BUT WHERE'S THE CONTRACT? A TRIBUTE TO PROFESSOR DAVID MCLAUCHLAN

Amelia Keene and Sarah Leslie*

This article is a tribute to Professor David McLauchlan on the occasion of his 40th teaching anniversary. The first part is a personal recollection from each of the two authors. The second part is a joint case note. It poses the question: how could a real estate firm who knew the vendor did not intend to appoint the firm as agent nevertheless have a legal right to withhold commission? In the decision of Nightingale v Barfoot Ltd, *Venning J confirmed that the firm had such a right. This article challenges the accuracy of that conclusion, suggesting that as there was no evidence to support the formation of an agency agreement, the real estate firm did not have the right to deduct commission. It analyses critically a number of the legal arguments raised in the case and those that should have been raised, including those concerning contract formation, the objective principle, promissory estoppel, and the effect of s 62 of the Real Estate Agents Act 1976 and the Contracts Privity Act 1982. Much responsibility for the outcome of the case must be pinned on counsel for the vendor, who failed to stop and ask himself "But Where's The Contract"?*

I INTRODUCTION

This article is written as a tribute to Professor David McLauchlan on the occasion of his 40th teaching anniversary. The first part is a personal recollection from each of the two authors. The

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second part is a joint case note on *Nightingale v Barfoot & Thompson Ltd*.[1] We argue that the case was incorrectly decided due to a failure to consider first principles of contract law.

II PERSONAL RECOLLECTIONS FROM AMELIA KEENE

Professor McLauchlan lights fires of rebellion in many law students each year. He teaches respect for the law but not necessarily judges. According to the Professor, students should take their pronouncements on the law with a grain of salt. Students are encouraged to take a critical view of cases, and read each word carefully. Sometimes, they are required to trace back and read the reports of the old cases cited within the cases, although if the reporter was Espinasse,[2] they should beware. Pollock CB recorded that "Mr Espinasse was deaf. He heard one half of a case and reported the other".[3] Professor McLauchlan teaches his students to think for themselves.

Known to most students simply as David or 'Dmac', he is the only lecturer I know of with a Facebook Appreciation Society and he has won many prizes for his teaching.[4] His irreverent style and quick wit make many fans. Once, having failed to get any answer from a student named Scott, he complained to the class, "I thought he'd be Scott on, but I was wrong".

He also understands how to make a point to technology-savvy students who increasingly turn up to class with laptops and iPhones, not pencil and paper. A student floundering under Socratic questioning on counsel's argument in the *Boots Cash Chemists*[5] case was told to create a Facebook page so that he'd remember the mistake: the page is entitled "Richards [sic] wrong interpretation of council's [sic] arguement [sic] in Boots case" and has a proud 45 members, of whom I am one. David even joined the group to correct Richard's spelling and grammar. His classes are a combination of legal and practical teachings. Those who had him as a lecturer for *Bridgewater v Leahy*[6] will remember him donning an outback hat and teaching the class as Bill York, a weathered, traditional old Australian farmer with a quite sure grasp of his faculties, despite what the High Court of Australia may have decided. Students are encouraged to "live" the cases discussed in class, to appreciate that judges are making decisions that sometimes have profound effects on the lives of real people, and to critique the judgments from that perspective.

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1 *Nightingale v Barfoot & Thompson Ltd* DC Auckland CIV-2008-004-875, 10 June 2009 [*Nightingale* (DC)]; appeal dismissed *Nightingale v Barfoot & Thompson Ltd* HC Auckland CIV-2009-404-4073, 22 October 2009 [*Nightingale* (HC)].

2 As in *Stilk v Myrick* (1809) 6 Esp 129, 170 ER 851 (Assizes).

3 Compare *Stilk v Myrick* [1809] 2 Camp 317, 170 ER 1168 (Assizes).

4 Victoria University of Wellington Award for Special Academic Achievement in Teaching 2002; *Victorias* Award for Best Lecturer at the Faculty of Law, 2000, 2006, 2007, 2008; *Salient*'s "Academic Idol" for 2006.

