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[2] *Messenger v Goodman* HC Auckland CIV-2009-404-3974, 20 October 2011.

the possession date of 18 December 2006 (which was also the settlement date) and Mr and Mrs Messenger had failed to give them title.

[23] This finding was reversed by the Court of Appeal in November 2012.[3] The Court of Appeal held that Mr Goodman and Ms Rattray had an obligation to tender the payment that was due under the agreement on 18 December 2006. Mr Goodman and Ms Rattray did not tender at all and they were accordingly in breach of the agreement and could not rely on the failure of Mr and Mrs Messenger to give them title on 18 December 2006. Judgment was given in favour of Mr and Mrs Messenger in the sum of $2,881.708.20. Mr Goodman and Ms Rattray were, however, declared bankrupt the following year and Mr and Mrs Messenger have been unable to recover their losses from them.

[24] Two weeks after the Court of Appeal judgment, Mr and Mrs Messenger filed these proceedings against Stanaway in order to recover their losses from the agent who handled the failed sale of the property in 2006.

Issues

[25] The preliminary issue for determination is the proper interpretation of the agreement. Thereafter, the issues for determination are:

Defendant

(a) The duties owed by Stanaway to Mr and Mrs Messenger.

(b) Were those duties breached by Stanaway?

(c) If Stanaway did breach its duties to Mr and Mrs Messenger, were those breaches causative of Mr and Mrs Messengers' losses?

(d) The proper assessment of Mr and Mrs Messengers' losses.

(e) Were Mr and Mrs Messenger contributorily negligent?

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3 *Messenger v Goodman* [2012] NZCA 535; (2012) 13 NZCPR 755.

First and Second Third Parties

(f) The duties owed by Gary Messenger and/or Realty NZ Limited to Mr and Mrs Messenger.

(g) Were those duties, if any, breached by Gary Messenger and/or Realty NZ Limited?

(h) If Gary Messenger and/or Realty NZ Limited did breach their duties to Mr and Mrs Messenger, were those breaches causative of Mr and Mrs Messengers' losses?

(i) Is Stanaway entitled to a contribution from Gary Messenger and/or Realty NZ Limited?

Third Third Party

(j) The duties owed by Simpson Western to Mr and Mrs Messenger.

(k) Were those duties breached by Simpson Western?

(l) If Simpson Western did breach its duties to Mr and Mrs Messenger, were those breaches causative of Mr and Mrs Messengers' losses?

(m) Is Stanaway entitled to a contribution from Simpson Western?

Terms of the agreement

[26] The agreement is contained in a standard form, being the seventh edition of a form approved by the Real Estate Institute of New Zealand and by the Auckland District Law Society. The offer as initially presented to Mr and Mrs Messenger contained two options as to the purchase price. Option one was a price of $6,017,275 with a payment of $2.75 million on 18 December 2006 and a further payment of $3,267,275 on 18 December 2008. Option two was a price of $5,995,000 with a payment of $2.75 million on 18 December 2006, payments of

$61,875 every three months between 18 March 2007 and 18 December 2008, with a final payment of $2.75 million also on 18 December 2008.

[27] There was no deposit payable. The possession date was specifically stated to be 18 December 2006. A settlement date was not separately identified. That is not unusual. Neither of the Dillon offers or the Eele offer contained separately identified settlement dates. In each case a deposit was payable to Stanaway and the agreements specifically provided that the balance of the purchase price was to be paid or satisfied in one lump sum by way of cash or bank cheque on settlement date. Although the settlement date was not separately identified, it was specifically defined in clause 1.1(3) of the agreement which provided:

> Settlement date means the possession date or such other date as the parties are to perform their obligations under sub-clause 3.7.

[28] The standard form agreement recognises that the possession date is normally also the settlement date, but that the parties can choose a date other than the possession date as the settlement date. Sub-clause 3.7 provided:

> 3.7 On the settlement date:
>
> (1) The purchaser shall pay or satisfy the balance of the purchase price, interest and other monies, if any, due as provided in this agreement (credit being given for any amount payable by the vendor under sub-clause 3.9 or 3.10); and
>
> (2) The vendor shall concurrently hand to the purchaser;
>
> (a) The memorandum of transfer of the property provided by the purchaser under subclause 3.5, in registerable form;
>
> (b) all other instruments in registerable form required for the purpose of registering the memorandum of transfer; and
>
> (c) all instruments of title;
>
> the obligations in sub-clauses 3.7(1) and 3.7(2) being interdependent.

[29] Under the agreement, Mr Goodman and Ms Rattray were to pay or satisfy the balance of the purchase price on 18 December 2008, two years after the possession date. Absent any other special term of sale, it was therefore possible that settlement date was 18 December 2008, because of the terms of sub-clause 3.7.

[30] There were initially three special terms of sale inserted in the offer. These were:

> 14.0 The purchaser acknowledges that the property has a Code of Acceptance in place of a Code of Compliance Certificate.
>
> 15.0 The Purchaser acknowledges the Vendor shall put in place a Caveat over the property at 29 Muritai Road, Milford. Such Caveat will be prepared by the Vendors Solicitor at the expense of the Purchaser.
>
> 16.0 This agreement is conditional on the Purchaser being satisfied, after taking such advice as the Purchaser may wish, that the property is in all respects suitable for the Purchaser. The Purchaser shall notify the Vendor or the Vendor's solicitor not later than 4.00pm on the 7th working day that this condition has been fulfilled or that this condition has been fulfilled or this agreement will be at an end and the deposit paid (if any) will be returned to the Purchaser. This condition is for the sole benefit of the Purchaser.

[31] The due diligence clause (clause 16.0) was initially deleted by Gary Messenger acting on instructions from his father but was reinstated by Mr Goodman and Ms Rattray and then accepted by Gary Messenger, again, acting on instructions from his father. In addition, two further special terms of sale, a confidentiality clause and an escape clause, were inserted on the recommendation of Ms Campbell as clauses 17.0 and 18.0.

> 17.0 The parties hereto covenant the information contained in this contract shall remain completely confidential to those named, their respective legal advisers, the Purchasers, Financiers, the Vendor's and the Purchasers Valuers and Stanaway Real Estate Limited or any other party associated with this contract and the obligation in respect of this Clause continue until the parties herein mutually agree the information is no longer confidential.
>
> 18.0 If before this agreement becomes unconditional the Vendor enters into another agreement which is either conditional, or is unconditional in all respects except for it being subject to non-confirmation of this prior agreement, and which the Vendor in the Vendor's judgment considers to be no less favourable, the Vendor may deliver to the Purchaser or the Purchaser's solicitor notice in writing requiring the Purchaser to confirm this agreement as being unconditional. The Purchaser shall have until 4.00pm on the second day after delivery of such notice to advise the Vendor by delivery of notice in writing to the Vendor or the Vendor's solicitor that this agreement is unconditional, otherwise this agreement shall terminate. This condition is for the sole benefit of the Vendor.

[32] Clause 15.0 (the caveat clause) has assumed major significance in this case. It acknowledges that Mr and Mrs Messenger were entitled to place a caveat over the

property. Under s 137 of the Land Transfer Act 1952, any person may lodge with the Registrar-General of Land a caveat against dealing in any land if the person claims to be entitled to, or to be beneficially interested in the land by virtue of any unregistered agreement or other instrument or transmission, or of any trust expressed or implied or otherwise. The short point is that Mr and Mrs Messenger did not need to lodge a caveat if they retained title until Mr Goodman and Ms Rattray paid or satisfied the balance of the purchase price on 18 December 2008. The better view of the agreement is, therefore, that the possession date was also the settlement date because of the insertion of clause 15.0.

[33] Much of Stanaway's defence to the claim by Mr and Mrs Messenger is based on what it says is the proper interpretation of the agreement, which is that Mr and Mrs Messenger would transfer title on 18 December 2006 in return for $2.75 million and an unregistered mortgage secured by a caveat, with priority as a first charge. At worst for Mr and Mrs Messenger, the mortgage would have priority as a second charge behind a first registered mortgage securing a maximum of $2.75 million. Stanaway submits that that is the presumed common intention of the parties.

[34] I agree with Stanaway that on the proper interpretation of the agreement, Mr and Mrs Messenger were to transfer title on 18 December 2006 on an initial payment of $2.75 million. However, I cannot go as far as implying a term that clause 15.0 was inserted to protect an unregistered mortgage, to be given by Mr Goodman and Ms Rattray to Mr and Mrs Messenger, in a sum sufficient to cover the balance of the purchase price as a first charge, or that the unregistered mortgage would have second priority behind a first registered mortgage securing a maximum of $2.75 million. Clause 15.0 says nothing of the sort.

[35] Clause 15.0 was inserted by Mr Goodman and Ms Rattray. Their solicitor certainly did not believe that the caveat protected an unregistered mortgage. He believed the balance of the purchase price was to be unsecured. During the course of the dispute over the settlement date, Mr Stokes wrote to Simpson Western by letter 13 December 2006:

> I confirm that my clients are adamant that settlement is to be effected on the 18 December 2006 and the balance of the money is to be paid on progress

> payments. I do confirm that the definition of settlement and possession is quite clear in the agreement and there is no second date provided under the possession date for settlement. Secondly, obviously if settlement was not intended for the 18 December 2006 there would be no purpose for clause 15 as why on earth would your clients put a caveat on a property that is owned by your clients. Obviously this is to protect the unsecured debt.

