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IN THE HIGH COURT OF NEW ZEALAND

A NO 16/84

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NAPIER REGISTRY

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BETWEEN KEITH HAY HOMES LIMITED a duly incorporated Company having its registered office at Auckland and carrying on business there and elsewhere as house builders

Plaintiff

AND THE NAPIER CITY COUNCIL a City Council incorporated under the Local Government Act 1974

First Defendant

AND LINDSAY HALL of Napier, Engineer

Second Defendant

M NO 134/83

IN THE MATTER of the Judicature Amendment Act, 1972

BETWEEN KEITH HAY HOMES LIMITED, a duly incorporated Company having its registered office at Auckland and carrying on business there and elsewhere as house builders

Applicant

AND THE NAPIER CITY COUNCIL, a City Council incorporated under the Local Government Act, 1974

First Respondent

AND LINDSAY HALL of Napier, Engineer

Second Respondent

Hearing: 5 June 1984

Counsel: M A Courtenay for Plaintiff
L H Chisholm and G L Lang for Defendants

Judgment: 7 June 1984

JUDGMENT OF JEFFRIES J

The protagonists in this litigation are Keith Hay Homes Limited (hereinafter referred to as "Plaintiff") and the Napier City Council (hereinafter referred to as "Defendant"). In both sets of proceedings, namely the action, and the application for judicial review, (details of which are set out hereafter) there is a second defendant named who is the City Engineer of the defendant, but he took no separate part in the proceedings. Despite the issue of two separate sets of proceedings, and the calling of six witnesses at the hearing of the action, the issue for the court to decide in the end is quite narrow. However to appreciate the point in dispute it is necessary to traverse the factual background that led to it, although the facts themselves are not really contested.

Plaintiff is a duly incorporated company with its registered office at Auckland and carrying on the business of house builder throughout the middle and northern parts of the North Island, including the Hawkes Bay region. Plaintiff has an office in Napier city. It specialises in the production of homes for first home buyers, who, naturally have not great capital to begin with. The evidence was suitable land sections for building such homes on were not readily available in 1983. Philip Rimmer Kenyon, who in early 1983 was the Hawkes Bay Sales Co-Ordinator for plaintiff, became interested in a sub-divisional development of the defendant named Greenmeadows East. Those enquiries led him naturally enough to the defendant's offices, where, in short, he received favourable indications at the possibility of using some of the sections in Greenmeadows East on which two separate residential units could be constructed, thus effectively halving the price of the land to each with cross leases of land between the two units for security purposes. The proposal

advanced and accepted by the officers of the defendant was somewhat unusual in that in the company's previous experience two units on the one section had to be physically contiguous. Mr Kenyon's immediate superior in the company, Blake James Bibbie, to whom the first contract for purchase of land was sent, was sufficiently alerted to the novelty of the proposal to go himself to the defendant's offices to ensure the proposal met with its agreement. He so satisfied himself.

There is another issue about the sale of the sections on which it was proposed to erect two separate units, which was that the council had resolved in 1981, and the exact resolution is referred to hereafter, to impose a dollar value on the building, or buildings, to be erected on any one section and accordingly in the first contract signed between plaintiff and defendant there appeared the following clause:-

> "The purchaser agrees within two (2) years after the date of this agreement to construct a residential building on the property to a value equivalent to a value of not less than Fifty thousand dollars ($50,000) calculated as at the first day of August 1981 and the vendor's decision as to the value of such residential building for the purposes of this sub-clause shall be final."

It was on the meaning and application of that clause that the enquiries of Messrs Kenyon and Bibbie centred when discussing plaintiff's proposals with defendant's officers. They were assured that the dollar value would be calculated on the total amount expended on both residential units erected on the one section. Although the clause speaks of "a residential building" none of the prior discussions which took

place between representatives of both parties raised that particular issue. In the discussions the central issues were that the dollar value condition would be filled by combining the cost of two separate residential units. A close analysis of the exact meaning of the clause is not necessary for this judgment but clearly it is ambiguous, and can be of more than one construction.

Between the dates of 16 May and 5 August 1983 the plaintiff executed eight contracts for the purchase of sections from the defendant all of which contained the clause reproduced above. Several contracts had different settlement dates but the issues arising out of that need not be explored. Plainly the intention was for the plaintiff to sell off the land, namely, each section to two separate buyers with the cross leases as referred to above. Apparently plaintiff constructs the residential unit at a central factory and transports the near completed house to the site. The ultimate intention of the plaintiff was to erect 16 separate residential units on the eight sections and sell the 16 units to individual buyers.

It should here be mentioned that the proposal of the plaintiff to erect two separate residential units on each single section was entirely in conformity with all town planning and building by-law requirements of the defendant acting in its role as the territorial local authority, and not as a developer. It suffices to say that plaintiff began its operation on the Greenmeadows East sub-division very promptly and applied for some building permits and received them from the defendant and itself proceeded to enter into contracts with proposed purchasers. On a number of sections residential units were erected without any objection by defendant. On

28 November 1983 a duly authorised agent of the plaintiff attended at the offices of the defendant and paid $1,335 being the balance of the building permit fees for three lots. The cheque was accepted by the defendant but never banked. The defendant refused to issue the permits and apparently did not advise plaintiff of its reason.