5 *Pharmaceutical Society of Great Britain v Boots Cash Chemists (Southern) Ltd* [1952] 2 QB 795 (QB).

6 *Bridgewater v Leahy* (1998) 194 CLR 457.

After 40 years of teaching this year, one wonders whether he is looking for new challenges, but he is emphatic: "I've got the best job in the world". David's fondest memories are of his students, many of whom keep in touch and some even refer their difficult contract questions to him. Each teaching morning he arrives at law school at 7 am to re-read the cases he may have read a hundred times before and to ensure he is on top of his game: "Those students have paid to be there, and by golly, I'm going to give them their money's worth." Among those students, he can name many judges, politicians, silks and partners in commercial firms. Former students include the President of the Court of Appeal, Justice Mark O'Regan, the Solicitor-General, David Collins QC, the Attorney-General, the Hon Christopher Finlayson, the Minister of Justice, the Hon Simon Power, and even the former Commissioner of Police, Howard Broad. In a recent *Dominion Post* interview,[7] the latter recalled his best lesson learnt as being in David's Contract and Commercial Law classes: "He was an absolute stickler for detail, much more so than in any other classes I had ever attended".

Professor Charles Rickett[8] described David's scholarship as "marked by an appeal to practical reason and meticulous attention to detail".[9] Having studied the Law of Contract with Professor McLauchlan, I can attest that his classes bear the same mark. They were at once frustrating and rewarding. He would chew through a whole row of students looking for an answer, sometimes for ten minutes or more. The questions I answered incorrectly haunt me to this day. Those classes truly inspired me to stick with law and created a passion for the subject of which I cannot be rid. They were a revelation. After three years as a guinea pig for the National Certificate of Educational Achievement (NCEA), I was being challenged to think, argue, and defend my views.

David has that special ability of a great teacher to break down, but never cross, the barrier between teacher and student. I recall working up the courage to ask, aged 19, at the end of my second year of law, whether I could tutor the law of contract the following year. "I think you can do it. Do you think you can do it?" he asked. "Yes" I replied. I was eventually hired. He believed in me from the outset, and remains an ally, mentor and friend. I will be forever indebted to him for his teaching and advice.

A quotation from Harold J Berman is stuck to his open door and is his guiding principle: "If a scholar is not a teacher his scholarship will be sterile … If a teacher is not a scholar his teaching will be superficial." A true teacher and scholar, David has met the balance perfectly.

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7 "University of Life: Police commissioner a law unto himself both at school and work" *The Dominion Post* (Wellington, 25 October 2010) at 10.

8 Formerly a Professor at the University of Auckland and now a Professor at the University of South Australia.

9 Charles Rickett "A 30 Year Legend" *New Zealand Lawyer* (Wellington, 25 January 2001) at 4.

III PERSONAL RECOLLECTIONS FROM SARAH LESLIE

"And remember, I like black pen." By the conclusion of David's customary final lecture on exam technique, most students know that the man is something of an extraordinary teacher. They will have read a mere dozen or so cases over the course, spent weeks discussing a few points, realised that half of the judgments are incontrovertibly wrong, and had the time of their academic lives. In a course where David has mocked the Australians for their television-viewing habits, talked of accidentally terrorising a student he encountered in church and described an incident in a Crown car during which he told a certain judge that his judgments had slipped since he joined the Court of Appeal, it is quite something that the highlight of the course is still his treatment of the law. David has been known to relate the story of a young student who told him that the three hours she spent sitting his commercial law exam were the best three hours of her life. Despite his comment that "she didn't get out much", I suspect he knows that there are a few of us who relished the opportunity to demonstrate that we had risen to his challenge and absorbed his arguments (and, hopefully, the beginnings of an understanding of the law of contract). He taught me never to trust anything I read and to be suspicious of any judgment that, in the context of contract law at least, failed to give effect to the reasonable expectations of the parties. What, if anything, is the law of contract for apart from that?

