IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2008-404-003323

UNDER	the District Courts Act 1947
BETWEEN	K MILLER Appellant
AND	T A PARKIN AND L E BUHLER Respondents

Hearing: 5 November 2008

Appearances: D M Connor for Appellant
C R Langstone for Respondents

Judgment: 15 December 2008 at 11:30 am

RESERVED JUDGMENT OF COURTNEY J

This judgment was delivered by Justice Courtney
on 15 December 2008 at 11:30 am
pursuant to r 540(4) of the High Court Rules

Registrar / Deputy Registrar
Date……..

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Introduction

[1] The appellant, Mr Miller came to New Zealand in 2005 and incorporated a company, SunTec International (New Zealand) Limited (SunTec). SunTec held the rights for the manufacture, distribution and marketing of a PVC joinery system. In August 2007 the respondents, Mr Parkin and Ms Buhler, began negotiations for the purchase of 50% of the shares in SunTec. They paid Mr Miller $50,000 and SunTec $100,000.

[2] Mr Parkin and Ms Buhler say that the payments were a sign of good faith in the continuing negotiations to be refunded if the purchase did not proceed. Since the purchase did not proceed, they sought repayment. Mr Miller refused to repay the money. He says that there was a binding oral agreement, that the $50,000 payment was a non-refundable deposit on account of the purchase price and the $100,000 payment was a loan to SunTec.

[3] In an action by the respondents in money had and received District Court Judge Hinton found that there was no binding oral agreement, that the payments were only made as a sign of good faith and that Mr Miller was liable to repay the full amount. He rejected affirmative defences of change of position and estoppel. The various grounds of appeal can be summarised as follows:

a) In finding that there was no oral contract between the parties and that the payments were gestures of good faith liable to be refunded if purchase did not proceed the Judge placed undue weight on aspects of the evidence that he viewed as favourable to the respondents while ignoring or wrongly rejecting evidence consistent with Mr Miller's account;

b) In relation to the $100,000 payment, the Judge proceeded on a wrong legal principle in finding that a claim for money had and received lay against Mr Miller notwithstanding that it was SunTec that had actually received the money;

c) The Judge failed to take account of the evidence of detrimental reliance in rejecting the estoppel defence.

[4] An appeal from a decision of the District Court is by way of rehearing and the correct approach is that described by the Supreme Court in *Austin Nichols & Co Inc v Strichting Lodestar*[1], namely that the appellate court is expected to undertake its own assessment of the facts and may substitute its own findings of fact if it considers that the first instance Judge was wrong. This approach applies equally to issues of credibility, though an appellate Judge will generally be cautious about reversing a credibility finding in recognition of the advantage frequently enjoyed by the first instance Judge in being able to observe the witnesses giving evidence.

First ground of appeal – finding that there was no oral contract and the $50,000 payment was refundable

Correct approach to determining existence of contract

[5] It was accepted that the Judge stated the relevant law on the formation of a contract correctly. The prerequisites to the formation of a contract are, first, an intention to be immediately bound from the time the contract is said to have been agreed on and, secondly, agreement on those terms that are legally essential to the formation of a contract or were regarded by the parties themselves as essential. Whether the parties intended to enter into a binding contract and whether they achieved that are to be determined objectively. All of the circumstances giving rise to the asserted agreement (commonly described as the matrix of facts) can be taken into account in making the determination. These include statements made during the course of negotiations. Subsequent conduct may also be taken into account. However, it seems doubtful that direct expressions of subjective intent should be included in the Court's consideration as to whether the parties intended to be bound[2].

[6] In *Fletcher Challenge Energy Limited v Electricity Corporation of New Zealand Limited* the Court of Appeal (which also concerned the question of whether

[1] [2008] 2 NZLR 141
[2] *Fletcher Challenge Energy Limited v Electricity Corporation of New Zealand Limited* [2002] 2 NZLR 433 Richardson P, Thomas, Keith, Blanchard, McGrath JJ at [56]

the parties had reached a binding agreement based on a signed Heads of Agreement) articulated the question to be decided in the following way:

> [70] The critical matter is whether the negotiators achieved their objective of agreeing on all terms they (or either of them) considered essential; whether, by signifying that certain matters had not been agreed they were indicating that essential matters remained outstanding or, alternatively, were withdrawing those matters from the list of what was, at the end of the negotiation, still regarded as essential. Did they, at the end of the negotiations on the [Heads of Agreement], intend to have an immediately binding contract?

