EDITORIAL NOTE: PERSONAL/COMMERCIAL DETAILS ONLY HAVE BEEN DELTED.

IN THE DISTRICT COURT
AT CHRISTCHURCH

CIV-2015-009-1756
[2017] NZDC 11513

BETWEEN	CLAIMS RESOLUTION SERVICE LIMITED Plaintiff
AND	AVERIL ARCUS O'HARA-SAFANOV Defendant

Hearing: 29 - 30 November 2016

Appearances: Mr Jai Moss appears for the Plaintiff
Mrs O'Hara-Safanov appears In Person on Day 1
Mr D Hills appears for Defendant on Day 2

Judgment: 31 May 2017

JUDGMENT OF JUDGE J A FARISH

Introduction

[1] The defendant (Mrs O'Hara) approached the plaintiff CRS in March 2013 with respect to the earthquake damage to her property at [address deleted] Port Hills Road. At the time she had stalled in relation to her negotiations with her insurer "AA" and also EQC. She sought the assistance of CRS with respect to funding litigation and resolving the dispute. In July 2015 following a successful mediation conference Mrs O'Hara received the sum of $565,000 she received the full claim of $492,000 as per the statement of claim and an extra $73,000 by way of contribution toward costs.

[2] Following settlement the plaintiff invoiced the defendant Mrs O'Hara for their commission of 12% (plus GST), plus the costs and disbursements in the amount of $130,000 being made up of the 12% commission on the settlement sum $492,000

plus actual costs and disbursements of $71,888.61. Mrs O'Hara has paid the sum of $54,500 and a dispute has arisen as to whether or not the plaintiff is entitled to the remaining $96,000.67.

[3] The plaintiff claims that this amount is due pursuant to a contract signed on 29 October 2013. Mrs O'Hara does not deny that she signed that contract however, she claims that an earlier contract that she signed and representations made to her by the plaintiff or representatives of the plaintiff have led to a significant misrepresentation and therefore she should only pay the original 10% commission and that any costs should be capped at $10,000.

History

[4] These proceedings commenced by way of a summary judgment application. At that point Mrs O'Hara was represented by Young Hunter. Following successfully opposing the summary judgement application Mrs O'Hara chose to represent herself. The matter proceeded through an unsuccessful settlement conference and at the time a note was made by the presiding judge that Mrs O'Hara would benefit from legal advice. Mrs O'Hara however, chose to represent herself and on the first day of hearing it became plain that Mrs O'Hara required legal representation.

[5] At one point she chose to ring her insurers whom she has sued for the original settlement sum for advice. At the close of the hearing on 29 November I pointed out to Mrs O'Hara that it would be in her best interest if she received and took some legal advice. She assured me throughout the course of the day that she did have access to advice from her niece but she did not access any advice during the course of the day, other than the contact with her insurers. On 30 November Mrs O'Hara was represented by Mr Hill from Duncan Cotterill. He applied for an adjournment, however, I declined that application on the basis that these proceedings had been in train for a lengthy period of time; Mrs O'Hara had plenty of opportunities to obtain legal advice and in fact originally had legal advice and representation. I gave Mr Hill the morning to consult with Mrs O'Hara also to see whether or not a settlement could be arrived at given the very proper and open suggestions made by Mr Moss during the course of the first day.

[6] Mrs O'Hara however, wished to pursue her defence and she gave evidence on her own behalf on the afternoon of 30 November. No other defence witnesses were called.

[7] Following the evidence I enquired of counsel as to closing submissions. I was acutely conscious that Mr Hill had come very late in the piece to the proceedings and would not be in a position to make oral submissions. During my course of discussions with counsel, Mrs O'Hara interrupted the proceedings; spoke directly to Mr Hill and said the following:

> "*You are my lawyer therefore you need to follow my instructions, you need to ask to file written closing submissions*"

I was already mindful of Mr Hill's position so I gave him till 2 December to file any written submissions in support of the defendant. Mr Moss, on behalf of the plaintiff was already in a position to file; he filed his submissions on 5 December 2016.