David's method is very simple. He takes his students through a limited number of cases, critiquing the judgments at every turn. In giving them time to read carefully ("there's too much assessment at this university and not enough learning!" is a catchcry of his) and challenging them with a series of compelling arguments as to why the judge failed properly to apply the law (or missed the point entirely), he helps his students understand the core principles of contract law. It is this understanding that provides a complete answer to the occasional complaint that a contract student at Victoria will emerge understanding selected areas of the law only. Perhaps the best answer is that of Lord Goff, who once said that:[10]

> To understand a legal subject, it is necessary to penetrate it in depth at a certain point or points. A skim of superficial knowledge is not enough; and knowledge of the whole subject in depth is neither necessary nor, indeed, possible.

The need for more of David's ilk is readily apparent in the numerous daft submissions and judgments today that apply textbook rules without any real understanding of the principles involved.

David's achievements as a scholar and critic are well known. Much of his recent research concerns remedies and contract interpretation. With regard to the latter, there is no need to rehearse his convincing reasons in favour of the liberal approach to contract interpretation, which aims to get at what the parties actually agreed.[11] His approach is largely in line with that of Lord Hoffmann in

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10 Robert Goff "Commercial Contracts and the Commercial Court" [1984] LMCLQ 382 at 382.

11 David McLauchlan "Contract Interpretation: What Is It About?" (2009) 31 Sydney Law Review 5.

Investors Compensation Scheme Ltd v West Bromwich Building Society ("*ICS*").[12] This approach holds that the task is to determine the meaning of the document recording the terms of the contract and that evidence of the "matrix of facts" is always admissible as an aid to interpretation. However, arbitrarily, evidence of prior negotiations is inadmissible. This particular point provided the basis for an indelible moment in the academic lives of students in David's 2005 contract class. Having completed a thorough study of the principles in *ICS* (and impressed on us the correct spelling of Lord Hoffmann's name – "two fs, two ns"), David turned to his Lordship's comment that evidence of prior negotiations was inadmissible. He argued that this view was incompatible with the *ICS* principles, and said that he had written to Lord Hoffmann, enclosing a relevant article, to tell him so. The class tittered appreciatively. But David was not finished yet. "And", he told us, "he wrote back!" Holding the class in thrall, he produced an envelope bearing a House of Lords seal and proceeded to read out the reply, which was something to the effect of: "Dear Professor McLauchlan, I quite agree with your views. However, we must proceed one step at a time". "Right," said David, "that's enough excitement for today. Class dismissed." Something that does not come across in his considered articles is something that is readily apparent to David's students: his wry sense of humour and perfectly-pitched sense of the theatrical.

IV A NOTE ON NIGHTINGALE V BARFOOT & THOMPSON LTD

One of the most important lessons Professor McLauchlan teaches his students is to trust their instincts when it comes to contract cases. Students should be suspicious of formalistic arguments that seem at odds with the merits, particularly if they deny an agreement that was made or foist on a party an agreement that was not. With this in mind, we examined *Nightingale v Barfoot & Thompson Ltd*. In that case, Mr Nightingale advised a real estate agent that he would not employ her to sell his property and that she would have to act for the purchaser. However, despite the fact that Mr Nightingale's evidence was accepted in its entirety and indeed preferred to that of the agent, both Courts found that an agency agreement did exist and Mr Nightingale was therefore liable to pay commission. This seems a perverse result.

V FACTS OF NIGHTINGALE V BARFOOT AND THOMPSON

We first recite the facts. Mr Nightingale listed his property for sale with Barfoot & Thompson ("Barfoots"). It did not sell and the agency relationship was terminated. Several months later Ms Wan, an agent at Barfoots, approached Mr Nightingale. She said she had found prospective purchasers. Mr Nightingale agreed to allow her to show the purchasers the property on the condition that Barfoots act as agent for the purchasers. Ms Wan proceeded to show the prospective purchasers through the property and they made an offer, conveyed by Mr Godfrey, a senior agent at Barfoots. Mr Godfrey brought the offer, contained in an ADLS-REINZ form, to Mr Nightingale. Critically,