[36] Mr Goodman and Ms Rattray had no intention of entering into an agreement which was to be interpreted in the manner suggested by Stanaway. They had entered into an agreement with New Zealand Finance Limited to borrow $6.27 million or $275,000 more than the purchase price, for six months at 13 per cent per annum. New Zealand Finance Limited required a registered first mortgage over the property with priority to the full extent of the loan as well as registered first mortgages over two other properties. Mr Goodman and Ms Rattray were going to use $2.75 million of the loan to make the initial payment due on 18 December 2006 under the agreement, and use a further undisclosed amount to refinance their borrowings against the two other properties. Mr Goodman intended to apply the balance to an aggressive investment strategy anticipated to generate income and/or short term profits sufficient to meet the quarterly payments of $61,875. Presumably, they also envisaged that the same source and/or an anticipated increase in the value of the secured properties would enable them to pay the balance of $2.75 million due on 18 December 2008 as well.

[37] Mr and Mrs Messenger did not have any clearly articulated intention. They therefore also lacked any intention of entering into an agreement which was to be interpreted in the manner now suggested by Stanaway. Mr Messenger says now that he would have been happy to have entered into an agreement to be interpreted in such a manner. It is my view, however, that Mr Messenger did not know at the time how the balance of the purchase price was to be protected. I accept that Mr Messenger did not know what a caveat was or how it might work in practice to protect the balance of the purchase price.

[38] Stanaway submits that the actual intention of Mr Goodman and Ms Rattray is irrelevant to the presumed common intention and, viewed objectively, it is not reflected in the terms of the agreement. The result is that Mr Goodman and

Ms Rattray committed themselves to an agreement that they would never be able to perform.

[39] Stanaway submits that the true legal cause of the losses suffered by Mr and Mrs Messenger is that, unknown to anyone on the Messenger side of transaction, Mr Goodman and Ms Rattray had entered into the transaction mistakenly believing that the agreement allowed them on settlement to register, as a first charge ahead of Mr and Mrs Messengers' caveat, a mortgage with priority in excess of the value of the property, leaving Mr and Mrs Messenger effectively unsecured. Based on the proper interpretation set out above, Mr Goodman and Ms Rattray could not settle, and/or would not have wanted and did not want the property and so, Stanaway submits, the agreement was doomed from the outset.

[40] With respect, however, I am unable to agree with Stanaway's submissions as to the proper interpretation of the agreement. Stanaway submits there must have been an implied term to grant an unregistered mortgage in order to create the caveatable interest. In *BP Refinery (Westernport) Pty Ltd v Shire of Hastings*[4] the Privy Council set out five criteria for the insertion of an implied term in a contract. These are:

(a) It must be reasonable and equitable;

(b) It must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it;

(c) It must be so obvious that "it goes without saying";

(d) It must be capable of clear expression; and

(e) It must not contradict any express term of the contract.

[41] Looking at these criteria in turn, firstly, there is nothing in the agreement to signal any intention by the parties to grant an unregistered mortgage. If the balance of the purchase price was to be secured by either a registered or unregistered mortgage, the agreement would, in my view, have said so. The agreement was drawn up by real estate agents who are familiar with and had access to standard clauses for vendor mortgages. The lack of any such commonly used form is a strong

4 *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* [1977] 16 ALR 363 (PC).

indicator that no mortgage was intended. The implication of such a term can therefore be seen as unreasonable.

[42] Secondly, such an implied term is not necessary in order to make the agreement work. The agreement works with Mr and Mrs Messenger being unsecured for the balance of the purchase price or entitled only to an equitable charge behind Mr Goodman and Ms Rattray's first and unlimited mortgage. I am of the view that the agreement is effective without the implied term, albeit that it is clearly to the disadvantage of Mr and Mrs Messenger.

[43] Thirdly, as to whether the implied term is so obvious that "it goes without saying", Stanaway has itself taken some time to formulate what it says is the proper interpretation of the contract. In an affidavit sworn on 23 October 2013 by Stanaway's expert, Tim Jones (who was not called to give evidence by Stanaway at trial), in support of its application to join Simpson Western as a third party, Mr Jones says that the caveat stipulated in clause 15.0 was to protect the money owing to Mr and Mrs Messenger by Mr Goodman and Ms Rattray. However, he says nothing about the nature of the equitable interest protected by their caveat and, in particular, does not assert that it protected either an unregistered first mortgage or an unregistered second mortgage behind a first registered mortgage securing a maximum of $2.75 million.

[44] In his brief of evidence dated 18 March 2014, Mr Jones says that the terms of the vendor financing arrangement were unsatisfactory "with only a caveat to protect the vendors' interest". Mr Jones said he agreed with the comments of Simpson Western's expert, Peter Nolan, in paragraph 28 of his affidavit where he stated:

> The usual arrangement would be for the vendor to take a registered mortgage as security. In the absence of any agreement to grant a mortgage in favour of the vendor it would have been questionable to a competent practitioner in my opinion as to whether the vendor would actually have a caveatable interest.

Mr Jones further says that this potential risk that the caveat in clause 15.0 may provide no security to the vendors would have needed to be spelt out to Mr and Mrs Messenger at the outset.

[45] It was not until Mr Jones' reply brief of 16 April 2014 that he says, for the first time, that because the caveat must have been intended to support some sort of interest in land (without specific description), the agreement must have implied an unregistered mortgage for the balance of the purchase price. The only issue then for Mr Jones was whether the vendors could expect the caveat to support a first priority unregistered mortgage. Mr Jones says that as there was no suggestion by the purchasers that they required finance prior to 1 December 2006, the objective conclusion would be that the caveat would support a first priority unregistered mortgage. As an alternative, once the purchasers brought their financier through the property on 8 December 2006, the vendors would assert that the intention of the parties was that the caveat would support a unregistered mortgage second in priority to a first registered mortgage securing a maximum of $2.75 million.

[46] It was only in the latest iteration of the statement of claim by Stanaway against Simpson Western, dated 15 August 2014, that Stanaway asserted that the only reasonable inference was that the parties must have intended that the caveat would protect an interest possessed by the vendors after 18 December 2006, pursuant to an unregistered mortgage securing the unpaid balance of the purchase price during the period that it remained outstanding and until 18 December 2008, being the due date for its payment in full.

[47] Fourthly, as to the requirement that the term be capable of clear expression, Stanaway remains uncertain as to what priority the unregistered mortgage was to have, so it is put in the alternative – either a first or a second priority. Although clearly expressed as an alternative, there is no certainty about its exact terms and effect. For instance, how would the quarterly payments be taken into account? Further, if the unregistered mortgage was to be a second priority, does the limit on the first registered mortgage of $2.75 million include interest and costs or were they additional to the sum of $2.75 million?

[48] Fifthly, I acknowledge that the implied term is not contrary to any express term of the contract. Clause 9.2 in fact provides that if the vendor is to advance mortgage moneys to the purchaser then, unless otherwise stated, the mortgage shall

be in the "fixed sum" form currently being published by the Auckland District Law Society.

[49] In conclusion, I agree with counsel for Simpson Western that an unregistered first (or adequate second) mortgage would give Mr and Mrs Messenger more than what the parties had expressly agreed to, and that the Court cannot improve their bargain. As Lord Hoffman stated in *Attorney-General of Belize v Belize Telecom Limited:*[5]

> [16] …The Court has no power to improve upon the instrument which it is called upon to construe…It cannot introduce terms to make it fairer or more reasonable. It is concerned only to discover what the instrument means…
>
> [17] The question of implication arises when the instrument does not expressly provide for what is to happen when some event occurs. The most usual inference in such a case is that nothing is to happen. If the parties have intended something to happen, the instrument would have said so. Otherwise the express provisions of the instrument are to continue to operate undisturbed. If the event has caused loss to one or other of the parties, the loss lies where it falls.

[50] Significantly, there has also been a prior judicial determination of the proper interpretation of the agreement. In his judgment, Priestley J held that the possession date and the settlement date were both 18 December 2006 and that clause 15.0 protected an unregistered equitable interest which ranked behind any mortgage taken out by Mr Goodman and Ms Rattray. Stanaway says it is not bound by Priestley J's judgment, particularly as the proper interpretation it contends for was not argued by Simpson Western on behalf of Mr and Mrs Messenger in the proceedings. However, Priestley J heard evidence from Mr Messenger, Gary Messenger, Ms Campbell and Mr Goodman. The facts, so far as relevant, which led up to the agreement being signed are set out at length in his judgment. On the issue of the interpretation of the agreement, specifically the settlement date and the nature of the security interest held by Mr and Mrs Messenger the Judge adopted an objective interpretation approach. This was the correct approach to take. Priestley J rejected an equitable charge as having priority to any mortgage taken out by Mr Goodman and Ms Rattray. In those circumstances, he clearly rejected the notion of an unregistered mortgage.

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[5] *The Attorney-General of Belize and Others v Belize Telecom Limited & Another* [2009] UKPC 10; [2009] 2 All ER 1127.

[51] Stanaway submits that the contrary comments and conclusions of Anderson J in *Broadley v McAlpine*[6] the Court of Appeal in *Hooker v Stewart*,[7] D W McMorland in his book *Sale of Land*[8] and, the Court of Appeal in *Swann v Secureland Mortgage Investment Nominees Ltd*[9] were not cited. I am of the view, however, that these cases and commentary do not call Priestley J's judgment into question.

[52] In *Broadley v McAlpine*, the parties had specifically agreed in writing that the vendors would provide a second mortgage to the purchaser by inserting a condition in the standard form agreement for sale and purchase as follows:

> VENDOR Second
> Term: 2 years $150,000
> Interest rate 24% pa
> Penalty 26% pa.

[53] Anderson J held that there was an implied term that the first mortgage would not exceed the difference between the purchase price and the sum of the deposits and the second mortgage finance. He stated:[10]

> This term is reasonable, is necessary to give business efficacy to the contract, and is so obvious it goes without saying.
>
> These three ingredients interact to some extent. First, no reasonable purchaser would expect and no reasonable vendor would accept, that a vendor mortgage forming part of the purchase price should be secured on a nil equity. Second, the contract would not be commercially efficacious unless the value of the equity after the first mortgage and to which the second mortgage would attach, were assessed in some way. Third, the terms of the agreement relating to the amount and manner of payment of the purchase price indicate a formula for fixing the maximum level of debt financing under the intended first mortgage.