[8] Prior to me being able to deliver a judgment, Mrs O'Hara filed a supplementary defence submission dated 22 March. I have taken into account those submissions; however, they largely repeat the original statement of defence and introduce new evidential matters which were never put in evidence before me. There is one aspect though which is pertinent which is Mrs O'Hara's claim that she was denied her rights to a solicitor or legal advice prior to signing the contract on 29 October 2013 and a lack of capacity. That matter is important and I will return to that later in this judgment.

[9] The hearing on 29 and 30 November was extremely difficult. On reviewing the notes of evidence there are many occasions when I had to interrupt Mrs O'Hara to try and get her to appreciate, one, the formality of the trial that she was undertaking but also to direct her as to what her role was in the courtroom. Her behaviour during the course of the trial could be described as erratic, emotional and at times confused.

[10] Part way through the first day I was concerned as to whether or not Mrs O'Hara did have cognitive capacity to participate in the proceedings, however,

having observed her over a period of two days and having considered her evidence, I am satisfied that she does have cognitive capacity. I came to the firm view that there was a lot of affectation in relation to her emotional responses to witnesses and protestations of love and concern for those she was calling absolute liars. The best way to describe Mrs O'Hara is that she has a unique interpersonal style.

The plaintiff's claims

[11] The plaintiff sues on a contract dated 29 October 2013. The essential terms of that contract were that the defendant would pay upon successful settlement 12% commission on the settlement sum (plus GST), plus the costs and disbursements incurred during the course of the proceedings. The defendant claims that she was misled and baited into entering the contract on 29 October 2013; that because of an existing head injury she was a vulnerable person and should have received legal advice prior to signing the contract. Mrs O'Hara claims that the earlier advertisements in March of 2013 said that it was 10% (ten percent) commission plus costs capped at $10,000. Her understanding was that was the contract she entered into.

[12] She claims that the issue of costs and disbursements was never discussed with her directly during the course of the two years of litigation and even during the course of the settlement conference she was not aware that she was going to be ultimately responsible for the full $73,000 worth of disbursements.

[13] The key issues to be determined are whether or not the contract dated 29 October 2013 (head start) applies. That is 12% plus GST and all incurred costs. Secondly, if that contract does apply, was Mrs O'Hara misled or were there material misrepresentations which led to unfairness to Mrs O'Hara. Alternatively, if the early contract, unsigned by the plaintiff of March 2013 applies of 10% plus GST plus $10,000 capped fees, the issue then arises as to whether or not the costs of $73,000 which were obtained on behalf of Mrs O'Hara at the settlement conference are payable to the plaintiff by way of unjust enrichment.

The evidence

[14] A significant issue arises in this case in relation to the veracity of the witnesses. The plaintiff called four witnesses, Mr Brian Staples principle of CRS, Ms Maria Hazledine-Barber who was directly involved in relation to the signing of the contracts and the initial consultation with Mrs O'Hara. Michelle McLeash, who had ongoing contact with the defendant and was present throughout the settlement conference and Dr Greg Chawynski, who was one of the third party disbursements and also gave evidence in relation to comments made by the defendant following her dropping of her payment of $54,500 to the plaintiff. All of those witnesses had filed affidavit evidence and in addition gave oral evidence. All of those witnesses were forthright and their evidence was backed up with written material which was consistent and contemporaneous with the matters that they were discussing.

[15] All witnesses were cross-examined by Mrs O'Hara.

[16] The only witness who was challenged directly in relation to their veracity by Mrs O'Hara was Mr Staples. It was never put to Ms Hazledine-Barber or Ms McLeash that they were giving evidence which was untruthful, unreliable or inaccurate. This is significantly important because those latter two witnesses evidence is directly relevant in relation to the issues that I need to determine.

