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**IN THE HIGH COURT OF NEW ZEALAND**
**AUCKLAND REGISTRY**

**CIV 2009-404-004917**

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| BETWEEN | BAVERSTOCK DEVELOPMENTS LIMITED<br>Plaintiff |
| AND | HOUSING NEW ZEALAND LIMITED<br>Defendant |

Hearing: 19 November 2009

Appearances: P F Chambers for Plaintiff
M A Gilbert SC/A Ho for Defendant

Judgment: 23 November 2009 at 5 pm

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## JUDGMENT OF ASSOCIATE JUDGE ROBINSON

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This judgment was delivered by me on 30 November 2009 at 5 pm,
Pursuant to Rule 11.5 of the High Court Rules

Registrar/Deputy Registrar

Date.......

Solicitors: James D Thompson, PO Box 33197, Auckland
P F Chambers, Barrister, PO Box 41351, Auckland
Gilbert Walker, PO Box 1595, Shortland St, Auckland

[1] Baverstock Development Limited brings these proceedings for recovery of $296,866.94 which it claims is due and owing by the defendant for the construction of 32 houses at 51 Baverstock Road, Flatbush. As the plaintiff believes the defendant has no defence to the claim the plaintiff applies for summary judgment.

[2] The plaintiff and the defendant are parties to an agreement dated 21 July 2006 whereby the plaintiff agreed to construct 32 houses of varying sizes on property at 51 Baverstock Road, Flatbush and sell the development to the defendant. In terms of the agreement the defendant was to pay the plaintiff the sum of $10,972,120 including GST plus, subject to the terms of the agreement, additional payments the amounts of which at that time were unknown for the development levy and reserves contribution and an additional sum of $371,974. The defendant agreed to a first stage payment of $3,845,888 including GST plus the amounts for development levy and reserves contributions and the additional sum of $371,974 for the land. That sum has been duly paid.

[3] The agreement contained provision for payment of the houses during the course of construction. Such payment was to be made by the defendant following issuing of stage certificates or certificate of practical completion with a requirement for the defendant to pay the amount of each stage certificate within ten working days of that stage certificate being issued. The stage certificate or practical completion certificate were to be issued by the purchaser's representative on the request of the vendor or the vendor's representative. The plaintiff is the vendor and the defendant the purchaser.

[4] The agreement contained provision for disputes to be referred to arbitration together with a requirement that the plaintiff and the defendant were to use their best endeavours to resolve all disputes arising from or concerning the agreement. Thus should there be any dispute arising out of the defendant's failure to issue a practical completion certificate or stage certificate such dispute was to be referred to arbitration. The agreement contained the following provision:

7. PURCHASE PRICE ADJUSTMENT

> Should the floor area of any of the Residences vary, using the same method of measurement as that used in the Design Specifications, from that shown in the Design Specifications that part of the Purchase Price in respect of those Residences shall be adjusted by the same percentage that the floor area is larger or smaller than the floor area shown in the Design Specifications.

[5] According to the evidence as at the date when these proceedings were commenced the defendants had paid the amounts claimed by the plaintiff under claims arising from the issue of stage certificates pursuant to paragraph 6 of the agreement. Those amounts were $2,334,442.76 for progress payment claims for civil works from 15 June 2007 to 17 March 2009 and $4,663,852.62 for construction works in respect of progress payments claims issued between 16 September 2008 and 16 July 2009.

[6] On 9 June 2009 the plaintiff wrote reminding the defendant of the provisions of clause 7 of the contract and advising the defendant as follows:

> Based on the original contract, total floor area of the 32-unit development is 3, 652 m2 whereas the total built area of all the residences is 3,879.20 m2, In view of this, we respectfully request for the corresponding price adjustment in the amount of $296,866.94, based on the percentage increase in total floor area. Please refer to attach breakdown of purchase price adjustment.

Enclosed with the letter was a table setting forth the total floor area of the houses being constructed disclosing a total floor area of 3879.20 square metres.