The negotiations and the $50,000 payment

[7] Mr Miller had previously lived in the Bahamas and while there had run a business licensing a PVC joinery system and manufacturing the joinery. He controlled both the licensor company, SunTec International Ltd, and the manufacturing company, Window Express Ltd. When he moved to New Zealand, however, he did not want to become involved in another manufacturing operation. He intended only to licence the process, with the actual manufacturing being undertaken by licensees. He incorporated SunTec to operate as the licensor. He also incorporated a New Zealand company, Windows Express Limited, to protect that name for use by future licensees.

[8] The respondents acknowledged that Mr Miller told them that he did not wish to become involved in manufacturing. Although they initially considered becoming a licensee they quickly became interested in purchasing part of the shareholding in SunTec. They also thought that SunTec should, at least for a time, manufacture the joinery as well. Although doubtful at first, Mr Miller eventually agreed to this proposal. He told the respondents that he would require $280,000 for 50% of the shares in SunTec. There was no argument about price. Mr Miller also told them that both he and they would have to inject further capital into SunTec and he proposed a figure of $200,000 each. The respondents accepted this as well.

[9] The respondents were due to go overseas on 26 August 2006 for two weeks. On 24 August 2006 Mr Parkin emailed Mr Miller a draft Heads of Agreement prepared by his solicitor. The next day, 25 August 2006, he and Ms Buhler went to see Mr Miller at his home. Mr Miller had not seen the Heads of Agreement at that

stage and there appears not to have been any discussion about it. At that meeting, however, the respondents gave Mr Miller a cheque for $50,000. There is no record of the basis on which this payment was made. The respondents both said that they wanted to convey their good faith in the continued negotiations and that they proposed the payment for that purpose. Mr Miller said that they had committed themselves to the purchase and the money was on account of the purchase price of the shares and specifically made on the basis that it would be non-refundable.

[10] While the respondents were away Mr Miller considered the Heads of Agreement. He said in evidence that it did not reflect the agreement that they had reached and he did not realise that it sought to make the agreement conditional on completing formal documentation. Nevertheless, when Mr Parkin and Ms Buhler returned they all signed it. Although Mr Miller had inserted 11 September 2006 as the date for payment of the purchase price both parties recognised that this would not occur; at the least the respondents had only just returned from holiday, did not have their finance arranged and there was uncertainty about how payment might be structured so as to make it tax effective. Mr Parkin and Ms Buhler also signed the Heads of Agreement, which contained the following clauses:

- E – the parties have agreed generally to the terms of this Heads of Agreement which terms are to be subsequently incorporated into formal documentation recording the arrangements between the parties. Such documentation to be signed by all parties prior to commencement of the business contemplated herein…

- 5 – The parties will enter into an agreement for Sale and Purchase of shares as contemplated in Clause 1 above, a Shareholders Agreement and will agree on the terms of the Constitution to be filed for SunTec.

- 6 – The parties entering into the formal documentation referred to above on terms acceptable to each of the parties on or before the ……day of……..2006. (The provision for a date in this paragraph was never completed).

[11] Mr Parkin began working at SunTec shortly after the Heads of Agreement was signed, assuming the sales and marketing role. On 22 September 2006 the respondents made a $100,000 payment by way of direct credit to SunTec's account. It was undisputed that it was made at Mr Miller's direction. However, the reason for it was not recorded.

[12] The documents envisaged by the Heads of Agreement (the shareholders' agreement, amendments to the constitution and directorship arrangements) were never finalised. On 30 November 2006, a number of minor incidents culminated in a disagreement between Mr Miller and Mr Parkin over a staffing issue. Mr Parkin told Mr Miller that he and Ms Buhler did not want to proceed with the purchase of the shares. Proposals for a purchase on terms that would give the respondents day-to-day control over SunTec were rejected.

Was there a concluded contract for the purchase of the shares?

[13] The Judge made the following findings regarding the binding oral contract alleged by Mr Miller to have been formed in August 2006:

> [35] In my view, the evidence for the defendant on this aspect is not compelling. On the share purchase aspect, Mr Miller stated that he told Mr Parkin in early August that the price was $280,000 and there was a non-refundable deposit. He did not say when the $50,000 was payable, but did say he expected to be paid in full by 11 September, although he knew this was unlikely. The suggestion is that Mr Parkin, for the plaintiffs, agreed to those bare terms, as at early August 2006. Thus it is contended, Mr Parkin duly paid the non-refundable deposit.
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> [36] I cannot accept the defendant's proposition that there was a binding unconditional oral contract. There is little in the evidence that, in my view, aligned with that proposition, and indeed there were several indicators to the contrary.
>
> [37] Fundamentally the defendant's proposition is wholly inconsistent with his, and the plaintiffs', entry into the heads of agreement. The heads of agreement dealt with the same subject matter, but was not binding and contemplated further documentation.
>
> [38] It is highly unlikely, in my view, that the heads of agreement would have been entered into if the unconditional oral contract existed.