[17] The defendant gave evidence on the afternoon of the second day. Mrs O'Hara had not filed an affidavit of evidence and sought to use her statement of defence which she had filed herself on 17 November as her evidence in chief. Although unusual, with the consent of Mr Moss I allowed Mrs O'Hara to read that statement of defence and then be available for further evidence in chief or cross-examination. In contrast to the plaintiff's evidence, Mrs O'Hara was contradictory and evasive even when challenged with contemporaneous records in her own hand writing she still would not concede that she had made an error.

[18] The manner in which she gave evidence however, has to be seen in light of an acknowledged head injury which she suffered in 2001. During the course of giving evidence she was asked directly as to the effect of the head injury and she indicated

it leads her to being muddled, having a poor memory and at times confused. I noted that she did not wish to use the agreed bundle of documents but was reliant on her own bundle which was not in the same order as the agreed bundle and from what I could see had voluminous hand written notes all over the documentation.

[19] Having viewed all of the documents and at times a lot of the documents provided by Mrs O'Hara with her own notations on them, I am led to the view that her head injury has affected her memory and the notes that she has made on the various pieces of paper are undated. I am led to the view that rather than being dishonest in terms of her evidence she is simply trying to reconstruct events which are consistent with her claims now from the notes and paperwork that she has made throughout the last four years.

[20] Where the documents do not assist her she simply claims that either she has not seen them (statement of claim) or that she might have seen them but has simply forgotten.

[21] Therefore on a charitable view of her evidence there are real issues as to her reliability in relation to recalling details and events which are relevant to these proceedings.

[22] Mr Moss, in his written submissions, has raised an issue with respect to Mrs O'Hara's claims that prior to the hearing she had made a complaint to the Law Society over the level of fees charged by Grant Shand. This was a matter that I raised right at the beginning of the hearing with all parties because Mr Shand's fees had not been included on the original statement of claim and a second statement of claim was filed immediately prior to the hearing. I queried Mrs O'Hara if that had been challenged whether she had raised that with the Law Society with respect to potential cost revisions. She claimed from the bar that she had done that and it had been done some weeks ago.

[23] During the course of her giving evidence she was challenged as to the accuracy of that claim and her evidence altered to having filed with the Law Society on the Monday a cost revision in relation to Mr Shand's invoice.

[24] Mr Moss, prior to filing his written submissions on 5 December had contacted Mr Malcolm Ellis, the president of the Canterbury Branch, New Zealand Law Society, who had confirmed that he had not received any complaint as of 5 December 2016. Mr Ellis had also sought confirmation from the Wellington office in case the complaint had been laid with the national office; again, no complaint was noted.

[25] For the purposes of this judgment, I put that issue to one side. Although the apparent inconsistency in her evidence on oath could severely impact her veracity, in fairness to Mrs O'Hara, I have simply concentrated on the evidence she gave relevant to the proceedings before the court.

The claim

[26] Mrs O'Hara and her husband Mr Safanov resided at [address deleted] Port Hills Road. Due to the 2011 earthquake their house suffered significant damage and claims were lodged with both EQC and their insurers AA. By March 2013 Mrs O'Hara, who had taken on the claims due to her husband's difficulties with English (Ukrainian), had seen some advertising by CRS for litigation assistance. The original flyer that she saw prior to March 2013 was on the basis that the costs of the litigation funding was 10% plus GST and all disbursements and costs apart from the filing fee and any court proceedings capped at $10,000; the understanding being that CRS would recover costs as part of the settlement negotiations. The clients would know up front that they were only liable to contribute $10,000 toward those costs.

[27] Mrs O'Hara attended at the CRS offices in Fitzgerald Avenue and met Ms Hazledine-Barber. Ms Hazledine-Barber described the defendant as being distraught and emotional like most of the clients were due to the ongoing stress of earthquakes and unresolved claims. At that time she provided Mrs O'Hara with a blank contract. This contract was for 10% commission but costs were not capped, the client being liable for all third party costs arising upon settlement. Ms Hazledine-Barber supplied the contract so that Mrs O'Hara could take it away and either discuss it with her husband or with any legal advisors.