[7] On 13 July 2009 the plaintiff wrote to the defendant enclosing an invoice for the purchase price adjustment for increased floor area of the residents at Baverstock Road. That invoice contained the following provision:

As per clause 7, contract dated 21 July 2006

| Purchase price adjustment for increased floor area of residences at Baverstock | $296,866.94 |
|---|---|
| Due Date: 10 working days from date of invoice Total Amount: | $296,866.94 |
| (Includes GST of $32,985.21) | |

[8] There being no response by the defendant to this invoice the plaintiff issued these proceedings. The plaintiff relying on the provisions of the Construction Contracts Act 2002 claims the defendant has no defence. The plaintiff claims that the progress payment it seeks must be paid within ten working days relying on clause 6.4 of the agreement which reduces the time for payment specified by s 18 of the Construction Contracts Act 2002 from 20 working days to 10 working days.

[9] In opposing the application for summary judgment the defendant raises the following defences:

a) The payment being sought by the plaintiff is for a variation in the design specifications which has not been agreed to by the defendant as required by paragraph 5 of the agreement.

b) The plaintiff must bring a claim for construction work under paragraph 6 of the agreement. The plaintiff is not entitled to bring an independent claim under paragraph 7.

c) That the plaintiff's invoice demanding payment does not comply with s 20(2) Construction Contracts Act 2002.

d) That as the defendent has not issued a stage certificate under clause 6.4 of the agreement the amount it claims is not at this stage due and payable.

[10] The plaintiff to justify its claim for payment under clause 7 of the agreement for the additional floor area relies upon a report from its project manager Practical

Project Services Ltd. Extracts of that progress report dated May 2007 have been produced. In that report Practical Project Services Ltd point out that on the lodging of plans for building consents the Manukau City Council requested amendments. At paragraph 3.1 of the report Practical Project Services Ltd states:

> There are also discrepancies between the memorandum of agreement and the actual dwellings approved as part of resource consent.
>
> PPS will supply an outline of these discrepancies within the next two weeks.

Mr Rodda, a director of the plaintiff claims that on receiving that report he spoke to Mr Murray Burt who represents the defendant about the discrepancy. Mr Rodda says the discrepancy resulted in an increase in the build area in the units that would require a price adjustment in accordance with clause 7 of the agreement. According to Mr Rodda, Mr Burt advised him to leave making a claim for any increase until towards the end of the contract when all the units had achieved practical completion. Mr Rodda said he agreed to this proposal.

[11] In making submissions before me counsel for the plaintiff had to concede that if the plaintiff had to follow the procedure for payments set forth in paragraph 6 of the contract, the plaintiff's application for summary judgment could not succeed as such procedure had not been followed. It is the plaintiff's contention that its claim for the additional payment is brought pursuant to clause 7 of the contract and arises out of an increase in floor area caused by an amendment to the plans required by the Manukau City Council.

[12] According to the evidence of Mr Rodda, Mr Burt has agreed verbally to the increased floor area and the parties agreed to the plaintiff deferring its claim for additional payment resulting from the increased floor area until the conclusion of the contract.

[13] The plaintiff also contends that the defendant having completed stage certificates required by clause 6 of the agreement at various stages throughout the construction of the houses must have accepted the houses have been built in accordance with the plans and specifications. As such plans have been amended to increase the floor area the defendant has therefore accepted the variations and must

accordingly pay for that increased floor area in accordance with the formula agreed upon in clause 7.

[14] Counsel for the defendant contends that an adjustment in floor area can only be authorised by a variation in terms of paragraph 5 of the agreement. It is accepted that the plaintiff did not seek a variation under paragraph 5. Consequently, the defendant cannot be liable to pay for the increased floor area.

[15] In any event, the defendant contends the plaintiff must follow the procedure set forth in paragraph 6 of the contract before it can claim for the increased floor area. As the plaintiff has not follow that procedure the defendant has a valid defence to this claim.

[16] Paragraph 5 of the agreement provides;

> 5. VARIATIONS
>
> 5.1 In the event that the Purchaser's Representative requires any variation it shall notify the Vendor's Representative of its requirement not less than 20 Working Days prior to the date that part of the Contract Works which will incorporate the Variation will commence. The Vendor's Representative shall determine the change in the Purchase Price as a result of the Variation and shall notify the Purchaser's Representative of the quantum not later than 5 Working Days after the date it receives notice from the Purchaser's Representative that it requires the Variation.
>
> 5.2 Should the Purchaser's Representative accept the change in the Purchase Price and wish to proceed with the Variation it shall advise the Vendor's Representative accordingly and the Vendor's Representative shall incorporate the Variation into the Contract Works and the Purchase Price shall be adjusted accordingly.
>
> 5.3 Should the change in the Purchase Price not be acceptable to the Purchaser's Representative or should the Vendor's Representative not notify the Purchaser's Representative within the period required by clause 5.1 the Purchaser's Representative may refer the matter to the independent Engineer for determination as if it was a dispute under this Agreement.