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12 *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 (HL) [*ICS*].

the form contained cl 11, which provided that the sale was by the agent named on the front page, if any, and that the vendor would pay that agent's fees. Barfoots were named as the agent. Mr Nightingale rejected the offer and Mr Godfrey took the form away with him. Negotiations then proceeded by fax, at which stage Barfoots faxed only the front cover and execution page of the same form to Mr Nightingale. Initially, Mr Nightingale struck out the reference to Barfoots as agent, but, given the number of offers and counter offers, the form became illegible and was replaced by a fresh one. Mr Nightingale did not strike out the reference to Barfoots on the offer that was eventually accepted. Barfoots received the deposit from the purchasers and withheld their commission, forwarding the balance to Mr Nightingale. Mr Nightingale sued in the District Court to recover the commission.

Mr Nightingale gave evidence in support of his claim. He conceded under cross-examination that, having been a real estate agent himself, he knew there was something like cl 11 in the standard form but thought that he would have to sign it in order to be bound to pay Barfoots' commission. He agreed that he knew all of the other standard clauses contained in the contract (which had not been faxed to him) would apply.

Judge Sharp accepted Mr Nightingale's evidence in its entirety.[13] She made three key findings in his favour. First, he told Ms Wan clearly that he would not appoint Barfoots as his agent. Second, he struck out the reference to Barfoots on the first page of the form early in the fax negotiation process. Third, he genuinely thought that he would not be bound by cl 11 unless he signed it. Nevertheless, the Judge found for Barfoots. This decision was upheld on appeal by Venning J.

In our view, it was unjust that Mr Nightingale was held bound to pay commission. In this article, therefore, we hope to show how a failure to identify the legal issues and advance appropriate arguments led to an unsatisfactory result.

VI THE REAL ISSUE

The issue at the heart of the case was whether Barfoots had a legal basis for withholding the commission. Counsel for Barfoots argued that they had such a right. However he did not argue that there was a contract of agency with Mr Nightingale, which would have contained all of the terms expected in an agency agreement such as scope of the agency, remuneration and duties to the principal. Instead, counsel argued that Barfoots were a third party beneficiary under the contract of sale. They were entitled to enforce that benefit under ss 4 and 8 of the Contracts (Privity) Act 1982.

Barfoots also had to satisfy the formality requirement in s 62 of the Real Estate Agents Act 1976:

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13 *Nightingale* (DC), above n 1, at [10].

62 Real estate agent to have written contract of agency

No person shall be entitled to sue for or recover any commission, reward, or other valuable consideration in respect of any service or work performed by him or her as a real estate agent, unless—

…

(b) His or her appointment to act as agent or perform that service or work is in writing signed either before or after the performance of that service or work by the person to be charged with the commission, reward, or consideration or by some person on his or her behalf lawfully authorised to sign the appointment.

The earlier agency relationship had been terminated and Judge Sharp found there was no such relationship in existence at the time of the sale. Counsel for Barfoots relied on the reference to Barfoots in the contract between Mr Nightingale and the purchasers as appointing Barfoots as agent for Mr Nightingale in satisfaction of the writing requirement. A decision of the Court of Appeal held that naming the agent in the sale and purchase agreement was sufficient to satisfy s 62.[14]

It is worth observing at this point that it seems conceptually odd that Barfoots would rely simultaneously on having satisfied s 62 and on the Contracts (Privity) Act 1982. Had Barfoots actually been appointed as agent, surely they would rely on the agency contract with Mr Nightingale? Unfortunately, counsel for Mr Nightingale did not point out this difficulty.

VII WERE BARFOOTS APPOINTED AS AGENT FOR MR NIGHTINGALE?

It is clear from the wording of s 62 itself that no real estate agent may deduct commission unless appointed as agent and such appointment is evidenced in writing and signed by the principal. According to *Bowstead on Agency*:[15]

The simplest way in which agency arises … is by an express agreement whether written or oral, by the principal, and acquiescence by the agent.