> [39] If such an unconditional contract existed, it is likely, in my view, that the defendant would have included at least some of its pivotal provisions in the heads of agreement. A reference to the agreed loans is an obvious candidate for inclusion. By contrast, the actual inclusion of the dies matters is curious at least.
>
> [40] I do not believe the plaintiffs would have already agreed the unconditional terms when they entered into the conditional heads of agreement and when they were, in my view, actually considering the proposed purchase. I believe they were seriously considering it, but I cannot accept they were already committed to the purchase on the threadbare basis proposed. It is not tenable on the evidence that these plaintiffs would have agreed to bare terms proposed without more usual share purchase provisions.
>
> [41] There were other matters proposed, and other activity, inconsistent with the existence of the unconditional oral contract. SunTec's accounts were awaited, the structure of the acquisition was being considered, and draft shareholder documents had been proposed. Mr Miller allowed in cross-examination that accounts were going to be done for Mr Parkin.
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> [42] It is relevant, too, in my view, that the non-refundable nature of the deposit, and the loan repayment terms, came up only in the course of this proceeding.

[14] It is clear from these passages that the aspects of the evidence that were most influential on the Judge in rejecting the existence of a binding oral agreement were:

- The terms of the Heads of Agreement and the fact that it was signed after the $50,000 payment was made.

- The fact that when both payments were made the shareholder documents envisaged by the Heads of Agreement and accounts for SunTec had not been completed.

- The Judge's view that the non-refundable nature of the $50,000 deposit had only been raised in the course of the proceeding.

[15] Mr Connor, for Mr Miller, submitted that in relation to the first two aspects, the Judge failed to take into account other factors that were equally consistent with an intention by the respondents to be bound. In relation to the third aspect Mr Connor submitted that the Judge was wrong to find that the non-refundable nature of the payment had not been raised prior to the proceedings being issued.

[16] There was evidence about the negotiations in the form of contemporaneous statements made by the parties that give a good insight into their respective beliefs at the time. Starting with Mr Miller, he located on his computer an email to Mr Parkin dated 29 August 2006 which had never been sent. It was put to Mr Miller at trial that this letter was fabricated in the sense of having been prepared well after the dispute arose but he rejected that proposition and it was not advanced on appeal. The email said:

> I am not quite sure if you will get this letter before you go, but I would just like to say I am glad you have decided to join me in my endeavours to make SunTec and Window Express number one in New Zealand for the manufacture and supply of PVCU windows and doors along with the profile and hardware supply side.
>
> I thought I would write this letter confirming our agreement that you will run the window express side of the business and I will run SunTec, as agreed I am willing to look at selling you part of the dies at a later date once we see how the business is doing, but in the meantime thank you for the $50,000 you paid me to show your commitment. When you get back from holiday we will have to go out and celebrate our partnership with the girls…

[17] The terms of this email are consistent with a party who believes that agreement has been reached and is looking ahead to other aspects of the business rather than a party still in negotiations. Whilst there is nothing about the payment being non-refundable, taken overall the email plainly demonstrates Mr Miller's belief that he had a binding agreement with the respondents.

[18] Mr Miller's evidence on the $50,000 payment reflected that email, though he also maintained that he had specified that the payment was not to be refundable:

> I spoke with Todd again on or about Thursday 24 August 2006 and he told me he was about to go on holiday for a fortnight. He told me that he had asked his lawyers to prepare the necessary documentation to record our agreement but that the documentation had not been completed as yet. I told Todd that I needed some payment from him and Lyndal to show their commitment because I was changing the direction and structure of the SunTec business as a result of my agreement with him. Todd asked me how much I had in mind. I suggested $50,000 and Todd said this was no problem. Todd was very enthusiastic about the SunTec business at that time and he was very keen to become involved.

> I told Todd that if he paid me $50,000, the payment would be non-refundable and he would be locked into the deal. I cannot recall the exact words that I used. However, I recall that I emphasised this point strongly, and certain that I made it clear to Todd he would not get the money back if he did not proceed with the deal and he understood this.[3]

[19] However, whilst Mr Miller may have believed that he had a binding contract, statements made by Mr Parkin at the same time show that he and Ms Buhler did not consider themselves to have entered into a binding contract. By 18 August 2006 Mr Parkin spoke to the ASB Bank about financing the purchase and in an email the same date said:

> As discussed, we are going to form a partnership to enter the New Zealand window and door industry with PVC windows and doors…
>
> As you know we are out of the country from Saturday 26 August, back 11 September. We are wanting to sign this off by Friday next week being 25 August…
>
> We have been in discussion with Ken for four weeks and have turned him around to agreeing to a partnership arrangement for all New Zealand. While he is genuinely excited about the advantages of a partnership, it is important to maintain our credibility, what I'm saying is that if you feel ASB will struggle to approve this I ask that the bank let us know ASAP to allow us the ability to settle alternative finance within the above time frame…

[20] The tenor of this email is one of intention to enter into an agreement. But clearly, Mr Parkin needed the finance confirmed and was not in a position then to commit himself until that had been done.