In terms of paragraph 1.2 of the contract:

> VARIATION means any variation from the design specifications.

[17] It is at least arguable that the increase in floor area which is the basis of the plaintiff's claim is a variation in terms of paragraph 5 of the agreement. As the plaintiff has not sought the consent to the variation in accordance with the procedure set forth in paragraph 5 the defendant has a defence to this claim and consequently the plaintiff is not entitled to summary judgment. The plaintiff contended that if the variation to floor area resulting from the adjustment in the plans required by the Manukau City Council is a variation requiring the consent of the defendant in terms of paragraph 5, paragraph 7 is superfluous. However, it can also be argued that paragraph 7 is an agreed formula to calculate adjustments in the price should the parties agree on a variation under paragraph 5 of the contract.

[18] There is clearly a dispute between the parties as to whether the adjustment to the floor area caused by the requirements of the Manukau City Council is a variation that requires the defendant's consent in terms of paragraph 5 of the agreement. Such a dispute cannot be resolved in an application for summary judgment. As stated by Lord Hoffman in *Investors Compensation Scheme Ltd v West Brunswick Building Society* [1998] 1 WLR, 896 at pages 912 - 913 to ascertain the meaning of the agreement the Court will require evidence as to "the matrix of fact". There is likely to be disagreement between the parties resulting in disputed evidence which simply cannot be resolved in an application for summary judgment.

[19] It is at least arguable that the increase in floor area which is the basis of the plaintiff's claim is a variation in terms of paragraph 5 of the agreement. As the plaintiff has not sought the defendant's consent to the variation in accordance with the procedure set forth in paragraph 5 the defendant has a defence to the plaintiff's claim and consequently this application for summary judgment cannot succeed.

[20] It is also arguable that the plaintiff must comply with clause 6 before it is entitled to any payment for construction of the houses in terms of the contract. The plaintiff seeks payment of the claim on the basis that it has served a payment claim under s 20 Construction Contracts Act 2002. As the defendant did not respond by providing a payment schedule as required by s 21 of that Act, the plaintiff contends the defendant is now liable to pay the amount claimed.

[21] The contract between the parties contains in s 6 a mechanism for determining the matters specified in s 14 of the Construction Contracts Act namely the number of progress payments under the contract, the interval between those payments, the amount of each of those payments, and the date which each of those payments becomes due.

[22] Consequently, it is at least arguable that the plaintiff in this case must comply with clause 6 of the contract before the defendant can be liable for the payment. In its statement of claim the plaintiff concedes that it seeks payment of the claim in accordance with clause 6.4 of the agreement. Paragraph 19 of the statement of claim states:

> The plaintiff has a right to that progress payment within 10 working days from the date of the progress payment claim, in reliance upon clause 6.4 of the Agreement and section 15 of the CCA, so that section 18 of the CCA does not apply to this construction contract.

[23] The claim served by the plaintiff on the defendant required payment within ten working days of the date of the invoice which is the time specified in clause 6.4 of the contract. If the claim is not made pursuant to clause 6 as the plaintiff contends at the hearing before me then payment becomes due and payable pursuant to s 18 of the Construction Contracts Act 2002 twenty working days after a payment claim is served.

[24] It must follow therefore that the defendant does have a defence. Consequently, it is not appropriate to enter summary judgment. The plaintiff's claim for summary judgment will therefore be dismissed.

[25] I am not satisfied that the circumstances justify departure from the general rule that costs are reserved on the dismissal of an application by a plaintiff for summary judgment enunciated in *NZI Bank Ltd v Philpott* [1990] 2 NZLR 403. Consequently costs are reserved.

[26] The defendant shall have 25 working days from the date of delivery of this judgment to file and serve a statement of defence. The registrar shall arrange a judicial case management conference by telephone at a time arranged with counsel to

consider further directions relating to discovery, arranging a settlement conference, arranging for a fixture and setting the case down for hearing.

**Associate Judge Robinson**