If an agency appointment is contractual, normal rules of contract formation apply,[16] and the scope of the agency is ascertained by ordinary principles of contractual construction.[17] Any agency agreement between Barfoots and Mr Nightingale would have been a contractual one. It would have

14 *Houlahan v Royal Oak Realty (1993) Ltd* [1996] 3 NZLR 513 (CA).

15 Peter Watts and FMB Reynolds *Bowstead & Reynolds on Agency* (19th ed, Sweet & Maxwell, London, 2010) at [2-029].

16 Ibid.

17 Ibid, citing *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480 (CA) at 502.

entailed Barfoots undertaking obligations, the primary one being to market the property, in return for remuneration if a sale resulted.

Thus, the first issue should have been whether Mr Nightingale actually appointed Barfoots as his agent according to normal principles of contract formation, not those of interpretation to which Judge Sharp referred.[18] Evidence of communications, negotiations and subsequent conduct were all admissible to determine whether a contract of agency had been concluded. The overall purpose of contract formation is to ascertain whether the parties objectively intended to be bound:[19]

> If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms.

While the fact that Mr Nightingale signed a contract with the purchasers which acknowledged Barfoots as his agent (and satisfied the writing requirement in s 62) was a factor likely to have led Barfoots reasonably to believe that he was appointing them as agent, it is not necessarily determinative of the issue. A reasonable person in Barfoots' position could not have believed that Mr Nightingale intended to appoint them as agent. Mr Nightingale had clearly told Ms Wan that he would not, and had crossed out the reference to Barfoots on the front page in an earlier version of the sale and purchase agreement. Barfoots could not have had a reasonable belief because they *knew* that Mr Nightingale did not intend to be bound. That ought to have been the simple end of the matter had counsel for Mr Nightingale put the matter properly to the Judge.

As it was, counsel for Mr Nightingale attempted a series of arguments as to the interpretation of the sale contract between Mr Nightingale and the vendors, which seem to miss the point entirely.

First, he argued that cl 11 was akin to an exclusion clause and was "unduly onerous and sufficiently uncommon",[20] and so had to be brought to Mr Nightingale's attention explicitly before he would be bound by it. Both Judge Sharp and Venning J rightly rejected this argument on the ground that cl 11 was nothing like an exclusion clause; it had been a standard term in the form for many years and was known to Mr Nightingale.[21]

Second, he argued that the sale and purchase agreement consisted of the front and execution pages that were faxed to Mr Nightingale only. This was an untenable argument and unsupported by

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18 *Nightingale* (DC), above n 1, at [19]–[22].

19 *Smith v Hughes* (1871) LR 6 QB 597 at 607, [1861–73] All ER 632. On the objective principle, see D W McLauchlan "The 'Drastic' Remedy of Rectification for Unilateral Mistake" (2008) 124 LQR 608 at 610–614.

20 *Nightingale* (DC), above n 1, at [31].

21 Ibid, at [34]; *Nightingale* (HC), above n 1, at [27]–[28].

the evidence. Mr Nightingale gave evidence that he knew that all of the standard terms would be included, even though he did not receive a copy of them. It would be a difficult, if not impossible, task to convince the Court that anyone, let alone Mr Nightingale, a former real estate agent, would reasonably believe that the standard terms had been omitted. The Judges rightly rejected this argument.[22]

The result, then, was that the matter went before both courts on the basis that the issue was one of interpretation. Clause 11 was included in the standard terms and the reference to Barfoots on the front page remained in the final written document. None of the arguments raised on behalf of Mr Nightingale convinced them that, on the proper interpretation of the sale and purchase agreement, cl 11 was not included. We agree that cl 11 was part of the contract between the purchasers and the vendors. However, neither Judge considered the logically prior question of whether Mr Nightingale had agreed to appoint Barfoots as his agent.

VIII DOES S 62 CHANGE THE REQUIREMENT FOR AN AGENCY AGREEMENT?