[21] Also on 18 August 2006, Mr Parkin emailed his solicitors as follows:

> Myself, Lyndal and our Trust are to purchase 50% of shares in an NZ company "SunTec International Limited"…It is our intention to take up this offer.

[22] This email is consistent with the email to the ASB; it conveys an intention to commit to the purchase at a later date.

[23] When Mr Parkin received the draft Heads of Agreement from his solicitor he emailed it to Mr Miller, commenting that he had yet to properly review it and asking that Mr Miller let him know any amendments that he thought would be appropriate.

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[3] Miller brief of evidence paragraph 31-32

This is not consistent with an intention to be bound immediately – at the least Mr Parkin was expecting to review the draft Heads of Agreement and consider any amendments that Mr Miller might suggest.

[24] Mr Connor submitted that Mr Parkin's various statements to his bank and solicitor showed an intention to purchase the shares which, coupled with the actual payment of $50,000, was compelling evidence that the respondents implemented their intention. However, I do not consider that the evidence has that effect; when the circumstances in which the payment was made are looked at as a whole the weight of evidence is clearly against the respondents intending to commit themselves at that stage. They did not have their finance approved, making commitment highly unlikely. There was no discussion about the Heads of Agreement, which Mr Miller appears not to have actually seen at that stage and; given Mr Parkin's request for Mr Miller's comments only the day before, it is unlikely that he would have intended to be bound without at least some discussion about it. The respondents both said in evidence that it was their idea to make a payment and their idea as to how much that payment would be. They both said that they suggested the payment because they wanted to show their interest in the business. I note that the Judge was impressed by Ms Buhler, describing her as a "frank and straightforward witness".

[25] Mr Connor made extensive submissions about the Judge's treatment of the Heads of Agreement as evidence tending to show that no binding contract had been reached and I therefore consider that aspect. The first point Mr Connor argued was that the Judge wrongly focused on the inconsistency between the Heads of Agreement and the existence of a binding oral contract. There is, clearly, an inconsistency; if the respondents had already committed themselves to a binding oral contract it is difficult to see any rationale for that document. However Mr Connor says that the Judge failed to recognise that the existence of a Heads of Agreement was equally inconsistent with the respondents' position in that, if the respondents had not been contractually bound to purchase the shares, the Heads of Agreement was wholly unsatisfactory in terms of advancing their position because it did not require any financial statements to be provided, it did not record the payment of the $50,000, and it did not refer to the proposal whereby both parties would inject further capital into the company.

[26] I do not regard these as compelling factors. When first sent to Mr Miller the Heads of Agreement was just a draft and the $50,000 payment had not even been discussed so it is hardly surprising that there was no mention of it. These parties clearly did not feel the need to go back to their solicitors to advise that the $50,000 payment had been made or that they had also agreed to inject $200,000. Ideally they would have but both aspects could be adequately covered by the sale and purchase agreement and shareholders agreement provided for in the Heads of Agreement. As for the provision of accounts, there was no dispute that the purchase price and the injection of capital – the two areas likely to be affected by accounts – had already been agreed. Whilst it was clear from the evidence that the parties wanted accounts prepared this appears to have been for the purpose of determining the structure of any shareholding, not to assist the respondents in deciding whether to purchase.

[27] Mr Connor pointed to Mr Parkin's acceptance in cross-examination that the purchase price and the injection of capital had been agreed to as evidence of an agreement to proceed with the purchase but I do not regard this as compelling. Agreeing on the purchase price and agreeing that the business would need $200,000 falls short of an agreement that the shares would, in fact, be purchased. The parties had agreed on certain important aspects of the transaction but the respondents had not committed themselves to it. I agree with the Judge that the signing of the Heads of Agreement and the terms of it was a strong indicator that the respondents did not consider themselves to be bound at that stage.

[28] Mr Connor also submitted that Mr Miller's contention could be easily tested by considering what the position might have been had the respondents sought specific performance for the transfer of the shares and that the Judge should have considered this. He submitted that, given the payments, the fact that Mr Parkin had been working in the business and that he had held himself out as a director made it highly likely that any Court would have granted such an application. This approach is of limited assistance. All of the factors that I have just discussed point away from there being a binding agreement regardless of the perspective one takes.