[54] In contrast to the present case, the parties had specifically inserted a provision for a vendor mortgage in the agreement for sale and purchase itself.

[55] In *Hooker v Stewart*, the two agreements for sale and purchase at issue also included specific provisions that the vendor would grant a second mortgage of $40,000 for a year and interest free. In an action taken by the vendors against the

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6 *Broadley v McAlpine* (1989) ANZ ConvR 172 (HC).
7 *Hooker v Stewart* [1989] 3 NZLR 543 (CA).
8 D W McMorland *Sale of Land* (2nd edition, Cathcart Trust, Auckland, 2000).
9 *Swann v Secureland Mortgage Investment Nominees Ltd* [1992] 2 NZLR 144 (CA).
10 At 24.

real estate agent involved in the sale, counsel for the agent submitted that there was an implied term in the agreements that the total of the mortgages and the deposit would not exceed the price paid. In that regard, he relied on the decision of Anderson J in *Broadley v McAlpine*. The Court of Appeal, however, stated:[11]

> There is, however, a very different situation here from the commercial business loan forming the subject of the contract at issue in that case. We see this arrangement as essentially a concession to a buyer in allowing the balance of the purchase price to stay in for one year without interest. It had the obvious advantage of enabling the vendors to achieve a better price overall, and a quicker sale of their properties. It does not follow that a limit on the first mortgage was needed to give the contracts business efficacy. But the important point is the one made by the purchaser's solicitors namely, that the principal was to be secured not only over the property but by the guarantees as well.

[56] Stanaway submits that *Hooker* supports their case because it appeared the Court of Appeal would have been willing to imply a term in the agreements that a limit on the first mortgages was needed to give the contracts business efficacy but for the existence of guarantees, of which there are none in the present case. However, it could also be said that in this case that the lack of a vendor mortgage enabled Mr and Mrs Messenger to achieve a better price overall and a quicker sale of the property.

[57] Counsel for Stanaway also cites McMorland's *Sale of Land*.[12] McMorland states:

> **3.07 Mortgage back to the vendor**. Sometimes the parties agree the vendor will lend a portion of the price to the purchaser to enable the purchaser to complete, and that the amount of the loan will be secured by mortgage of the property to the vendor. Again, if the contract of sale is not to be void for uncertainty, the basic terms of the mortgage must be agreed, and, if there is to be compliance with the Contracts Enforcement Act 1956, recorded in writing. The bare minimum is that amount of the principal sum and the interest rate must be stated, but to avoid later dispute, and to ensure that both parties achieve the terms they anticipate, as much detail as is necessary should be included. In the absence of agreement on the term of the loan, the law imply an "on demand" mortgage; but if a term mortgage is required, the term must be expressly agreed. As in the case of most problems raised by uncertainty, the Court will try to make the provision work if possible, often by the implication of appropriate terms.

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11 At 547.

12 McMorland *Sale of Land*, above n 8, at [3.07] and footnote 3.

[58] McMorland cites two cases as authorities – *Beck v Erickson*,[13] in which a term and rate of interest were implied in line with discussions which had taken place during negotiations, and *Broadley v McAlpine*. This commentary does not, in my view, assist Stanaway. McMorland refers to compliance with the Contracts Enforcement Act 1956. Section 2 of the Contracts Enforcement Act 1956 has now been replaced by s 24 of the Property Law Act 2007, which states that a contract for the disposition of land (which includes a mortgage) is not enforceable by action unless the contract is in writing or its terms are recorded in writing, and the contract or written record is signed by the party against whom the contract is sought to be enforced. No argument was addressed to me on the basis that there could not be an implied term that Mr Goodman and Ms Rattray were to grant a mortgage to Mr and Mrs Messenger because there was no record in writing of it. The need for certainty, however, is in my view, another factor that the Court should bear in mind in assessing whether or not there is an implied term as submitted by Stanaway.

[59] Finally, *Swann v Secureland Mortgage Investment Nominees Ltd* was a case of fraud. In that case, the agreement for sale and purchase of a residential property provided for a purchase price of $500,000, payable by way of an initial payment of $150,000 with the balance satisfied by a vendor second mortgage of $350,000. There was no express term limiting the amount or priority of the purchaser's first mortgage and the purchaser borrowed $250,000 secured against the property as a first charge. In the Court of Appeal, Gault J held that it was fraudulent for the purchaser to induce the vendor to enter into the agreement "without disclosure to her of his intention (subsequently carried out) to over-mortgage the property, so eroding her security".[14] I see no statement of principle by the Court of Appeal which assists Stanaway in the present case.

[60] If there is no implied term granting an unregistered mortgage, what interest is protected by the caveat? A caveat is described in Hinde, McMorland & Sim *Land Law in New Zealand* as:[15]

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13 *Beck v Erickson* (1908) 28 NZLR 43 (SC).

14 *Swann v Secureland Mortgage Investment Nominees Ltd* [1992] 2 NZLR 144 (CA) at 153, line 34–36.

15 Hinde, McMorland & Sim *Land Law in New Zealand* (online looseleaf ed, Lexis Nexis) at [10.001].

> …a document that, when lodged in the Land Registry office, gives the caveator the opportunity of protecting an existing right or of establishing an existing claim. The caveat does so by preventing some action with respect to the land (such as registration of a transfer or mortgage) that might otherwise destroy the right or claim. A caveat does not create new rights. As its name suggests, a caveat will often serve also as a warning that the caveator is making some claim with respect to the land.

[61] The most common form of caveat is a caveat against dealings with land under the Act. It is important to recognise that the agreement in clause 15.0 to place a caveat over the property did not, in itself, create a caveatable interest. As noted by Hinde, McMorland & Sim:[16]

> A registered proprietor of land sometimes grants the right to lodge a caveat over that land to another person with whom the registered proprietor is contracting. Where the effect of the contract, quite apart from the clause granting the right to caveat, is to confer a caveatable interest on the other person, the clause is otiose. Where the contract does not, apart from the clause, confer a caveatable interest, it is not clear whether the clause is effective to vest a right to lodge a caveat in the other person.

[62] It seems to me that the present case falls into the latter category – the agreement for sale and purchase does not, apart from clause 15.0, confer a caveatable interest. Hinde, McMorland & Sim goes on to state that in this situation:[17]

> … Two possibilities should be distinguished.
>
> First, it may be that the clause granting the right to caveat necessary implies that the registered proprietor intended to confer a caveatable interest on the other person. Such an implication should arise only where the nature of the interest that the registered proprietor intended to be conferred is clear from the contract. Where such an implication does arise, the other person will have a caveatable interest that can be protected in the ordinary way by the caveat provisions of the Land Transfer Act 1952.
>
> Secondly, the clause granting the right to caveat may occur in a contract in which no caveatable interest of any sort is conferred by the registered proprietor. In such a case, the other person has no caveatable interest, and therefore has no right to lodge a caveat under s 137 of the Land Transfer Act 1952. Nonetheless, where that person does lodge a caveat, it is submitted that the clause granting the right to caveat will have some effect. An application by the registered proprietor under s 143 of the Land Transfer Act 1952 for removal of the caveat would, it is submitted, be a breach of contract, so that the application should fail. However, the clause granting the right to caveat will bind only the registered proprietor, so that third parties would be free to invoke the procedure under s 143 for the removal of the caveat, or the procedure under s 145 for the lapse of the caveat.

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16 At [10.009 y].
17 At [10.009 y].

[63] It is clear from the contract that Mr Goodman and Ms Rattray were obliged to make quarterly payments and then a final payment of $2.75 million on 18 December 2008. Because of this obligation on the part of Mr Goodman and Ms Rattray, I am prepared to imply that they intended to confer a caveatable interest on Mr and Mrs Messenger in relation to the further sums to be paid pursuant to the agreement, which is the first of the two possibilities identified by Hinde, McMorland & Sim.

[64] It is common ground that the form of the interest protected by the caveat must be either an equitable mortgage or an equitable charge. Hinde, McMorland & Sim states:[18]

> An equitable mortgage is one under which no legal estate or interest is vested in the mortgagee, and may be defined as a contract or deed that operates as a security and is enforceable under the equitable jurisdiction of the Court. In common with other equitable interests, equitable mortgages may be created informally, although equitable mortgages of land must be evidenced in writing or supported by a sufficient act of part performance…
>
> The Court gives effect to equitable mortgages either by giving the mortgagee the appropriate remedies, or by compelling the mortgagor to execute a mortgage in accordance with the contract and allow it to be registered. The Court's usual remedy is to order a sale of the land, though there seems no reason why the Court could not order that the mortgagee enter into possession of the land. These remedies may be available to an equitable mortgagee without the assistance of the Court, though in the case of the remedy of sale it is doubtful that the power of sale can in practice be exercised effectively without the Court's assistance.

[65] As to equitable charges, Hinde, McMorland & Sim states:[19]

> Under the general law of securities an equitable charge is a security whereby property is appropriated for the payment of a debt without transfer of ownership or possession to the charge. An equitable charge is distinguishable from a mortgage, which at common law involves a transfer of ownership. Moreover, the remedies available to an equitable chargee are not as extensive as those available to a mortgagee. Because an equitable charge does not involve a transfer of ownership, the chargee has no remedy of foreclosure. Nor does the chargee have the right to enter into possession. The chargee's remedies are to apply to the Court for an order for sale or for the appointment of a receiver.
>
> In relation to land, since a mortgage operates only as a charge, it might be thought that there was now no distinction between an equitable charge and

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18 At [15.006].
19 At [15.010].