[28] Ms Hazledine-Barber explained to her the four step procedure that CRS had; the first step being an initial damage assessment which was paid for by a grant from the Red Cross in the sum of $750. Mrs O'Hara took the blank contract with Marie's name on it, she subsequently signed it, however, the exact timing of that is unknown. However, it was never signed by the plaintiff. Mrs O'Hara returned to CRS though and signed up for an IDA assessment and that was undertaken later in April 2013. Following the comprehensive IDA assessment, Mrs O'Hara then attended at the new offices of CRS. At that stage CRS had moved premises in approximately July 2013 and due to the growth in their business they had changed the contractual basis upon which they were supplying their services; this reflected the varying needs of the client base.

[29] In July 2013 there was another flyer published which Mrs O'Hara had seen and put into evidence. This set out three different contractual bases upon which client could sign up for services. The first was an 8% commission with all costs paid at the time they were incurred by the client. The Jumpstart Programme which was 10% commission plus GST and all costs and disbursements paid upon settlement and the Helping Hands Programme which was 12% commission plus GST and again, disbursements and costs paid upon settlement by the client.

[30] On 29 October, Mrs O'Hara attended at the offices of CRS and signed two contracts. The first was for [address deleted] Port Hills Road and the second contract was for another rental property at Hewling Street, Timaru. Both contracts were Helping Hand contracts with 12% plus GST commission and all costs and third party disbursements being due upon settlement. The following year on 24 November Mrs O'Hara also signed up a third property on the Jumpstart Programme, being 10% commission plus costs and disbursements being due and payable upon settlement.

[31] CRS started negotiations with both "AA" and EQC. Proceedings were issued on the instructions of CRS by Grant Shand, solicitors. The statement of claim lodged sought the sum of $492,000. The proceedings were filed in the High Court. On 12 August 2014 Justice Wylie held a case management conference; attending was Mrs O'Hara with her legal representative. The minute of Justice Wylie was annexed

in the defendant's bundle of documents.[1] That minute is annotated by the defendant. It is clear from that minute that Mrs O'Hara understood that she would require an independent geotechnical report prior to the matter being set down for hearing.

[32] At that stage the "AA" were only prepared to offer Mrs O'Hara the sum of $274,000.

[33] Prior to the matter being set down for trial a mediation conference was convened. The mediation conference was attended by Mrs O'Hara; Ms MacLeish as a support person and a employee of CRS. Mrs O'Hara had legal representation and also at lunchtime she was joined by Mr Staples to assist in terms of settling the claim. Mrs O'Hara settled her claim with "AA" in the sum of $565,000; the original judgment sum as per the statement of claim was in the sum of $492,000 and the remaining balance was a contribution towards her costs. A dispute has arisen as to how those costs were arrived at which I will address shortly.

[34] Following the settlement conference in July 2015, Mrs O'Hara was invoiced by the plaintiff in the sum of $130,935.91; that was later amended to include Grant Shand's invoice to $160,881.91. Mrs O'Hara attended at the offices of the plaintiff and paid the sum of $54,500; being what she believed was due and owing; that is 10% of the judgment sum, it did not however address (and she now acknowledges) the additional sum of $10,000 for her portion of the costs, which she claims were capped by the plaintiff.

[35] During the course of the proceedings and even on the second day of the trial CRS offered to settle at 10% of the $492,000 plus the $73,000 received by Mrs O'Hara for the costs at the mediation and the $10,000 for capped costs. Despite some lengthy discussions between the bench and Mrs O'Hara pointing out the principle of unjust enrichment, Mrs O'Hara chose not settle and continued with her defence. She continued with this course of action despite having the advice of counsel for a full half day on the second day of the hearing.

---

[1] ABD 208.

Mrs O'Hara's brain injury

[36] During the course of the proceedings plus subsequently in her supplementary written submissions dated 22 March 2017 Mrs O'Hara placed large emphasis on the effect of her brain injury. There is no dispute that she suffered significant brain injury in 2001. Despite this brain injury she continues to work part time manages to run a reasonably busy household and also has the abilities to manage five rental properties. Despite obvious memory issue Mrs O'Hara asserted both during the trial and in subsequent proceeding that because the effects of her head injury were bad at the time of her engagement with CRS that there was an obligation on CRS to provide her with independent advocacy or alternative legal advice.