[29] I am satisfied that the weight of evidence is firmly against the respondents intending to be bound in August 2006. I consider that when the payment was made

the parties had agreed that, if the respondents purchased half of SunTec's shareholding, they would pay $280,000 and would also inject $200,000 working capital into the company within quite a short time. However, the respondents had not got to the point of intending to be bound to do so at that time and although I accept that Mr Miller believed that they had committed themselves, objectively, there was no reasonable basis for him to have held that belief. I therefore consider that the Judge was right to find that in August 2006 there was no binding oral contract concluded.

[30] I also consider the Judge was right to find that the payment was refundable in the event of the purchase not proceeding. Payment on the basis that the payment was non-refundable would be inconsistent with the circumstances discussed above. In particular the respondents did not yet have finance approved, which made it unlikely that they would risk losing $50,000 on a non-refundable deposit. Such an arrangement would be sufficiently unusual as to make it likely that one of the parties would have recorded the fact somewhere but there was only Mr Miller's own assertion in evidence that he had specified that the payment would be non-refundable. Mr Miller was, however, shown to have been mistaken on other factual matters and the Judge was entitled to prefer the respondents' evidence on this point.

Second ground of appeal – whether Mr Miller should be liable to repay the $100,000

[31] In the District Court and on appeal Mr Connor argued that, as the $100,000 payment had been received by SunTec, a claim for money had and received could not lie against Mr Miller personally. The Judge rejected that proposition on the basis that the payment had, in law, been made to Mr Miller.

[32] The $100,000 was paid on 22 September 2006. By then the parties had signed the Heads of Agreements which was conditional on certain documents being prepared. Mr Parkin had been begun working in the business, essentially unpaid. He had given Mr Miller a draft Agreement for Sale and Purchase to consider but they had not discussed it. It was against that background that Mr Parkin and Ms Buhler direct credited $100,000 to SunTec's account.

[33] Mr Parkin said that Mr Miller had asked for the payment because he did not want to break a term deposit and that he and Ms Buhler agreed to the payment as a further sign of good faith pending conclusion of the negotiations and execution of all the relevant documents. They understood that it would be repayable in the event of the share purchase not proceeding and be taken on account of the purchase price if it did.

[34] Mr Miller's account is that he expected Mr Parkin and Ms Buhler to pay the balance of the purchase price when they returned from holiday and for that reason inserted the settlement date of 11 September 2006. However, Mr Parkin wanted to wait for accounting advice as to which entity he should use to complete the purchase and the way the balance of the purchase price should be paid and that advice could not be provided until SunTec's accounts for the year ended 31 March 2006 were available. Mr Miller says he told Mr Parkin that SunTec needed further working capital immediately and that he wanted Mr Parkin to advance $100,000 of the $200,000 they had previously agreed would be put into the company. As far as Mr Miller was concerned the payment was made pursuant to the concluded agreement for the purchase of the shares and was intended as a loan to SunTec, interest free and repayable when SunTec could afford to do so.

[35] The Judge rejected Mr Miller's account, citing the following difficulties. The respondents were neither shareholders nor directors at the time of the advance so that an advance on the basis that SunTec would only be liable to repay it when it could was improbable. Secondly the advance was made at a time when the respondents were still seeking information about SunTec, still working on documentation and had not actually decided to buy into the company. Thirdly, the payment was made to an entity that the respondents knew very little about. Fourthly there was no documentation regarding the loan, no acknowledgement from the company and no terms:

> [52] Overall, I find that the proposition that the plaintiffs advanced $100,000 to SunTec on the basis that effectively they would get that money back if Mr Miller and SunTec ever decided that SunTec could repay it, is highly unlikely. I believe that the plaintiffs made the payment to Mr Miller as part of the consideration for a proposed acquisition of an interest in the company at a time when they did think there likely would be, but were not contractually committed to, a purchase transaction. I do not believe that the

> plaintiffs agreed or intended to advance money to SunTec at any time. Certainly, the advance was paid at Mr Miller's request by direct credit to SunTec, but this does not for one moment alter the proposition that the plaintiffs paid the money to Mr Miller.