> an equitable mortgage. But for Land Transfer land an equitable mortgagee usually has the right to compel the mortgagor to execute a registrable mortgage in accordance with the contract, which right an equitable chargee does not have.
>
> Where an equitable charge is granted over Land Transfer land the chargee thereby acquires an interest in the land that, although not registrable, does support a caveat. While the Land Transfer Act 1952 does not allow for the registration of equitable charges, there is nothing in that Act to prevent the creation of such charges, or their protection by caveat.

[66] Again, Hinde, McMorland & Sim makes reference to the requirement that equitable mortgages of land must be evidenced in writing. I also note that in the three cases cited by Stanaway, namely, *Broadley v McAlpine, Hooker v Stewart* and *Swann v Secureland Mortgage Investment Nominees Ltd*, the vendor mortgages in each case were evidenced in writing. In contrast, there is no written indication in the agreement in the present case that a mortgage was to be provided by Mr Goodman and Ms Rattray in respect of the balance of the purchase price. The amounts and the dates of the further payments were the only matters specified.

[67] In those circumstances, I agree with Priestley J that the interest protected by clause 15.0 was an equitable charge only. As such, it did not give Mr and Mrs Messenger any right to compel Mr Goodman and Ms Rattray to execute a memorandum of mortgage. An equitable charge is not capable of giving rise to a registerable instrument. Equitable charges arise in a variety of circumstances, but "most frequently in respect of loans or guarantees, debts due to builders or for goods".[20] In my view, the balance of the purchase price was a debt owing by Mr Goodman and Ms Rattray to Mr and Mrs Messenger, in respect of which there was an equitable charge and not an equitable mortgage.

Stanaway's duties

[68] The general principles are not in dispute:[21]

> Every agent acting for reward is bound to exercise such skill, care and diligence in the performance of his undertaking as is usual or necessary in or for the ordinary or proper conduct of the profession or business in which he

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[20] "Editorial comment" (1996) ANZ ConvR 165. See as an example, *Yuan v Te Construction Ltd* HC Auckland CIV 2013-404-3019, 12 August 2003.

[21] Peter Watts (ed) *Bowstead & Reynolds on Agency* (20th ed, Thomson Reuters, London, 2014) at [6-017].

> is employed, or is reasonably necessary for the proper performance of the duties undertaken by him.

[69] The degree of skill and care which may be expected of an agent acting for reward is similar to the normal duty of care in negligence.[22] An agent employed for the purpose of effecting a contract between the principal and a third party must use due skill and care in making that contract.[23]

[70] In *McKenna v Stark,*[24] a real estate agent was found to be in breach of his general duty to his principal when he failed to adopt the means usually adopted by real estate agents to protect their principals when selling farms, in particular, by failing to insert a clause that the sale was subject to the consent of the Land Valuation Court, or that the purchaser would provide a declaration under s 24 of the Land Settlement Promotion Act 1952, which would make such consent unnecessary.

[71] *Hooker v Stewart*[25] was another case where a real estate agent was found to be in breach of his general duty to his principals, Mr Stewart and his wife, both in respect of the assurances he gave them of the purchaser's financial position and in persuading them against taking legal advice before signing two agreements for sale and purchase.

[72] In this particular case Mr and Mrs Messenger allege that in breach of its duty of care, Stanaway failed to:

(a) advise Mr and Mrs Messenger that clause 15.0 created an ambiguity such that it was unclear whether the settlement date was 18 December 2006 or 18 December 2008.

(b) advise Mr and Mrs Messenger that, if on the proper interpretation of the agreement, the settlement date was 18 December 2006, then Mr and Mrs Messenger would be required to give title to Mr Goodman and Ms Rattray on 18 December 2006 and would be left

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22 *Bowstead & Reynolds on Agency*, above n 21, at [6-019].
23 At [6-019].
24 *McKenna v Stark* [1955] NZLR 1226 (SC).
25 *Hooker v Stewart* [1989] 3 NZLR 543. See [55]–[56] above.

unsecured or inadequately secured for the payment of the balance of the purchase price following settlement.

(c) advise Mr and Mrs Messenger either not to enter into the agreement because of the uncertainty created by the ambiguity arising from the inclusion of clause 15.0 in the agreement or amend the agreement by either deleting clause 15.0 and/or adding a further term/s specifying that the settlement date was 18 December 2008 or providing for the grant of a mortgage by Mr Goodman and Ms Rattray to Mr and Mrs Messenger.

[73] In summary, I am of the view that the first allegation is not made out, but that broadly the second and third allegations are established on the evidence.

[74] The two features of the agreement that were immediately obvious to anyone reading it were:

(a) the possession date was 18 December 2006; and

(b) on either payment option, Mr and Mrs Messenger would only receive $2.75 million on the possession date and would not receive the balance of the purchase price until up to two years after the possession date.

[75] Given these obvious features, I am of the view that any reasonably competent real estate agent would therefore immediately realise that if title also passed on 18 December 2006, Mr and Mrs Messenger needed security for the unpaid purchase price. Legal advice was not required to understand the dangers of leaving the balance of the purchase price unsecured.

[76] A reasonably competent real estate agent would therefore have sought confirmation of the settlement date. Ms Campbell says that Mr Messenger asked her when settlement was and that she replied that she was unsure, but that she thought it was probably 18 December 2006 because of clause 15.0. In my view, that advice

was insufficient to discharge her duty of care to Mr and Mrs Messenger. If she was unsure, then she should have telephoned Mr Marmont and asked him what the purchasers intended the settlement date to be and then, after discussing the issue with her clients, written the settlement date in the agreement. It would have been a simple matter for Ms Campbell to have written the settlement date in the agreement. Yet she did not do so before the agreement was signed by Gary Messenger. She says that she did, in fact, telephone Mr Marmont from her car after she left Gary and Michelle Messenger's house with the signed agreement and asked him whether the purchasers were expecting title on possession date, although when interviewed by Brian Stewart of Simpson Western on 24 January 2007, she said she could have had that conversation the next day. Whenever it was, Mr Marmont apparently told Ms Campbell that was his understanding. Ms Campbell does not assert in her brief of evidence that she later told her clients that she had confirmed with Mr Marmont that the purchasers were in fact expecting title on possession date, although in a file note Ms Campbell made on 21 January 2007, she says "I rang Gary and let him know" after being told by Mr Marmont that the purchasers were expecting title on possession date.

[77] Alternatively, Ms Campbell could simply have written a settlement date in the agreement after discussing the issue with her clients, but without consulting Mr Marmont. The disadvantage of this approach was that Ms Campbell would have remained unsure of the purchasers' intentions as to the settlement date. If she had, however, simply written a settlement date in the agreement, Ms Campbell would have discharged her duty to seek confirmation of the settlement date, as the purchasers would have confirmed the date by their subsequent signature of the amended agreement, if they chose to do so.

[78] Legal advice was not required to confirm the settlement date. The settlement date is such a fundamental part of any agreement for sale and purchase of real estate that a real estate agent has a duty to take all reasonable steps to seek confirmation of the settlement date, if it is not clear on the face of the agreement. Counsel for the defendant submits that it was obvious that the settlement date was 18 December 2006, but in my view it is significant that after advice from a major law firm, Mr Goodman and Ms Rattray issued rectification proceedings and not proceedings

for specific performance of the contract. An application for specific performance of the contract would have been the preferable course for Mr Goodman and Ms Rattray if the settlement date was obviously 18 December 2006. Ms Campbell herself acknowledged that it was a significant omission on her part not to have written the settlement date into the agreement. I agree. The uncertainty about the settlement date was a major contributor to the ensuing difficulties.

[79] Another fundamental aspect of this particular agreement for sale and purchase of real estate was the issue of security for the balance of the purchase price if the settlement date was 18 December 2006. Ms Campbell herself knew that vendor finance should always be secured by a registered mortgage. Bayleys had standard vendor finance clauses available to be inserted into agreements for the sale and purchase of real estate, which either provided for a first mortgage or a second mortgage with a limit on what could be borrowed under the first mortgage. The Real Estate Institute of New Zealand (REINZ) also had standard clauses that were readily available to real estate agents.

[80] Ms Campbell acknowledged that she would quite often use those clauses when the parties had not taken legal advice on an agreement. She also acknowledged that including clauses relating to vendor finance in agreements was part of a real agent's ordinary job. She could not recall having ever used a caveat clause such as cl 15.0 to secure vendor finance before and it was not clear to her whether Mr and Mrs Messenger would have adequate security.

[81] The real estate expert called by Stanaway, Michael Pinkney, agreed that it was preferable to use the standard clauses such as those published by REINZ, rather than rely on a caveat. When it was put to him that he had never seen a caveat clause such as 15.0 used to secure vendor finance, Mr Pickney said he could not swear that he had never seen such a clause, but that it would be very unusual.

[82] I agree with the real estate expert called by Mr and Mrs Messenger, Max Oliver, who said that a reasonably competent and careful real estate agent would have known that if the settlement date when transfer passed was the earlier possession date of 18 December 2006, then Mr and Mrs Messenger really required

mortgage security in respect of their vendor finance, secured against the title of the property. He said, at the very least, they required a carefully drafted and legally binding agreement recording the priority of mortgages registered against the title in respect of any purchasers' finance and the Messengers' vendor finance.

[83] A reasonably competent real estate agent would therefore have advised Mr and Mrs Messenger to insert one of the standard vendor finance clauses into the agreement. Although Ms Campbell says that Mr Messenger was firmly of the mind that he did not want more conditions in the contract, she still added two additional clauses, being a confidentiality clause (clause 17.0) and an escape clause (clause 18.0), which would have entitled Mr and Mrs Messenger to require the purchasers to declare the agreement unconditional if they received an offer no less favourable from another purchaser.