[37] No independent evidence was put before the court as to the impact of her brain injury in relation to her capacity to understand her legal obligations. It also flies in the face of her choosing to represent herself throughout the proceedings despite more than one judge giving her advice that she needed legal representation.

[38] Despite the peculiarities in relation to her personality there was no evidence presented that challenged Mrs O'Hara's ability to have contractual capacity and to follow and understand the nature of the proceedings. In fact, the documents that she provided herself; in particular the self annotated minute of Justice Wylie[2] is a clear indication that she was able to follow what was occurring in the court and also make her own notes as to what may or may not need to happen moving forward.

[39] I accept however that Mrs O'Hara's memory and her ability to be easily confused and mistaken is an effect of the brain injury that she suffered in 2001.

[40] It was up to Mrs O'Hara to prove on the balance of probabilities that a brain injury impacted her ability to enter into a contractually binding agreement with CRS. There is no evidence put before me that CRS were on notice as to Mrs O'Hara's lack of mental capacity. Mrs O'Hara has failed to establish this point. In essence her claim is that CRS were under an obligation to provide her with independent legal advice or provide her with the opportunity to obtain independent legal advice. As I

[2] ABD 208

said, there was nothing in the material before me that indicated that CRS would be on notice or even under an obligation to provide this to Mrs O'Hara. The direct evidence is that Ms Hazledine-Barber, on her first meeting provided Mrs O'Hara with the opportunity to discuss the original contract prior to it being signed with whomever Mrs O'Hara chose to discuss the document with.

Which contract?

[41] The only valid contract which was signed by both parties was a Helping Hand Contract signed in October 2013 with fees including 12% plus GST commission and third party expert costs without limitations.

[42] The only subsequent issues are whether or not Mrs O'Hara was misled in relation to the commission payable, that is 10% plus GST or the 12% plus GST and whether the cost were capped at $10,000 plus GST or payable by Mrs O'Hara in full.

[43] During the course of the hearing and in relation to the submissions filed, it was difficult to determine whether Mrs O'Hara was claiming that the contractual obligations were 10% plus GST with third party cost capped at $10,000 or she was referring to the Jumpstart Contract which she claimed in her affidavit in support of opposition to the summary judgment. This being repeated in her letters in August and October of 2015. The Jumpstart Contract was 10% plus GST however there was no cap on the costs. Interestingly the contract which she relied on which she obtained from Ms Hazledine-Barber in March 2013 is for 10% plus GST in relation to commission, however, there is no cap on costs; there was a hand written note added subsequently, however, Mrs O'Hara denied that that was her handwriting.

[44] It was clear that Mrs O'Hara had had the flyer of July 2013 which sets out the three types of contracts and underlined the one that she thought she was entering (Jumpstart). I agree with the plaintiffs submission that the highest Mrs O'Hara can claim is that she believed she was on the 10% plus GST commission as opposed to the 12% plus GST commission and could have been confused given the subsequent contract that she signed in November of 2014 which was the Jumpstart Programme. None of the programmes offered after July 2013 had any cap on the costs.

[45] The issue for me to consider is whether or not Mrs O'Hara was mislead by representations to sign the Helping Hand contract on the basis that she understood that she would pay 10% plus GST commission with costs capped at $10,000.

[46] I am satisfied on the evidence that between March 2013 and the subsequent signing of the contract on 20 October 2013 that Mrs O'Hara had significant contact and built up a relationship with Ms Hazledine-Barber and also Ms McLeash. This is consistent with the evidence from all three of them.

[47] Mrs O'Hara's reliance on costs being capped at $10,000 is based solely on an advertising flyer dated around March 2013 and her hand written amendments (undated) to the blank $10,000 plus GST contract she had received from Ms Hazledine-Barber in March 2013.