Both Judge Sharp and Venning J relied on a Court of Appeal judgment in *Houlahan v Royal Oak Realty (1993) Ltd*[23] to justify their conclusion that cl 11 appointed Barfoots as agent for the vendors.[24] In that case, prospective purchasers approached Royal Oak Realty, a real estate firm, to contact the Houlahans to see if they would sell a certain property. The Houlahans initially declined to sign Royal Oak's standard form of general authority. However they must then have decided to accept Royal Oak as their agent, since they signed a sale and purchase agreement which recorded Royal Oak as the agent. There are no facts to suggest they did not intend to do so. The agreement was not performed as not all of the conditions were met. Both parties treated it as lapsed, but it was not cancelled. The parties later signed a new sale and purchase agreement with no agent recorded. Royal Oak sued for commission and succeeded.

The majority of the Court of Appeal held that the second agreement was essentially a variation of the first and thus the effect of cl 12.2 (now cl 11.1) was that the agent was still entitled to commission. Richardson P and Henry J dissented. All of the Judges agreed that the sale and purchase agreement was an agency appointment between the agent and the vendor. Gault J held that the sale and purchase agreement constituted:[25]

> ... the appointment by the vendors of [Royal Oak] as agent for the purpose of satisfying the requirements in s 62(b) of the Real Estate Agents Act 1976 and ha[s] contractual effect between the vendors and the

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22 Ibid.

23 *Houlahan v Royal Oak Realty (1993) Ltd*, above n 14.

24 *Nightingale* (DC), above n 1, at [37]; *Nightingale* (HC), above n 1, at [34].

25 *Houlahan v Royal Oak Realty (1993) Ltd*, above n 14, at 522.

> agent. As with any contract it is to be interpreted on an objective assessment of what was contemplated by the parties.

But the main issue before the Court was whether the variation was effective, not the effect of what is now cl 11.

Houlahan can be distinguished from the present facts. In *Houlahan* there was nothing to suggest anything other than that the Houlahans had led Royal Oak to believe that they did intend to be bound to a contract of agency. Although they declined to sign the original appointment, they did not demur in signing the contract that clearly stipulated Royal Oak would be the agent. In fact, that agreement went further than Mr Nightingale's in that it also stipulated what Royal Oak's commission would be. It seems clear that the Houlahans agreed to appoint Royal Oak as their agent before signing the agreement and the Court took the view that the parties intended cl 12 to operate as a contract within a contract, even though Royal Oak had not signed it.[26] This would give it contractual effect between the Houlahans and Royal Oak. However, this was a factual finding, rather than a legal principle that the inclusion of cl 11 in a sale and purchase agreement will always serve to appoint the agent as such.

In most cases, cl 11 is intended simply to provide written evidence of a prior existing oral contract between the vendor and the agent for the purpose of s 62 if there is no such contract in writing. It is not meant to act as the appointment itself. Many of the terms that might be expected to be included in an agency appointment contract do not feature in most sale and purchase agreements. These might include a fee schedule, clauses stipulating what the agent must do in performance of the contract and termination provisions. It may be that the facts of *Houlahan*, including the fact that Royal Oak's fee schedule was included in the contract, led the Court to conclude that cl 11 was intended to act as the appointment, but such a conclusion will be rare. Indeed, in Mr Nightingale's case, by relying on the Contracts (Privity) Act 1982 to recover, Barfoots were conceding they were not party to the sale and purchase agreement.

Houlahan should not have been relied on to conclude that Mr Nightingale appointed Barfoots as his agent. Although the formalistic requirements of s 62 were met, the logically prior condition that there must be a contract was not. There could not be an enforceable contract on the facts because Barfoots could not reasonably believe that Mr Nightingale intended to be bound.

IX WERE BARFOOTS ESTOPPED FROM RELYING ON THE CONTRACTS (PRIVITY) ACT 1982?

Another question that can be raised about both Judges' reasoning relates to Barfoots' reliance on the Contracts (Privity) Act 1982. Section 4 provides:

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26 The agent's signature is not required for a contract to be binding. See *Durrell v Evans* (1862) 1 H & C 174 at 191, 158 ER 848 (Ex) at 855, the name of the agent printed on the contract will suffice.