[84] Ms Campbell acknowledges that she did not give any advice Mr and Mrs Messenger about the adequacy of the caveat as security. She says that she did not regard the caveat as security and knew that clause 15.0 "contained no clear right to security for the Messengers for the balance of the balance of the purchase price". Ms Campbell also cannot recall giving any advice to Mr and Mrs Messenger that vendor finance should always be secured by a registered mortgage. Mr and Mrs Messenger are adamant that she did not. In those circumstances, I find that Ms Campbell did not give any such advice, nor did she suggest the inclusion of a standard vendor finance clause.

[85] In my view, this was clearly negligent. A reasonably competent real estate agent would have understood that the offer presented to Mr and Mrs Messenger that evening, with a probable settlement date of 18 December 2006, seriously disadvantaged them. Even though Ms Campbell knew that security still needed to be sorted out, she gave no advice to Mr and Mrs Messenger that vendor finance should always be secured by a registered mortgage, nor did she suggest the insertion of a standard vendor finance clause.

[86] Ms Campbell says that she got the impression from her discussions with Mr Messenger that he was of the view that security could be sorted out later. That

"impression" reinforced her negligence, as she must have known that once signed, the agreement was binding on the parties and could not be altered unilaterally to provide for security which was not originally specified in the agreement. Ms Campbell cannot recall giving that advice and acknowledged that it would have been a significant omission on her part not to point out to Mr and Mrs Messenger that they could not change the terms of the agreement later, if in fact she did not give that advice.

[87] Legal advice was not required to confirm that clause 15.0 contained no clear right to security for Mr and Mrs Messenger for the balance of the purchase price. Mrs Campbell knew that already. Security for the unpaid purchase price is such a fundamental part of any agreement for sale and purchase where money is still owing on settlement date, that a real estate agent has a duty to advise their client that vendor finance should always be secured by registered mortgage. Ms Campbell, herself, acknowledged that she had often used the standard vendor finance clauses without any involvement from lawyers. It was a significant omission on her part not to have given Mr and Mrs Messenger such advice. The apparent lack of security, if the settlement date was 18 December 2006, was also a major contributor to the ensuing difficulties.

[88] Ms Campbell's duty to confirm the settlement date and to give advice on measures to properly secure the unpaid portion of the purchase price, if settlement was to take place on 18 December 2006, could not be avoided simply by recommending that her clients obtain legal advice. Ms Campbell says that she told Mr Messenger twice that he should get his solicitor to check the agreement out before her clients signed it – once, just after 10:00 pm. on the evening of 30 November 2006 and, again, the next morning at around about 6:30 am.

[89] There is already a recommendation in bold capital letters in the printed form as follows:

> **PROFESSIONAL ADVICE SHOULD BE SOUGHT REGARDING THE EFFECT AND CONSEQUENCES OF ANY AGREEMENT ENTERED INTO BETWEEN THE PARTIES.**

[90] The experts who gave evidence in this case suggested that could be a reference to legal advice or some advice from other professionals, such as valuers or accountants. However, if it is a reference to legal advice, the experts agreed that it was ignored in the majority of cases, as most agreements for the sale and purchase of real estate are concluded without any involvement from lawyers. This makes it all the more important for a real estate agent to ensure that an agreement is drafted in a readily understandable form so that they can give sound advice to their clients. If they cannot understand it, then their clients are unlikely to be able to do so.

[91] Ms Campbell says that it was not clear to her when title would pass or whether Mr and Mrs Messenger would have adequate security. In the circumstances, she could have easily remedied any ambiguity or uncertainty by writing the settlement date in the agreement, as well as advising Mr and Mrs Messenger to insert a standard vendor finance clause, which she had used many times before.

[92] Legal expertise was not necessary to confirm the settlement date or to give advice on measures to properly secure the unpaid portion of the purchase price. Those matters are, in my view, part of the duties owed by real estate agents.

Causal connection to losses

[93] Stanaway submits that Mr and Mrs Messenger can only succeed if the claimed losses would not otherwise have occurred and are sufficiently consequent on Stanaway's negligence. In that regard, Stanaway submits that even if Ms Campbell had given the advice alleged to have been negligently omitted:

(a) Mr and Mrs Messenger would still have entered into the agreement;

(b) The real cause of their claimed losses against Stanaway is that Mr Goodman and Ms Rattray entered into an agreement that they could not perform; and

(c) The losses claimed by Mr and Mrs Messenger do not flow from the breach as pleaded.

[94] Stanaway submits that Mr and Mrs Messenger would still have entered into the agreement because they were reluctant to wait or to make any changes to the agreement except to delete the due diligence clause. They had already lost a sale to Mr Dillon because of a due diligence clause and an adverse building report and did not want this to happen again.

[95] Stanaway's submissions are, however, predicated on what it says is the proper interpretation of the agreement, namely, that clause 15.0 protected an unregistered first mortgage, or at worst, an unregistered second mortgage behind a registered first mortgage securing a maximum of $2.75 million. This is, however, contrary to my view and that of Priestley J, who found that clause 15.0 protected an equitable charge only.

[96] Stanaway submits that the real cause of Mr and Mrs Messenger's claimed losses is that Mr Goodman and Ms Rattray entered into an agreement that they could not perform. This is because the finance arrangements that Mr Goodman and Ms Rattray had entered into disclose that they needed to have title and the ability to register a first mortgage securing a sum that exceeded the total purchase price of the property. Their own solicitor, Mr Stokes, regarded the balance of the purchase price as unsecured as that was the only basis upon which his clients were prepared to do the deal.

[97] Again, Stanaway's submission is predicated on what it says is the proper interpretation of the agreement. If clause 15.0 protected an equitable charge only then Mr Goodman and Ms Rattray could have performed the agreement. Mr Goodman and Ms Rattray did not enter into an agreement they thought they could not perform. They did not have any expectation that they would have to provide a registered or unregistered mortgage to Mr and Mrs Messenger. In my view, had Ms Campbell confirmed the settlement date and advised Mr and Mrs Messenger to insert a vendor finance clause, then Mr and Mrs Messenger would not have entered into the agreement as presented to them. They would never have passed title to Mr Goodman and Ms Rattray without any security for the balance of the purchase price, but this was the only basis upon which Mr Goodman and Ms Rattray could purchase the property.

[98] I am of the view that the losses claimed by Mr and Mrs Messenger do flow from the breaches as pleaded against Stanaway. Had Stanaway not breached its duties, Mr and Mrs Messenger would have instead sold the property later in 2006 or in 2007 at the market value prevailing at that time. In this way they would have avoided the very significant fall in the market and the interest holding costs that they in fact experienced. They would have also avoided the significant legal costs that they have incurred as a result of the various Court proceedings.

[99] This accords with both commonsense and the judgment of Priestley J when he observed:[26]

> Given the large amount of the purchase price which would remain unpaid after 18 December 2006, it would be remarkable if any competently advised vendor would accept an offer drawn in those terms. Other than the protection afforded by lodging a caveat, the unpaid purchase price was unsecured …
>
> …
>
> Nor would any properly advised vendor be satisfied with an equitable interest of that type, protected by caveat, where more conventional forms of security would have been available.

Measure of damages

[100] Stanaway accepts that if Stanaway is found to be causatively negligent, then Mr and Mrs Messenger are entitled to an amount of damages that would put them in the same financial position as they would have been if the causative negligence had not occurred.

[101] I have found that had Mr and Mrs Messenger been given proper advice by Ms Campbell, they would not have signed the agreement with Mr Goodman and Ms Rattray. Rather, they would have sold the property later in 2006 or in 2007 at the market value prevailing at the time. In this way, they would have avoided the very significant fall in the market caused by the global financial crisis later in 2007 and the interest holding costs that they in fact experienced. They would also have avoided the significant legal costs that they incurred as a result of the Court

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[26] *Messenger v Goodman*, above n 2, at [63] and [73].

proceedings involving Mr Goodman and Ms Rattray. On this basis, Mr and Mrs Messenger claim a total of $2,771,314 as follows:

Loss on resale of property	$1,570,000.00	
Interest costs from 1 December 2006 to 4 May 2009 (settlement date on resale of property)	$785,672.00	
Litigation costs	$415,642.00	
Total		**$2,771,314.00**

[102] No issue is taken in principle with the recovery of interest on the existing mortgage and litigation costs. Issue is however taken with the resale loss.

[103] The resale loss claim by Mr and Mrs Messenger is based on the proposition that they lost the opportunity to sell the property for a similar price to that offered by Mr Goodman and Ms Rattray. Stanaway submits, however, that if they did not sell the property to Mr Goodman and Ms Rattray, Mr and Mrs Messenger would have sold the property to Ms Eele or another purchaser for about $5 million with settlement at the end of the first quarter of 2007. Ms Eele had offered $4.8 million and Mr and Mrs Messenger had countersigned the offer at $5.2 million a day or two earlier. Stanaway submits that it is reasonable to assume the likelihood of some convergence, making the midpoint $5 million. Stanaway therefore submits that the loss on resale was therefore only $570,000 (being the difference between $5 million and the sale price actually achieved, two and a half years later, of $4.43 million) rather than the claimed loss of $1.57 million.

[104] Stanaway also submits that if Mr and Mrs Messenger had sold the property to the Ms Eele, or another purchaser with settlement at the end of the first quarter of 2007, then Stanaway should only be responsible for the interest between 31 March 2007 and 4 May 2009 of $522,646 and the litigation costs of $415,662, a total of $1,508,308, rather than the $2,771,314 claimed by Mr and Mrs Messenger.

[105] Stanaway's position may have merit if the price that Mr Goodman and Ms Rattray were prepared to pay was significantly out of kilter with market value. The property was, however, assessed by Stanaway and listed for sale at $5.95 million. For the purpose of obtaining finance, Mr Goodman and Ms Rattray

obtained a valuation of the property from Prendos, a firm of registered valuers. It was dated 5 December 2006 and assessed the market value of the property at that time at $6 million. An expert valuer called by Mr and Mrs Messenger at trial, Peter Bates, also valued the property at $6 million as at 1 December 2006.