[48] Although she claims that Ms Black attended with her on 29 October 2013 when the details of the contracts were discussed, Ms Black did not attend to give evidence and both Mr Staples and Ms Hazledine-Barber deny Ms Black being present.

[49] Six months after the IDA was undertaken Mrs O'Hara signed up two properties; [address deleted] Port Hills Road and also Hewling Street on the Helping Hand agreements. Having listened to Ms Hazledine-Barber and considering her evidence I am satisfied that she would have taken the time and also the effort to explain to Mrs O'Hara the nature and details of the contract that she was entering into. I am satisfied that the commission of 12 % and the issue of costs was discussed directly with a Mrs O'Hara.

[50] I am also satisfied that from the time that the contract was signed up until July 2015, when her claim was settled by "AA", that Mrs O'Hara was fully aware that she would be liable to pay third party costs and disbursements.

[51] This is consistent with the correspondence and in particular consistent with the correspondence to her then solicitor Noor Hamid to the effect that she could not afford a deep geotechnical survey. I accept the plaintiff's submission that if she had

believed that her costs were capped at $10,000 then a deep geotechnical survey would not have been cost prohibitive.

[52] I am also satisfied on the evidence that the issue of costs would clearly have been raised during the course of the settlement conference. My own experience both as a judge and a lawyer and also in a personal capacity that once settlement has been reached often the vexed issue is costs! The original settlement agreement had the sum of $492,000 written on the bottom; however that was crossed out and then increased by $73,000. The $73,000 was nearly the equivalent of the costs disbursements that have subsequently been sought by the plaintiff off Mrs O'Hara.

[53] Mr Staples gave quite detailed evidence that the sticking point was in relation to $4,000 for advocacy fees which "AA" contributed $3,000 towards and on that basis they settled. It is simply untenable that the issue of costs was not discussed with Mrs O'Hara during the course of the settlement conference or leading up to the settlement conference.

[54] Her claims that she wanted matters brought to a head because of her concern about the costs and that she understood that these were costs that Mr Staples was to bear is disingenuous.

[55] I prefer Mr Staple's evidence with respect to the incurring fees of third parties and in particular his evidence concerning Mr Cowey's invoice and the discussions he had with Mrs O'Hara with respect to that fee and how that fee could be possibly discounted by Mr Cowey.

[56] I am also satisfied that all of the disbursements that were charged to the defendant were necessary. It could perhaps be described as a belt and braces approach with respect to litigation; however, it was highly successful in that Mrs O'Hara obtained 100% of the claim plus costs. I am also satisfied that the people who rendered the invoices were qualified and were not holding themselves out as anything other than qualified practitioners in particular Dr Chawynski. Mrs O'Hara during the course of the proceedings took issue with Dr Chawynski's qualifications, however, I think that is due to a lack of understanding as to what a

Doctor of philosophy is and what Dr Chawyski's qualifications are. I am satisfied that he was entitled to charge $190 plus GST per hour, and that is a fair remuneration for the work that he undertook.

Capped costs or costs payable without limitation

[57] Mrs O'Hara's claim that the costs were capped is based solely on an advertising flyer in March 2013. The flyer states:

> "We take on the prosecution of your claim on a no win no pay basis for 10% of the final settlement plus all costs, including quantity surveyor, independent reports and assessment costs. Costs are limited to $10,000; any costs above this amount are borne by Claims Resolution Services Limited."

That advertisement was superseded by the second advertisement July 2013 and is also not reflected in the first contract that Mrs O'Hara was given by Ms Hazledine-Barber which was unsigned by the plaintiff. Mrs O'Hara had a copy of the July 2013 flyer and entered it in evidence herself[3]. This has been annotated by her and highlights her understanding that all costs are payable at the time of the settlement.

[58] This flyer in July 2013 was very clear as to the three contractual arrangements that were being offered at that time.

[59] The terms of the contract that she entered into in October 2013 clearly stipulates that the wording of the agreement supersedes all representations made (clause 12).