> Where a promise contained in a deed or contract confers, or purports to confer, a benefit on a person, designated by name, description, or reference to a class, who is not a party to the deed or contract (whether or not the person is in existence at the time when the deed or contract is made), the promisor shall be under an obligation, enforceable at the suit of that person, to perform that promise:
>
> Provided that this section shall not apply to a promise which, on the proper construction of the deed or contract, is not intended to create, in respect of the benefit, an obligation enforceable at the suit of that person.

The first requirement of the section is that there is a promise for the benefit of a third party, contained in a deed or contract. The words of cl 11 are:

> **Agent**
> 11.1 If the name of a licensed real estate agent is stated on the front page of this agreement, it is acknowledged that the sale evidenced by this agreement has been made through that agent whom the vendor appoints as the vendor's agent to effect the sale. The vendor shall pay the agent's charges including GST for effecting such sale.

The judgments contain little discussion on this point. But we agree that there is a promise, namely to pay the agent's charges. This confers a benefit on Barfoots: they may claim commission. The proviso is not met because there is nothing in the contract to suggest that the parties did not intend the clause to be enforceable by Barfoots. Such indicators were all extraneous to the contract.

However, Barfoots were arguably estopped from relying on s 4. The defence of estoppel is protected under s 9(2) of the Contracts (Privity) Act 1982. Under that section, the promisor (Mr Nightingale) has available to him any defence that would have been available had Barfoots been a party to the sale and purchase agreement. One such defence is that of promissory estoppel, which has long been available as a shield against legal rights being enforced by a party who has previously stated that they will not be enforced. Thus in *Jackson v Blagojevich*,[27] a lessor who had represented that a lease could run on was estopped from denying that it had been renewed when the tenant stayed in occupation in difficult trading conditions. Promissory estoppel has three requirements: there must be a promise or representation, it must be relied on by the promisee, and that reliance must be to the detriment of the promisee if the promisor is permitted to resile from the promise.[28]

When Ms Wan agreed to show the prospective purchasers through Mr Nightingale's property on the condition that Barfoots would act for the purchasers, she made a representation to that effect that

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27 *Jackson v Blagojevich* (1997) 3 NZ Conv C 192 (HC), at 564.

28 Such a proposition barely needs authority, but see for example *Gillies v Keogh* [1989] 2 NZLR 327 (HC) at 346 per Richardson J.

would bind Barfoots. A clear and unambiguous representation is required for estoppel to succeed.[29] It is not entirely clear from the account of the evidence given by either Judge exactly what she said. Certainly, however, Mr Nightingale reasonably understood by her act of showing the property to the eventual purchasers that she was agreeing to his stipulation that he would not appoint Barfoots as agent. He permitted her to show the vendors the property in reliance on this representation. Finally, he would suffer the detriment of the loss of part of the sale price when Barfoots resiled from that representation and deducted the commission. Thus it is arguable that Barfoots were estopped from relying on their legal rights under the Contracts (Privity) Act 1982.

Counsel for Mr Nightingale did not argue estoppel in the District Court. It was raised for the first time in the High Court but Barfoots objected on the basis that the point had not been properly pleaded. Similar objections were made to counsel's attempt to present a Fair Trading Act 1986 argument (presumably accusing Ms Wan of misleading or deceptive conduct under s 9) and a collateral contract argument. Venning J held that the points raised issues of fact and evidence and were not merely limited points of law and that the new points could not fairly be raised in the High Court.[30] The evidence as recorded by Judge Sharp suggests that the issue of what was actually said by Ms Wan and Mr Godfrey was not the subject of cross-examination, which may have been necessary if estoppel was to be argued.

However, counsel was wrong not to push the point, instead conceding that the case "stands or falls on whether cl 11.1 was incorporated into the contract and whether there was an appointment of the respondent as the appellants' agent".[31] Even if both of those points had been decided in Barfoots' favour, there was still the outstanding issue of the Contracts (Privity) Act 1982, because Barfoots argued on the basis of s 4, not on the basis of a contractual right to commission. In this sense, the case diverged from *Houlahan.* But had Barfoots argued that cl 11 constituted a valid agency agreement, they might also have been estopped from relying on their contractual rights.