[36] The essence of a claim in money had and received is the unjust enrichment of the person receiving the money. The obligation to repay arises as a response to the unjust enrichment at the point the money is had and received[4]. This is, of course, straightforward when the defendant is the person who has received and been enriched by the money. The problem of identifying the correct defendant where money has not been paid directly to that person is discussed in *Enrichment & Restitution in New Zealand*[5]:

> On whatever basis a principle of restitutionary recovery is articulated, the plaintiff must identify the correct defendant. The defendant must be the person (and this is made clear by the generalisation of the grounds of restitution as "restorable") who has received the enrichment from the plaintiff. In the vast majority of cases this poses little difficulty. The transfer of an enrichment, to which the plaintiff has a legal title, is made by the plaintiff directly to the defendant. Accordingly, its status as a separate requirement is "invisible".
>
> However, there will be cases where it is more difficult to determine who is the recipient of the enrichment formerly held by the plaintiff. This difficulty arises principally where the transfer is not made directly by the plaintiff to the defendant, but is made via some third party. In this case in particular, though technically also in the simple case, in order to identify the appropriate defendant the plaintiff must trace the enrichment from his hands through the intervening steps, into the defendant's possession and control. The relevance to the cause of action of some notion of tracing is clear from cases such as *Lipkin Gorman (a firm) v Karpnale Limited*[6]. There in order to assert a claim of money had and received against the defendant, the plaintiffs were required to trace the money taken from the bank account through the hands of a number of parties, including the bank, and into the defendant's hands…
>
> While in cases of a direct transfer from the plaintiff to the defendant the identity of the defendant can virtually be presumed, in the more factually complicated case the plaintiff will be required to demonstrate that the defendant should be regarded as the recipient of the plaintiff's value (and hence the party enriched), notwithstanding that the transfer was initially to another party.

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[4] *Civil Remedies in New Zealand* - Blanchard et al (Thompson & Brookers 2003)
[5] Grantham & Rickett – Oxford Portland Oregon 2000 at p63
[6] [1991] 2AC 548 (HL)

[37] The decision of the House of Lords in *Lipkin Gorman* referred to in this passage concerned a partner in a firm of solicitors who stole money from the firm's trust account and gambled it away at a club. In action for money had and received against the club Lord Templeman said[7]:

> In my opinion in a claim for money had and received by a thief, the plaintiff victim must show that the money belonging to him was paid by the thief to the defendant and that the defendant was unjustly enriched and remained unjustly enriched....

[38] There is no suggestion of dishonesty by any of the parties in this case. It is, however, clear that in a claim for money had and received there must be enrichment of the defendant himself through the plaintiff's payment. The Judge's finding that the money was paid to Mr Miller because the parties intended that it would be treated as part of the purchase price if the transaction proceeded was made without any explicit consideration of whether and how the payment enriched Mr Miller.

[39] It appears from the judgement that the Judge may have been influenced by the decision in *Goss v Chilcott*[8] in which the Privy Council held that the borrowers of money who had allowed the funds to be paid to a third party were nevertheless liable to the original lender in money had and received:

> [56] Mr Connor sought to distinguish the decision in *Goss v Chilcott* [1996] 3 NZLR 385. In that case the appellants argued that they should not be required to make restitution because they had never received the relevant advance. It was held that the appellants had indeed received the advance when it was paid, at their direction, to the third party recipient. Mr Connor's submission involved an argument that in the *Goss* decision the appellants had actually agreed to borrow and agreed to in-lend to the third party….
>
> [57] Mr Connor submitted that the difference was that in the present case Mr Miller had no liability for the $100,000 from the beginning….
>
> [58] Contrary to these submissions I have found on the evidence that Mr Parkin intended to pay the money to Mr Miller at his request, and made the payment to SunTec at the request of Mr Miller in relation to a payment being made Mr Miller. That finding is sufficient to address Mr Connor's submission. To put it another way, I am not holding that Mr Miller has to repay the $100,000 simply because he gave a direction as to where it should be paid. I am, however, holding that he received the $100,000 because, on the evidence, I have found that the payment was a part-payment on account of a share purchase transaction and not a payment to SunTec. Mr Miller

[7] p559-560
[8] [1996] 3 NZLR 385

> received the money in law, notwithstanding to whom he directed it should be paid.

[40] Even assuming that the money was intended as a payment towards the purchase price I consider that the case is distinguishable from *Goss v Chilcott*. It is apparent from the report in that case that the money had been paid to the appellants in the first instance; it was paid into their solicitor's trust account in their name and then paid out of the trust account to a third party at their direction. It is clear that their liability arose from the fact that they had received and been enriched by the payment made to their account. The Privy Council held that, even though they were not contractually obliged to repay the money (as a result of an alteration to the mortgage itself):

> …they had nevertheless been enriched by the receipt of the money, and prima facie reliable in restitution to restore it. They had however allowed the money to be paid over to Mr Haddon in circumstances which, as they well knew, the money would nevertheless have to be repaid to the company…