[60] This clause is consistent with the case-law and is supported by a number of cases, *Charterbrooke Limited* v *Persimon Homes Limited*[4] and also *Vector Gas Limited* v Bay *of Plenty Energy 2010*, that is that the courts are not able to consider pre-contractual negotiations when interpreting a contract, unless it is to ascertain the subject matter and/or to determine the objective proof of what parties intended their words to mean.

---

[3] ABD (203)
[4] [2009] UKHL 38

[61] Mrs O'Hara accepted under cross-examination that she understood what the words of the second flyer meant because she had underlined them. It was also reinforced to her during the course of the mediation by Ms McLeash, that she was conscious that costs were mounting hence her desire to settle short of a full trial at mediation and also her desire not to incur a further cost prior to a full blown hearing.

[62] It is hard to accept Mrs O'Hara's claim that she believed costs were capped at $10,000 when she entered into a third contract with Estuary Road where costs were not capped under the 'Jumpstart Programme'.

Fair Trading Act / Misrepresentation

[63] The defendant claims relief pursuant to s 9 and s 13 of The Fair Trading Act 1986. The Act provides for a party to claim damages for misrepresentation as long as the misrepresentation has induced the party to enter into a contract.

[64] The defendants claim is that CRS made a positive representation by way of advertising in March 2013 that the costs were capped at the sum of $10,000. Mrs O'Hara claims that the CRS then remained silent as to whether the costs were capped after offering her a Helping Hand contract approximately six months later.

[65] Mere silence cannot amount to a misrepresentation[5], the only exception to that rule is where the representor is under a duty to disclose. This only arises with contracts of utmost good faith, or where there exists a fiduciary relationship between the contracting parties. They are narrow exceptions and applied primarily to narrow circumstances such as in insurance contracts and in partnership agreements.

[66] Although the defendant in her closing submissions relies on a number of cases, *Commerce Commission v Bell South New Zealand 1998* and *Commerce Commission v Telecom New Zealand Limited 2005*, all of these cases involve the representor being aware at the time that the contract was entered into that the other party was relying on those representations. In the present case there is no evidence to suggest that CRS were aware that Mrs O'Hara in October, when she signed the

[5] *Fox v MacCreath 1788 2 Cox eqcas 320*

Helping Hand contract was under the illusion that the early advertising in March 2013 had not been overtaken by the subsequent flyer in July 2013.

[67] Her obligation for liability for costs was clearly set out in the contract that she signed in October 2013; as it was in the original contract that she took home in March 2013.

The Contracts and Consumer Finance Act 2003

[68] The defendant also seeks relief under The Contracts and Consumer Finance Act 2003, her application is to reopen the Helping Hand contract that she signed on the grounds that it is oppressive. Mrs O'Hara claims that the original contract should have provided and incorporated the statutory protections that are contained in the Credit Contracts Act. Namely:

(a) Full disclosure of key information including a reasonable estimate of the fees and charges and the method of calculation of the total amount that is to be repaid.

(b) The debtor is not subject to unreasonable fees.

(c) The debtor is fully informed of their rights to terminate.

[69] I accept the plaintiffs submission that s 17 of the Credit Contracts Act are not applicable to litigation funders as clearly the information that is required and set out in schedule (1) is not known until the costs of litigation are incurred.

[70] CRS were also exempt from the continuing disclosure requirements of the Credit Contracts Act because it was exempted in accordance with s 21. As no interest charges or credit fees were payable by Mrs O'Hara until CRS had rendered its invoice dated 13 July 2015.

[71] I accept that CRS is a litigation funder; it is not providing a credit facility that requires the same protection as other regulated financial services. CRS does not charge interest or credit fees on costs therein incurred except on default. The only

fee payable by the client is a commission which is fixed at the time settlement is reached, depending on the settlement sum. The level of commission is set at the time the contract is entered into.

Defendant's supplementary bundle of documents

[72] In March 2017 I received supplementary hand written submissions filed by Mrs O'Hara. She sought that these be received by the court on the basis that she had been unwell since the end of the hearing in December 2016 and wished to elaborate on the submissions that had been filed by her lawyer.