[106] I cannot make a finding that, if Mr and Mrs Messenger did not sell to Mr Goodman and Ms Rattray, they would have sold the property to Ms Eele or another purchaser for $5 million with settlement at the end of the first quarter of 2007. That is pure speculation. The market was rising and another purchaser may have materialised. The more principled approach is to look to the market value at the time, objectively assessed. Stanaway had some months earlier marketed the property for sale at $5.95 million. The property has also been valued as at early December 2006 at $6 million by two independent valuers, one on instructions from Mr Goodman and Ms Rattray and the other on instructions from Mr and Mrs Messenger.

[107] Stanaway call its own expert valuer at trial, Ian Colcord, who disputed that the market value of the property as at December 2006 was $6 million. He said it was only $5.1 million. In his original brief, however, Mr Colcord had valued the property at $5.4 million. He had reduced his valuation by $300,000 after reviewing a builder's report obtained by Mr Dillon, a prospective purchaser. In the end, however, the key dispute between the valuers who gave evidence was over the land value, as both Mr Colcord and Mr Bates valued the improvements on the property as at December 2006 at almost exactly the same figure ($2.095 million vs $2.1 million). Mr Colcord valued the land at $2.9 million, while Mr Bates valued it at $3.8 million (Prendos, the firm instructed by Mr Goodman and Ms Rattray in December 2006, had also valued the land at $3.8 million).

[108] The contest between Mr Colcord and Mr Bates came down to whether the land should be valued on an "as occupied" basis as adopted by Mr Colcord or on a "vacant site" basis as adopted by Mr Bates. I prefer the "vacant site" basis as adopted by Mr Bates. Although an "as occupied" basis is appropriate if there are no comparable vacant land sales, there were, in this case, sufficient vacant land sales from which a more accurate assessment of land value could be made. Furthermore,

the "as occupied" basis requires an artificial and arbitrary apportionment by a valuer because there is no market for improvements without land.

[109] The vacant land sales relied upon by Mr Bates were from between March 2006 and November 2006 and were of superior sites on either Takapuna Beach or Milford Beach. The rates per square metre ranged from $3,916 to $4,611. Mr Bates utilised a per square metre rate of $4,750 for the smaller 800 m² subject property on the basis that the subject property had immediate street access to its triple garage (unlike the comparative properties each of which had a long driveway), the subject property benefited from an eave overhang (slightly greater land use benefit), the diminishing marginal rate of return (the first 800 m² were the most valuable) and each of the previous sales were in a buoyant and rising market (rising at an average rate of 1 per cent per month).

[110] On the other hand, Mr Colcord relied on sales of occupied or improved properties which were, in my view, not directly comparable to the subject property. A number were not beach front or cliff top or were inferior sites. Mr Colcord was also unable to articulate a principled basis as to how the land value was to be apportioned.

[111] In those circumstances, I adopt the Prendos and Bates valuations of $6 million as at December 2006.

[112] It is also more principled to assess damages from the settlement date of the agreement with Mr Goodman and Ms Rattray of 18 December 2006 rather than a proposed settlement date at the end of the first quarter of 2007. Settlement date on the Eele offer was in fact only a month later, on 17 January 2007.

[113] In my view, Stanaway is liable for all the foreseeable consequences of its negligence. It was foreseeable that the market would fall. It was foreseeable that Mr Goodman and Ms Rattray would place a caveat on the property which had the effect of preventing any resale of the property. It was foreseeable that Mr and Mrs Messenger would continue to incur interest costs and, finally, it was foreseeable

that litigation would ensure between Mr and Mrs Messenger and Ms Goodman and Ms Rattray.

Was there contributory negligence by Mr and Mrs Messenger?

[114] Stanaway alleges that if Mr and Mrs Messenger have suffered any losses as the result of any breach of duty by them (which is denied), then any awarded damages in favour of Mr and Mrs Messenger against Stanaway ought to be reduced pursuant to s 3(1) of the Contributory Negligence Act 1947 by an amount to be determined at trial by reason of the contribution of Mr and Mrs Messenger to their own losses.

[115] The contributory negligence alleged is the failure of Mr and Mrs Messenger to obtain legal advice before signing the agreement. Stanaway submits that if Ms Campbell suggested that Mr Messenger seek legal advice he acted unreasonably in not taking this advice. However, Stanaway submits that even if Ms Campbell did not recommend legal advice, Mr Messenger was already aware of the desirability and availability of legal advice before he became committed to the agreement and he already had engaged solicitors. Accordingly, Stanaway submits it was reasonable to expect Mr Messenger not to rely exclusively on Ms Campbell for advice and imprudent for him to have done so – particularly if she expressed uncertainty about the agreement and/or if he did not know what a caveat was.

[116] I agree. Because of the alternative manner in which the argument is advanced by Stanaway, it is strictly unnecessary for me to make a definite finding of fact whether or not Ms Campbell advised Mr Messenger to seek legal advice. I note that in his judgment, however, Priestley J found that Ms Campbell proffered some brief advice to Mr Messenger along the lines that the agreement required settlement on 18 December 2006 rather than two years later, coupled with a suggestion that he should seek legal advice on the topic if it was relevant. Priestley J also considered that Ms Campbell's brief comments to Mr Messenger "would have passed him by". I agree. Mr Messenger was, in my view, focused on assessing the net effective purchase price of the offer of Mr Goodman and Ms Rattray. He was also keen to

commit Mr Goodman and Ms Rattray to the agreement, as evidenced by his instruction to his son Gary Messenger to delete the due diligence clause in the offer.

[117] Priestley J queried why Mr Messenger did not get his lawyers to review the offer on his own volition and make sure there were no "fish hooks" in it. In response, Mr Messenger said that it was because he thought involving lawyers would result in the deal falling through, as it had when a builders inspection clause had been inserted in the earlier Dillon agreement. This shows a certain imprudence on the part of Mr Messenger.

[118] Normally a vendor would not be contributorily negligent if he or she failed to obtain legal advice prior to signing an agreement for sale and purchase, but in the circumstances of this case, I am of the view that Mr and Mrs Messenger were so negligent. This was because of the uncertainty expressed by Ms Campbell about the settlement date, as well as the unusual caveat clause. Mr Messenger says that he did not know what a caveat was and, in the absence of sound advice from Ms Campbell, he should have referred the offer to Simpson Western.

[119] Counsel for Mr and Mrs Messenger submits that they did not know what it was that they needed to obtain advice about and it was reasonable for them to proceed without incurring the additional cost of obtaining advice. With respect, I disagree. Ms Campbell had expressed doubts about the settlement date and Mr Messenger did not know what a caveat was. A prudent businessman would have sought advice in order to safeguard his position. Ms Campbell says that she got the impression from her discussions with Mr Messenger that he was of the view that security could be sorted out later. While a particular finding is also not required as to this impression, it does accord with the general uncertainty evident as to the settlement date and the effect of clause 15.0.

[120] In those circumstances, having determined that Mr and Mrs Messenger have been contributorily negligent in failing to obtain legal advice, the extent of a reduction in damages recoverable from Stanaway is to be determined by reference to the relative casual potency and the relative blameworthiness. Overall, the reduction must be just and equitable.

[121] Mr and Mrs Messenger's failure to obtain legal advice prior to entering into the agreement clearly made some contribution to the losses now being claimed from Stanaway. It is a real possibility that if the Mr and Mrs Messenger had obtained legal advice from Simpson Western, the agreement may not have proceeded at all and Mr and Mrs Messenger would then have focused on Ms Eele as the most likely purchaser.

[122] Mr and Mrs Messenger had engaged Simpson Western to advise them in respect of the property. The name of one of the partners of Simpson Western, Gary Simpson, together with his contact telephone number was noted on the sole agency agreement signed with Stanaway. Mr Messenger was an experienced businessman and was aware of his ability to consult with Simpson Western if he wished to do so with or without a recommendation from their real estate agent. Mr Messenger had earlier instructed Simpson Western to look over the Dillon offer. Ms Campbell also recommended that Mr and Mrs Messenger do nothing with the offer from Mr Goodman and Ms Rattray while she worked on the Eeles in an attempt to have them increase their offer.

[123] On the other hand, I am of the view that Stanaway must share a much greater proportion of the responsibility for the losses caused. Mr and Mrs Messenger had engaged Stanaway and Ms Campbell in particular because of her reputation and experience. Mr and Mrs Messenger were to pay $148,251.50 (excluding GST) by way of commission on a successful sale. As a result of accepting the sole agency agreement, Stanaway's primary obligation was to look after the best interests of Mr and Mr Messenger. They failed to do so, because Ms Campbell failed to identify all obvious risks in the agreement. Further, I agree with counsel for the plaintiffs that she failed to do so in a way that meant that Mr and Mrs Messenger were not really aware of the problems which existed. It would, in my view, be a misallocation of risk if Mr and Mrs Messenger were found too highly responsible for the losses incurred because of their reluctance to second guess an experienced and well paid real estate agent upon whom they were rightly relying to ensure their interests were protected.

[124] The appropriate apportionment is a question of fact involving matters of impression and not some sort of mathematical computation. Given the nature of the apportionment exercise, comparisons with figures in other cases are not particularly helpful. Nonetheless, in *Clasper v Lawrence*[27] a real estate agent was held to be negligent by misnaming a lot number on an agreement for sale and purchase. The consequence was that the vendor sold the same piece of land twice. The real estate agent claimed contributory negligence. Tipping J found the vendor was negligent in that a reasonably careful vendor ought before signing the contract to have checked the details to make that the lot number was correctly described. Tipping J assessed the vendor to be 20 per cent contributory negligent.