[41] In comparison, the $100,000 never came into Mr Miller's hands. It was paid to the company and there was no evidence that it was disbursed by the company to Mr Miller. It is shown in the company's statement of financial position for the year to 31 March 2007 as an advance from Mr Parkin. In short, there is no basis on which to find that Mr Miller was personally enriched by the payment. Even if, as the respondents contend, the money was paid on account of the purchase price of the shares then, in the event of the purchase proceeding, SunTec would have had to either repay the money to the respondents for them to pay to Mr Miller personally or to have paid it on to Mr Miller at the direction of the respondent. Only then would Mr Miller have received the money and been enriched by it. But because the money only reached SunTec and remained in its hands an action for money had and received could only lie against the company. It follows that Mr Miller is not liable to repay the $100,000 in an action for money had and received.

Third ground of appeal – estoppel

[42] Mr Miller raised as an affirmative defence that the respondents were estopped from denying the existence of a binding contract to purchase the shares.

[43] The Judge correctly stated the requirements for estoppel at [72]:

> Estoppel depends upon a representation of fact by one party to another in reliance upon which that other party has changed its position in such a way that it would be inequitable for the first party to go back on the representation. The representational promise must be clear and unambiguous and of course there must be detriment to the representee. The element of "unconscionability" runs through all manifestations of estoppel: *National Westminster Finance NZ Limited v National Bank of NZ* [1996] 1 NZLR 548 at 549.

[44] The Judge held that neither of the prerequisites had been satisfied. In terms of whether there had been a clear and unambiguous representation the Judge held that:

> [75] I cannot conclude on the evidence that there was an unequivocal representation by the plaintiff that they would proceed with the purchase and with the advance to SunTec. As is apparent from my findings earlier in this judgment, the reality was in my view that the plaintiffs were looking positively towards a possible transaction, and had not committed themselves to it.
>
> [76] It follows that they would not, in my view, have made an unequivocal representation of the variety claimed by the defendant. In relation to the specific alleged manifestations of that representation, I find that there was no advice by the plaintiffs verbally during July and August 2006 that they would purchase 50 percent of the shares for $20,000 and advance $200,000 to SunTec. The fact that Mr Parkin began working at SunTec and described himself as an office holder for a short time cannot, in my view, assist the defendant on this issue.

[45] I agree with that assessment in relation to the period prior to September 2006. I accept that Mr Miller believed that the respondents had committed themselves but there is no evidence of their actually doing or saying anything to create that belief, other than making the payment which cannot, in itself, amount to a sufficient representation given the circumstances in which payment was made.

[46] I do, however, consider that Mr Parkin's conduct from the time the Heads of Agreement was signed did clearly and unequivocally convey that the respondents were committed to the purchase. Mr Parkin knew that Mr Miller had no desire to embark on a manufacturing venture and had only agreed to do so because Mr Parkin had "talked him round". Yet Mr Parkin began work in the company specifically on the basis that it would undertake manufacturing work. Mr Parkin held himself out as a director in dealings with potential staff and customers, conduct which is consistent

with someone committed to that role. In this regard I note that Mr Parkin had previously held a senior commercial position in a company and could be taken to have understood the significance of the role of director.

[47] Secondly, the respondents had their finance approved by 22 September 2006 and their solicitor's correspondence suggests that settlement was being put off because of ongoing work to identify the appropriate structure for the payment, not because the decision to invest had not yet been made. Mr Miller said that the reason Mr Parkin gave for delaying payment of the purchase price was that he and Ms Buhler were working out with their accountant the appropriate structure for that payment and this assertion is consistent with letters from the respondents' solicitors to them and to their bank. On 21 September 2006 the respondents' solicitors wrote to them referring to discussions with their accountant about the "proposed financing structure" and the need for changes to be made to the bank documentation. The same day the solicitors also wrote to the ASB requesting changes be made to the documentation and referring to confirmation from the respondents' accountant about the proposed structure for the financing.

[48] Thirdly, the figure of $100,000 was consistent with the amount of working capital previously discussed between the parties as being the amount required, being exactly half of the amount each expected to put in. The evidence was that SunTec already had quite substantial funds, about US$200,000 and therefore did not actually require the money urgently; in cross-examination Mr Miller said that he wanted Mr Parkin to put the $100,000 into the company to match the amount that he would be putting in. Conversely, $100,000 was not a sum that related in any way to the share purchase price.