[73] In the course of those submissions she raised a number of issues which were not addressed with any of the witnesses during the course of the hearing, in particular her now claimed dissatisfaction with the amount she was awarded in her settlement conference with "AA" Insurance. There is now substantial criticism not only of CRS but also of her solicitors, Mr Grant Shand as to why her statement of claim was only in the amount of $494,000.

[74] During the course of the proceedings the only relevance in relation to the settlement conference was with respect to the amount of settlement but also the additional sum of $73,000 which was awarded over and above the amount that she had claimed in her statement of claims.

[75] Mrs O'Hara is trying to redress what she now claims is a mishandling of her earthquake claim against both "AA" Insurance and EQC. Put simply, this Court cannot re-litigate that set of proceedings. Neither were there any allegations of negligence claimed either against CRS or indeed against Grant Shand.

Ultimate decision

[76] I am satisfied that the parties entered into a binding contract in October 2013 where commission was set at 12% plus GST and the costs were payable upon settlement by Mrs O'Hara. I am satisfied that she was aware of the details of that contract and that there was no misrepresentations made by CRS leading up to her

signing of the contract or subsequently leading up to the settlement conference that took place in June 2015.

[77] As a result I do not need to consider the argument of unjust enrichment. I would only have had to consider that if I was to find that her costs had been capped at $10,000 as she has claimed and represented.

[78] Accordingly the plaintiffs are successful and the plaintiff is entitled to the following award:

Commission on $492,000 including GST….. $ 67,896.00

Total costs and disbursements…….$ 82,671.90

Subtotal……...$150,567.90

Less payment made…….$ 54,500.00

Total owing under the contract……$ 96,067.90

Costs

[79] CRS seeks indemnity solicitor costs in the sum of $36,026.89.

[80] The application for indemnity costs is on two separate grounds;

(a) They are included in the contract at clause 6(d)[6] and/or

(b) Pursuant to rule 14.6.4 of the District Court Rules.

[81] Rule 14.6.4 states that a court may order a party to pay indemnity costs if the party has acted vexatiously, frivolously, improperly or unnecessarily in commencing, continuing or defending a proceeding or a step in the proceedings.

[6] ABD page 83

[82] The plaintiff CRS claims that Mrs O'Hara continued to defend the proceedings on a false premise, given that she paid $54,500 which does not amount to the 10% plus GST of her final settlement and it does not include what she now claims is her costs being capped at $10,000. Rather, what she has done is pay what she thought CRS deserved which is not based on any prior contractual agreement.

[83] She has only very recently, as of 2 December, accepted that she would need to pay at least $12,000 more to comply with what she thought her contractual obligations were.

[84] Mrs O'Hara also continued her defence into the second day of trial after receiving legal advice and even with a lawyer it took significant correction and guidance from the Court to manage her not only as counsel but also whilst giving evidence. Her defence and cross-examination was unstructured and extended the length of the trial unnecessarily.

[85] CRS also in the alternative claims costs on 2B basis with an uplift to reflect the behaviour of Mrs O'Hara during the hearing and in defending the case. Scale 2B costs amount to $29,266.86.

[86] CRS claims an uplift of 30% due to the conduct of Mrs O'Hara.

[87] I am acutely conscious of the fact that Mrs O'Hara is a self represented litigant. Some of her behaviour can be attributed to the problems that she has with memory and what I have described as a unique interpersonal style. I am conscious that she is not legally trained but does have some awareness of the Court environment and the procedures in the Courtroom.

[88] Her overall conduct in defending the claim, her very late acknowledgment that even on her own defence she needed to pay an extra $12,000 to the plaintiff and the frivolous nature of her defence lead me to the position where I will award costs to the plaintiff on a 2B basis of $29,266.86 with an uplift of 20% pursuant to Rule 14.6.3 of the District Court Rules.

[89] Therefore I enter judgment for $96,067.90 plus an award of costs to the plaintiff in the sum of $35,120.23.

J A Farish
District Court Judge

Signed in Christchurch on _____2017 at _____am/pm