[125] In *Malone v Barrett*[28] the plaintiff was an elderly widow who was inexperienced in business matters. She had access to a solicitor and could have asked her daughter for advice. The Judge considered that the plaintiff had been negligent by not seeking advice from those quarters before entering an agreement. In that case, the Judge reduced damages by 25 per cent for her contributory negligence.

[126] In this case, I am of the view that the damages awarded to Mr and Mrs Messenger should be reduced by 20 per cent for their contributory negligence in not seeking legal advice prior to signing the agreement.

Claim by Stanaway against James Messenger and Realty NZ Limited

[127] Stanaway alleges that, as a real estate agent, Gary Messenger owed his parents a duty of care to exercise reasonable skill and care when representing their interests and advising them throughout the negotiations for the sale of the property. Stanaway alleges that, in breach of his duty of care, Gary Messenger failed to advise his parents that the agreement, which provided for a settlement date of 18 December 2006, two years before the final instalment of the purchase price was due, was disadvantageous to them. If Stanaway is liable for failing to represent Mr and Mrs Messengers' interests and provide adequate advice to them during the

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27 *Clasper v Lawrence* [1990] 3 NZLR 231 (HC).
28 *Malone v Barrett* [1992] DCR 840.

negotiations for the sale of the property (which is denied), Gary Messenger is also liable to his parents in negligence for those same losses.

[128] Stanaway also alleges that Gary Messenger's company, Realty NZ Limited, owed the same duty of care to Mr and Mrs Messenger to exercise reasonable skill and care when representing their interests and advising them throughout the negotiations for the sale of the property. Stanaway alleges that, in breach of its duty of care, Realty NZ also failed to advise Mr and Mrs Messenger that the agreement was disadvantageous to them.

[129] In summary, I am of the view that neither Gary Messenger or his company, Realty NZ Limited, owed a duty of care to Mr and Mrs Messenger.

[130] Realty NZ Limited was a referral agent and by arrangement with Stanaway was to receive 20 per cent of commission payable. Stanaway's expert, Mr Pinkney, expressed the view that by taking a share of the commission, Realty NZ Limited took on all of the responsibilities of the selling agency on a joint and several basis. I respectfully disagree. The existence and extent of any duty of care depends on the facts of the particular case. I accept the evidence of Mr and Mrs Messenger's expert, Mr Oliver, that typically a referral agent would perform no further role after introducing the property owner to the listing real agent. If a referral agent has no further role, then he or she has not assumed any responsibility nor can there be any reasonable and foreseeable reliance on the part of the property owner. Both are necessary for a duty of care to exist.

[131] There may, however, be particular cases in which a duty of care does exist. It all depends on the facts of the case. The relevant facts of this case are:

(a) Gary Messenger was the son of the vendors of the property and held a power of attorney from his parents.

(b) Although Gary Messenger was working at the time as a real estate salesperson, he did not undertake the training necessary to become a licensed real estate agent until the following year.

(c) The listing agreement entered into between Mr and Mrs Messenger and Stanaway on 27 April 2006 was a sole agency.

(d) Gary Messenger's company, Realty NZ Limited, was to receive a referral fee of 20 per cent. The Bayleys operating manual states that standard referral fees were 10 per cent "but where it is a sole agency with vendor contributions (which it could be in the majority of cases), then a referral fee of 20 per cent of the commission is applicable". The manual makes no reference to any ongoing involvement of a referral agent.

(e) Gary Messenger took no role in marketing the property, nor did he take any buyers through the property. In September 2006 he referred a friend who had expressed interest in the property to Ms Campbell. He also advised his father that he had been contacted by a real estate agent who told him she had a potential buyer, which advice was relayed to Ms Campbell.

(f) Ms Campbell took instructions directly from Mr Messenger. Some, but not all, of the communications between Ms Campbell and Mr Messenger were copied to Gary Messenger.

(g) Gary Messenger played no role in the negotiation of the first Dillon offer. Ms Campbell communicated directly with Mr Messenger. Gary Messenger's only role was to sign the agreement as attorney for his parents on 6 November 2006.

(h) On 29 November 2006, Mr Goodman made unsolicited contact with Gary Messenger. Gary Messenger called Ms Campbell and asked her to liaise with the agent for Mr Goodman and Ms Rattray, Mr Marmont. That evening, Ms Campbell brought two offers to Gary Messenger's home, one from Mr Dillon for $4 million and the other from Ms Eele for $4.7 million. Gary Messenger faxed the offers

to his parents and on instructions from his father, countersigned the higher Eele offer at $5.2 million.

(i) On 30 November 2006, Ms Campbell again brought two offers to Gary Messenger's home, one from Ms Eele for $4.8 million and the offer from Mr Goodman and Ms Rattray with two price options.

(j) Gary Messenger's wife, Michelle Messenger, had some accounting experience and gave advice to her parents-in-law about the relative merits of the two payment options contained in Goodman and Rattray offer.

[132] While Mr Messenger said he would have expected Gary and/or Michelle Messenger to speak up if Ms Campbell said something wrong or omitted to say something about the agreement, and Gary Messenger acknowledged he would not remain silent if he thought his father was going to do something wrong, such statements do not necessarily lead to the existence of a duty of care. In this case, they are in my view, attributable more to the family relationship than to a relationship of agent and principal. Gary Messenger had acknowledged his own limitations and the desirability of retaining independent expert advice when he recommended to his father that he enter into a sole agency agreement with Stanaway on the basis that Ms Campbell had the necessary experience and expertise to negotiate a binding contract for the sale and purchase of the property.

[133] In my view, any advice given to Mr Messenger by Gary and Michelle Messenger was in their capacity as son and daughter-in-law. There was no assumption of responsibility, nor reasonable and foreseeable reliance.

[134] Stanaway points to the evidence of the Messengers' own expert, Mr Oliver, who finally agreed under cross-examination, that if Gary or Michelle Messenger had heard something incorrect being said in respect of the house, they would have a duty to Mr and Mrs Messenger to speak up.

[135] Again, with respect, I do not necessarily agree. Much would depend on the facts. In any event, such a duty does not arise in the present case as I have held that Stanaway was in breach of its duty of care through omission rather than commission. It was not something incorrect being said by Ms Campbell – it was what she failed to say.

Claim by Stanaway against Simpson Western

[136] Stanaway alleges that Simpson Western held themselves out as skilled, knowledgeable, experienced and expert in advising on this type of agreement. In the circumstances, they owed Mr and Mrs Messenger a duty of care to exercise reasonable skill and care in advising them on the terms of the agreement and of their remedies under the agreement.

[137] Stanaway alleges that Simpson Western breached its duty to the plaintiffs to exercise reasonable skill and care as follows:

(a) Simpson Western failed to advise Mr and Mrs Messenger that the settlement and possession date was 18 December 2006.

(b) Simpson Western failed to advise the plaintiffs to issue a settlement notice in January 2007 after the purchasers failed to make payment on 18 December 2006 and, if the terms of the settlement notice were not complied with, to cancel the agreement.

(c) Simpson Western advised Mr and Mrs Messenger to pursue a costly claim in the High Court against the purchasers on the basis that the settlement date was 18 December 2008, rather than advising them to cancel the agreement at any stage following 18 December 2006 for failure to make payment.

[138] Stanaway says that if it is liable for losses resulting from failure to represent Mr and Mrs Messengers' interests and provide adequate advice to them in the sale of the property (which is denied), Simpson Western is also liable to the plaintiffs in negligence for those same losses.

[139] In summary, I am of the view that Stanaway's allegations are not made out. Stanaway's claim is that Simpson Western should have recognised what it says is the proper interpretation of the agreement. The proper interpretation of the agreement is, however, not self-evident. There have been two previous High Court proceedings, one for rectification of the agreement by Mr Goodman and Ms Rattray and the second by Mr and Mrs Messenger claiming damages against Mr Goodman and Ms Rattray for breach of contract. It is only now, in the third set of High Court proceedings, that Stanaway's interpretation is advanced.

[140] Stanaway submits that the only possible interpretation of the agreement open to a reasonably competent conveyancing solicitor was that the common intention was that on 18 December 2006:

(a) Mr and Mrs Messenger would transfer title to Mr Goodman and Ms Rattray.

(b) Mr Goodman and Ms Rattray would provide Mr and Mrs Messenger with a signed mortgage entitling Mr and Mrs Messenger to a first charge or, at worst, a second charge behind a maximum of $2.75 million.

(c) Mr and Mrs Messenger would lodge a caveat to protect the equitable interest in (b) above.

[141] Stanaway says that not only was this the correct interpretation of the agreement, but it also provided Mr and Mrs Messenger with adequate security for the unpaid balance of the purchase price.

[142] With respect, I am of the view that Stanaway's interpretation is not the only possible interpretation of the agreement open to a reasonably competent conveyancing solicitor. The expert solicitors called by Simpson Western, Chris Darlow and Peter Nolan, referred to it as a complete mess, patently conflicting and as having been poorly drafted. Even the expert solicitor called by Stanaway, John Greenwood, said "it could have been better drafted for certain". Priestley J, in

the proceedings taken by Mr and Mrs Messenger against Mr Goodman and Ms Rattray also held that the critical clauses of the agreement and clause 15.0, in particular, were ineptly drafted.[29]

[143] Simpson Western submits that there were at least nine possible interpretations of the agreement and many reasonably competent conveyancing solicitors would disagree as to its particular interpretation. Of these nine possible interpretations, six involved a settlement date of 18 December 2006 and three involved a settlement date of 18 December 2008.

[144] Two of the possible interpretations are those advanced by Stanaway as alternatives – that is, that Mr and Mrs Messenger were unregistered first mortgagees or that Mr and Mrs Messenger were unregistered second mortgagees behind Mr Goodman and Ms Rattray's first mortgage, which was limited to the amount of the purchase price paid on settlement, that is, $2.75 million. A closely related interpretation is that Mr Goodman and Ms Rattray's first mortgage was limited to $2.75 million plus interest and costs. The addition of interest and costs is a standard approach taken by lending institutions. This interpretation is not, however, advocated by Stanaway as an alternative.