[49] Fourthly, having made payments totalling $150,000 as (on their own account) gestures of goodwill, there was no evidence that the respondents ever pursued the outstanding conditions provided for in the Heads of Agreement. They did not raise the draft sale and purchase agreement with Mr Miller in discussions. They did not provide a draft shareholders' agreement. They did not propose changes to the constitution of SunTec. If they did not intend to commit themselves to the purchase until these conditions were fulfilled it would be reasonable to expect that they would

follow them up, given their own description of how keen they were to proceed. Their payment of money coupled with the failure to pursue these other matters was very likely to send the message that the respondents were no longer concerned to see these documents completed before committing themselves. This conduct would, in my judgment, have conveyed a clear and unambiguous message that the respondents were committed to seeing the purchase through. I therefore consider that the Judge erred in finding that this prerequisite had not been satisfied.

[50] On the question of reliance to Mr Miller's detriment the Judge found that:

> [76] ….even if there were any representation at all that could in law constitute the requisite promise, there would be insufficient evidence of reliance or detriment suffered by the defendant. Detriment argued for, as represented by the expenses schedule, was clearly not proven.

[51] On appeal Mr Connor conceded that the claim of expenditure having been incurred in reliance upon representations made could not be sustained; at trial Mr Miller had conceded that the expenditure either did not relate to the business or had not been made in reliance on the respondents' conduct. Instead, on appeal the detriment relied on was the burden on Mr Miller of having to operate a manufacturing business with all its attendant stresses and inconveniences when that was the very thing he intended to avoid when he incorporated SunTec. This had been pleaded and Mr Miller described in his brief of evidence the pressure he found himself under in having to manage a manufacturing business, which he considered was too much for one person, and the consequent effect on his health as a result of the stress.

[52] The Judge did not refer to this aspect at all as a possible form of detriment, which was an error. It was accepted that Mr Miller had made it plain to the respondents that his desire was not to have a manufacturing company but merely to license the process. Mr Parkin referred in his letter to the ASB to having "talked Mr Miller around". It was clearly envisaged that the business would require two people to run it. The fact that this detriment could not be readily quantified in pecuniary terms does not preclude it from constituting detriment for the purposes of estoppel.

[53] However, I do not consider that this detriment precludes the respondents from denying the existence of a binding agreement to buy shares in SunTec. A party who has made a representation on which another has relied to his detriment may nevertheless resile from the represented position provided the representee is given a reasonable opportunity of resuming his original position and has not been permanently prejudiced by relying on the representations[9]. In *BNZ v Smith*[10] Richardson J observed that the effect of a waiver or estoppel is only to suspend the rights between the parties and that the party making the promise or assurance is bound unless and until it gives the promisee a reasonable opportunity of recovering his position.

[54] Whilst it is true that Mr Miller had embarked on a manufacturing business that he did not want, the evidence shows that only a minimal amount of additional expenditure was required since SunTec was already occupying the space that was to be used for the manufacturing and already owned the manufacturing equipment required. Mr Parkin only worked in the business for about ten weeks before advising Mr Miller that he and Ms Buhler did not wish to proceed further. During that time a new staff member had been taken on but he resigned soon after Mr Parkin left the business. The company had received some orders, which Mr Miller understandably felt obliged to fulfil. But the evidence does not suggest that the commitment in either expense, staffing or customer services as a result of the ten weeks that Mr Miller might reasonably have thought the respondents had committed themselves was such that Mr Miller could not extract himself and return to his original plan. For that reason the estoppel defence must fail.

Conclusion

[55] I have found that:

a) The weight of evidence was against the existence of a binding oral contract concluded in July /August 2006. There was therefore no error in the Judge's conclusion on this issue;

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[9] *Burbery Mortgage Finance & Savings Limited v Hindsbank Holdings Limited* [1989] 1 NZLR 356 (CA) at 361

[10] *BNZ v Smith* [1991] 3 NZLR 659 at 678

b) The weight of evidence was also against the $50,000 being non-refundable and there was therefore no error in the Judge's conclusion on that issue;

c) The Judge did err in finding that an action in money had and received lay against Mr Miller. There was no evidence that Mr Miller was enriched a result of the payment, it being SunTec that received and retained the payment. This ground of appeal succeeds;

d) I consider that the respondents did conduct themselves in the period September – November 2006 in a way that led Mr Miller to believe that they had committed themselves to the purchase. I also consider that Mr Miller did rely on that representation to his detriment. However, I also consider that Mr Miller could have resumed his original position with relative ease after the respondents advised that they did not wish to proceed. Therefore the respondents are not estopped from denying the existence of an agreement. This ground of appeal fails.

[56] It follows from these conclusions that the appeal fails in relation to the $50,000 payment but succeeds in relation to the $100,000 payment.

[57] Each party having succeeded in part I consider that appropriate course regarding costs is for each party to bear their own. If, however, any party wishes to apply they may do so by memorandum filed by 20 February 2009 with any reply to be filed within 7 days after that.

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P Courtney J