X WOULD THE RESULT BE DIFFERENT TODAY?

Although it will provide no comfort for Mr Nightingale, the new legislative regime of the Real Estate Agents Act 2008 would have led to a different result. The Act came into force on the 16 September 2008 and replaced the Real Estate Agents Act 1976. Section 126(a) is more prescriptive than s 62. It provides that an agent is not entitled to any commission or expenses from a client for real estate work unless there is "a written agency agreement" signed by or on behalf of the client and

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29 *Scandinavian Trading Tanker Co AB v Flora Petrolera Ecutoriana (The Scaptrade)* [1983] QB 529 (CA) at 534.

30 *Nightingale* (HC), above n 1, at [14].

31 Ibid, at [15].

the agent.[32] Section 126(b) provides that a copy of that agreement must be given to the client within 48 hours of the agreement being signed by the client. It will be difficult to fit cl 11.1 of the sale and purchase agreement within the stricter language of s 126 because agents do not sign sale and purchase agreements. The agreement is intended to be a contract between vendor and purchaser, not between vendor and agent. In addition, s 128(1) requires the agency agreement to disclose all rebates, discounts and commissions that the agent will receive in relation to the expenses. Such a clause does not appear in the standard ADLS-REINZ precedent. Accordingly, it would be more difficult for a court deciding a similar case under the new regime to find that the requirements of the new Act had been satisfied. However, whatever the formality requirements, courts should find agency agreements only where such an agreement exists according to basic principles of contract law.

XI CONCLUSION

The idea for this article came from an instinct that *Nightingale v Barfoot & Thompson Ltd* could not have been correctly decided. How could a real estate firm who knew the vendor did not intend to appoint the firm as agent nevertheless have a legal right to withhold commission? David teaches his students to trust their first instincts as to where the justice of the case lies, and then trace through the legal reasoning to see where it may have gone wrong. The answer will usually lie in a failure to consider the first principles of contract law. Counsel for Mr Nightingale failed to see the agency agreement as a contract and thus subject to the objective principle. Barfoots could not reasonably believe that Mr Nightingale intended to be bound by cl 11. Accordingly, there could be no contract. Counsel also, at least in the District Court, failed to consider estoppel.

Contract law is a complex area of law. It becomes all the more complex when lawyers lose sight of first principles. David offers a steadfast, principled and clear articulation of the law of contract in his many publications and his law courses. His scholarship is authoritative for students, practitioners and judges alike. We can do no more than quote from Thomas J in one of his last judgments, sitting as a Supreme Court judge:[33]

> I pause to pay, or repay, a tribute to the learned professor. His work to bring some logic and cohesion into the task of contractual interpretation has been as outstanding as it has been tireless. Indeed, since argument was heard on this appeal, Professor McLauchlan has published another article under the title "Contract Formation, Contract Interpretation and Subsequent Conduct".[34] That article exhibits the same impeccable scholarship that has marked Professor McLauchlan's earlier essays. I for one am indebted to

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32 Although the authenticated signature fiction may apply to limit the effect of this section. See *Leeman v Stocks* [1951] Ch 941 (Ch).

33 *Gibbons Holdings Ltd v Wholesale Distributors Ltd* [2007] NZSC 37, [2008] 1 NZLR 277.

34 David McLauchlan "Contract Formation, Contract Interpretation and Subsequent Conduct" (2006) 25 UQLJ 77.

> him. It will undoubtedly be a matter of some satisfaction to him that four members of this Court have now decided that evidence of subsequent conduct may be admitted in appropriate cases. The fact that two of the four do not consider that the evidence of subsequent conduct in this particular case is of assistance does not derogate from the fact that the principle has now been established.

We offer our sincerest congratulations to a tireless, rigorous teacher and scholar, to a mentor and friend on his 40th anniversary. We can only hope to have the privilege to pay him tribute again in another decade.