[145] While I have determined (as has Priestley J) that the proper interpretation of the agreement involved a settlement date of 18 December 2006, it was not completely out of the question that the agreement may have been properly viewed as a long term sale and purchase agreement with a settlement date of 18 December 2008. There were then three different approaches possible to clause 15.0. It was irrelevant; it referred to a caveat to protect Mr and Mrs Messenger's right to reacquire the equitable estate should Mr Goodman and Ms Rattray fail to perform the agreement; or it referred to a caveat to protect Mr Goodman and Ms Rattray's equitable interest in the property as purchasers.

[146] Upon receipt of the agreement, Simpson Western wrote to Mr and Mrs Messenger by letter dated 4 December 2006 setting out the terms of the agreement and advising them that "settlement is scheduled to be completed on

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[29] *Messenger v Goodman & Anor*, above n 2, at [63].

18 December 2008, when the last payments are made". I accept that this was their genuine assessment upon reading the agreement. Simpson Western requested Mr and Mrs Messenger to contact them if "any of the above does not correspond with your understanding of the terms of the agreement". Mr and Mrs Messenger did not contact Simpson Western immediately, although it is not known when they received the letter.

[147] It was only after Mr Goodman and Ms Rattray had declared the agreement unconditional on 8 December 2006 that it became obvious that Mr Goodman and Ms Rattray took the view that the settlement date was 18 December 2006. The difference of opinion became obvious in correspondence between the parties' respective solicitors on 11 December 2006. Simpson Western then contacted Mr and Mrs Messenger in Guernsey, first by telephone and then by e-mail.

[148] On 12 December 2006, Mr Messenger e-mailed Simpson Western confirming that he was under the impression that they were transferring title on 18 December 2006, but from what he was told in a telephone call from Gary Simpson, a partner at Simpson Western, "this is probably not the case and Title will be transferred on 18 December 2008, which is certainly better". He then gave instructions to Simpson Western on what to do regarding the mortgage in the event they were not transferring title on 18 December 2006, and in the event title was being transferred on 18 December 2006.

[149] In an e-mail in response also dated 12 December 2006, Simpson Western stated "The purchaser's solicitor takes the same view as you do and expects title on 18 December 2006". The e-mail went on to state "Please note that transferring title in this fashion with no real security for your money is extraordinarily risky and not a course that we would recommend".

[150] Simpson Western had an obligation to act in the best interests of Mr and Mrs Messenger. It therefore adopted a strategy of continuing to assert that the settlement date was 18 December 2008, while at the same time being open to an earlier settlement date if Mr Goodman and Ms Rattray were able to offer adequate security over the property and/or other properties they owned. Stanaway criticises

this strategy because it submits that this was contrary to Mr Messenger's intention and belief on entering into the agreement. Stanaway also claims that Simpson Western had an obligation to warn Mr and Mrs Messenger of the dangers of asserting the 2008 date.

[151] However, counsel for Stanaway acknowledged that proper interpretation of the agreement reflects the presumed common intention of the parties. It is an objective interpretation. Counsel states that "a party's subjective unexpressed intentions on entering into the contract can play no part in ascertaining the presumed common intention, and are not even admissible". Mr Messenger's "impression" as disclosed in an e-mail 12 days after he instructed his son to sign the agreement can therefore have little weight, even if it is admissible.

[152] As to the dangers of asserting that the date of settlement was 18 December 2008, the most important factor was that Mr and Mrs Messenger would retain title until then. The dangers now identified by Stanaway should all be seen in the light of its assertion that Mr and Mrs Messenger would be adequately protected by an unregistered first or second mortgage if title was to be transferred on 18 December 2006. I have, however, already determined that clause 15.0 did not protect an equitable mortgage, but only an equitable charge.

[153] The choice was therefore rather stark. Simpson Western's advice, that transferring title on 18 December 2006 with no real security was extraordinarily risky and not a course they would recommend, was the best advice it could give in the circumstances. While there were some disadvantages in asserting that the date of settlement was 18 December 2008, there was in my view no real option to do otherwise. The alternative was far worse.

[154] As noted, three expert solicitors gave evidence – Mr Greenwood for Stanaway and Mr Nolan and Mr Darlow for Simpson Western. Mr Greenwood's evidence was predicated on the basis that although the caveatable interest was not specified, there was an implied term in the agreement that the caveat was intended to support an unregistered mortgage in favour of Mr and Mrs Messenger over the

property for the unpaid balance of the purchase price, which was at worst second in priority behind a first registered mortgage securing a maximum of $2.75 million.

[155] Mr Greenwood was of the opinion that Mr Goodman and Ms Rattray would be unable to settle as per the agreement on 18 December 2006 and concluded that a reasonably competent solicitor would therefore send a settlement statement and mortgage document for execution, arrange a discharge of the existing mortgage and insist on settlement on 18 December 2006, in the expectation that Mr and Mrs Messenger would then be able to cancel the agreement in early 2007 because of Mr Goodman and Ms Rattray's inability to grant a mortgage.

[156] There are two difficulties with this approach. First, I have already determined that the caveat supported an equitable charge and not an equitable mortgage. Secondly, the details of Mr Goodman and Ms Rattray's arrangements to borrow money to fund the purchase were not known prior to 18 December 2006. The finance company had only indicated that it required a first mortgage on the property in the sum of $4.5 million plus interest and costs. Other properties were also available as security so it was not certain that Mr Goodman and Ms Rattray would be unable to grant a mortgage.

[157] On the other hand, Mr Nolan did not see any difficulty in a reasonably competent solicitor maintaining the 2008 settlement date strategy as long as the agreement was capable of more than one interpretation, especially if one interpretation disadvantaged the clients. Mr Nolan did however agree that Mr and Mrs Messenger could have then been unable to cancel the agreement for two years, and that litigation could arise out of this strategy.

[158] Mr Darlow agreed with Mr Nolan. In his opinion, Simpson Western did a very good job of extracting Mr and Mrs Messenger from the mess that was created when they entered into the sale and purchase agreement with Mr Goodman and Ms Rattray dated 1 December 2006. He could not see any basis for Stanaway to suggest otherwise and he was unable to see what more Simpson Western could have done to protect the interests of Mr and Mrs Messenger.

[159] I prefer the evidence of Mr Nolan and Mr Darlow. If Mr and Mrs Messenger had cancelled the agreement in early 2007, it was inevitable that Mr Goodman and Ms Rattray would have made a wrongful cancellation claim. As it was, they lodged a caveat against the title to the property preventing any dealing with the land. They also issued rectification proceedings, which were pursued for over a year from April 2007 to May 2008. I agree with Mr Darlow that putting it simply, the matter was not going to be resolved quickly. I am also of the view that there is no credible basis to claim that the property could have been put back on the market in early 2007, as suggested by Mr Greenwood.

[160] There were, of course, different strategies available which may have led to a different outcome along some other time frame, but it is difficult to determine whether any alternative strategy would have been preferable to that adopted by Simpson Western. The test for negligence is not whether a different strategy would have been preferable, but whether a reasonably competent solicitor could have adopted Simpson Western's strategy. I am of the view that that strategy was clearly open to them, even if their initial view on the settlement date was not the one ultimately found to be correct by the Court.

[161] Because I have determined that Simpson Western was not negligent, it is unnecessary for me to consider issues of causation. However, Stanaway submits that for the purposes of causation, Simpson Western's actions could be divided into three categories:

- Conduct between 4–8 December 2006 (date agreement declared unconditional)
- Conduct between 8–18 December 2006 (possession date)
- Conduct after 18 December 2006

[162] Stanaway has made all sorts of assumptions, mostly on the basis of what it says is the proper interpretation of the agreement (which I have not accepted), using various scenarios. Stanaway claims, that in those scenarios, at best, Mr and Mrs Messenger would not have suffered any recoverable losses or at most would have incurred $516,300 for interest costs and litigation costs if a High Court action

was necessary to test the validity of the caveat lodged by Mr Goodman and Ms Rattray. Accordingly, Stanaway submits that Simpson Western's actions are at least primarily causative of about $2.2 million of Mr and Mrs Messenger's overall losses, being those caused in 2008–9.

[163] I disagree. I question the assumptions made by Stanaway, although no specific finding is necessary. For example, Stanaway claims that Mr and Mrs Messenger would have been able to resell the property, at worst, in December 2007. Even though the market had started to fall in mid 2007, Stanaway submits that Mr and Mrs Messenger would still have been able to achieve close to the $5.2 million that they had been prepared to accept in December 2006 and therefore there would have been no resale loss. That is pure speculation.

Result

[164] In accordance with my findings, judgment is given in favour of Mr and Mrs Messenger against Stanaway. The applications by Stanaway for a contribution or indemnity against Gary Messenger, Realty NZ Limited and Simpson Western are dismissed.

[165] The sums claimed are:

(a) $1,570,000 in lost resale value and interest at the Judicature Act rate on that sum;

(b) $785,672 in interest costs on Westpac borrowings secured by mortgage over the property;

(c) $414,942 in legal costs of the past proceedings and interest at the Judicature Act rate on that sum.

[166] Judgment is given for those sums, reduced by 20 per cent to take account of Mr and Mrs Messenger's contributory negligence. The final sums awarded are:

(a) $1,256,000 plus interest on that sum;

(b) $628,537.60;

(c) $331,953.60 plus interest on that sum.

The total is $2,216,491.20, plus the interest on the relevant sums.

[167] The successful parties are entitled to costs. If these cannot be agreed, memoranda should be filed within 28 days of the date of this judgment.

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Woolford J