Plaintiff responded quickly by instructing its solicitors to issue an application for judicial review of the decision by the council and seeking by that application, as disclosed in the statement of claim, an order compelling the defendant to issue the building permits. The motion for review was supported by affidavits. The matter was called before me when attending the Napier sessions earlier this year and in a discussion with counsel it appeared from those papers that there would be a factual dispute as to what had passed between the representatives of the plaintiff and defendant at discussions which had taken place and which appeared vital in the resolution of the difficulties. Counsel accepted that as the position then. The plaintiff after that discussion issued an action which is more amenable to the disposal of disputed questions of fact.

Much of what has been said earlier in this judgment is pleaded in the statement of claim but the prayer in the action is for rectification of the contract so as to conform with the oral agreement reached between the parties. In argument after evidence Mr Courtenay specified the rectification to be as follows:-

> "The purchaser agrees within two (2) years after the date of this agreement to construct two residential buildings on the property to a combined value of not less than Fifty thousand dollars ($50,000) calculated as at the first

day of August 1981 and the vendor's decision as to the value of such residential building for the purposes of this sub-clause shall be final."

The hearing of the action (which incorporated also the judicial review) took place on 5 June 1984 and Mr Courtenay, acting for plaintiff, called the evidence necessary to establish the oral agreements as to the true intention of the parties, and it was not disputed in cross examination, or by opposing evidence, from the defendant. In fact it was not until late afternoon when I became puzzled at one aspect, which need not now trouble us, that counsel disclosed in chambers the defence to the claim for rectification. It was not contained in the statement of defence but apparently advised to opposing counsel. In argument defendant's counsel conceded the arrangement, of which much evidence was given by plaintiff's witnesses, whereby defendant's employees, including its then Deputy Town Clerk, had assured plaintiff's representatives, that two independent residential units could be erected on the individual sections and the dollar value condition would be fulfilled by combining the value of each residential unit. Ample evidence was given that several applications for building permits had been made and issued by the defendant wherein the calculated value of each separate unit was well below the $50,000 benchmark. The defence however consisted of the fact that the Napier City Council had on the 27th day of July 1981 passed the following resolution by which it was bound, namely,

"On the motion of His Worship the Mayor seconded by Cr Richards, IT WAS RESOLVED:

(a) To release the sections for sale in the southern part of Greenmeadows East on the following basis:

i) At the revised values determined by the City Valuer in May 1981.

ii) At either cash or 25% deposit with the balance payable over 12 months with the interest rate calculated at current local body rates.

iii) That houses to be constructed on the land have a minimum value of $50,000.

(b) Accept the offer from New Zealand Housing Co Ltd for the purchase of 13 sections on the terms prepared by the Company except that interest will be charged at 13½% and the minimum value of $50,000 is to apply to houses built on these sections."

It can be seen that the central matter for our purposes concerns the true meaning of (a)iii). Mr Chisholm, and his junior, argued the true meaning of the clause was not as might appear from a literal analysis of the ordinary meaning of the words themselves but had to be gleaned from surrounding circumstances and read as meaning for each individual section one single residential unit constructed on the land having a minimum value of $50,000. Defendant's argument was that if this construction of the clause was accepted by the court then as a matter of law the Council officers were not competent to bind the Council by their representations about a decision the Council had not itself made.

Because of the interpretation I think ought to be placed upon that central clause in the resolution I do not think it necessary to enter the thicket of the extent to which

officers of a statutory corporation are, or are not, able to bind the body itself. To an extent the clause itself might be said to have been of general application but hastily drafted. Read as a whole it could mean it was intended to cover all the sections in the sub-division and therefore the plural used therein is not to have the meaning argued for by plaintiff's counsel. In this court's view, looking at the whole evidence in this case, that construction is not available. The Council officers themselves, including the Deputy Town Clerk, in giving the advice they did to the plaintiff's representatives conveyed that more than one house could be erected on each individual lot but that the total value of the buildings on each lot had to pass the $50,000 value mark. As the local authority is plainly authorised by statute to sell sections on conditions it chooses I think for the defendant to even advance such an argument it would have had to be on the basis of a resolution whose true meaning was beyond question. That most certainly cannot be said of clause (a)iii). By its very words it specifically authorises more than one house on one section, which is plaintiff's case. There is another reason. The public dealing with a council's officers, in this case senior ones, are entitled to accept their assurances without the necessity of carrying out for themselves a perusal of Council's resolutions. Otherwise the system would be placed under considerable strain.

Defendant's counsel both conceded that if the court's construction of the clause was that the other arguments against issue of mandamus could not be advanced.

The court's order under the action is that the contracts are to be rectified in the manner requested by counsel for plaintiff and from that order it is assumed that the building permits will now issue without any further orders. However should that not be the case leave is specifically reserved for the plaintiff to return to court.

I consider this to be a proper case for the award of generous costs to the plaintiff which I fix at $1,500 together with witnesses' expenses and disbursements to be fixed by the Registrar.

J.

Solicitors for Plaintiff: Langley Twigg & Co.

Solicitors for Defendants: Willis Toomey Robinson & Co.