IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2008-404-6364

UNDER	the District Courts Act 1947
IN THE MATTER OF	an appeal against a judgment of the District Court at Auckland dated 26 August 2008
BETWEEN	GERALD MULLANEY Appellant
AND	TERENCE JOHN BROWN First Respondent
AND	POWER PAINTERS LTD & ORS Second Respondents

Hearing: 2 July 2009

Counsel: D E Smyth for the appellant
A Maclean for the first and second respondents

Judgment: 14 July 2009

JUDGMENT OF STEVENS J

This judgment was delivered by me on Tuesday, 14 July 2009 at 3pm pursuant to r 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Solicitors/Counsel:
D E Smyth, PO Box 105 270, Auckland City 1143
A Maclean, PO Box 40294, Glenfield, North Shore City 0747

Introduction

[1] Mr Gerald Mullaney, the appellant, appeals against a reserved decision of Judge Walker ordering him to pay monies to the respondents. Mr Terence Brown, the first respondent is a building Project Manager and successfully sought the recovery of monies from the appellant for work undertaken in the construction of a house for the appellant at 212 Schnapper Rock Road, Albany (the house). The orders involved payment of; the sum of $61,657.81 payable to the second respondents, the sum of $12,437.02 payable to the first respondent (subject to setting off a contingency sum of $10,000) and a further sum of $2,500 to the first plaintiff in respect of additional work.

[2] The appellant submitted that the District Court judgment was erroneous in fact and in law. The grounds of appeal submitted by the appellant include that certain PC sums were part of the maximum price payable under the contract, that the appellant had not waived any rights to insist on such maximum price, that an advertising brochure of the respondent formed part of the contract, and various other grounds.

[3] The respondents submitted that the District Court Judge heard the evidence and was able to assess the credibility of the witnesses. The respondents submitted that the Judge conducted a thorough review of the evidence and the applicable law and that the judgment was carefully reasoned and based on the evidence at the hearing. The respondents submitted that the appellant has failed to show any basis for challenging the District Court decision.

[4] For the reason set out below, none of the grounds advanced by the appellant can succeed. The appeal must therefore be dismissed with costs.

Background facts

[5] The first respondent and the appellant entered into a written agreement for the construction of a house (the contract) at 212 Schnapper Rock Road, Albany. This agreement was signed by the first respondent on 18 October 2005 and by the

appellant on 20 October 2005. It was signed by the first respondent as Terry Brown (the Project Manager) and the appellant as Gerald Mullaney (the client) as Trustee for and on behalf of the Kilkenny Trust. The contract covered specifications and materials. It also detailed work to be undertaken, together with a breakdown of the contract costs.

[6] The contract provided for the Project Manager to undertake certain responsibilities. These were:

1. To organise all materials, hire and manage all tradesmen, sub-contractors and suppliers to enable the completion of the contract.

2. And to ensure their work complies with the plans and regulations.

3. To ensure that all works are carried out in a professional manner and completed in accordance with the drawings, specifications, New Zealand codes and recognised building practices.

4. To ensure that the works are completed in a reasonable time frame.

5. To arrange all local authority inspections and to obtain a Code of Compliance Certificate at the end of the contract.

6. To arrange quotations for all labour, materials, sub-contractors and suppliers and to submit all invoices to the client for payment.

7. To ensure that the property and site are left in a clean and tidy condition and ready for occupation or sale.

8. Obtain the clients written approval to all matters of cost and change in specification and design.

[7] The contract provided for the client, the appellant, to undertake the following:

1. The client is fully responsible to pay all invoices that are submitted by the Project Manager in accordance with the contract and any agreed written variations.

2. To ensure that all reasonable decisions relating to specifications or cost are made in an appropriate time frame so as not to impair the performance of the Project Manger.

3. To ensure the release of monies for payment of construction costs and project management fees that are payable in accordance with this contract, so as not to impair the performance of the Project manager.

4. To give unrestricted access to the site for the Project Manager and construction staff.

5. To make all changes in design or specification through the Project Manager in written form and not directly through the construction staff.

[8] The contract also set out the fee for the management of the project of $18,000 plus GST. This sum was to be paid in seven steps.

[9] In respect to the cost of the house, the relevant parts of the agreement read:

> The maximum cost will be $333,750 including G.S.T. based on the approved drawings and the construction cost breakdown and specifications annexed to this contract. The costs include PC sums to the value of $49,000.00 for kitchen, bathroom fittings, electrical, tiling and excavation.
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> Should the client upgrade the specification or increase the quantities then the maximum figure of $333,750.00 shall be increased accordingly by this amount.
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> Should the costs for the project be less than $333,750.00 then this shall result in a saving to the client for the difference between $333,750.00 and the total cost of the project.
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> Any costs over and above the figure of $333,750.00 including GST, where no written variations have been made, will be incurred by the Project Manager.
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> All invoices will be checked against work completed by the Project Manager to ensure work has been carried out prior to payment.
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> The client indemnifies the Project Manager against any liability for non-payment of invoices that have been incurred in accordance with the terms of this contract.
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> The keys to the dwelling are to be handed over to the client upon payment of all outstanding invoice. In signing this contract the client acknowledges that possession of the property is not permitted until all outstanding payments, payable in accordance with the terms of the contract, have been made.

[10] There was an oral agreement between the parties, whereby, the appellant undertook to purchase the items stated in the construction cost breakdown as "PC sums". "PC sums" covered the costs of the electrician and their works, the kitchen supply and fix (including cooler), bathroom fittings, laundry tub, floor tiling labour and materials and the carpet. With respect to the various PC sums, the specification relevantly provided:

> Appliances – the PC sum allows for the kitchen and a stainless steel oven and hob. Please note that the kitchen, cooker, rangehood and insinkerator are contained within the PC sum of $15,000.00.

> Bathrooms: all bathroom fittings are to be at the discretion of the client but contained within the bathroom fittings PC sum of $14,000.00.
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> Laundry – supertub unit (included in bathroom fittings PC sum).
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> Tiling – tiling has been allowed for all bathroom, kitchen and laundry area floors. Wall tiling to 1200mm high has been allowed for all first floor bathrooms.
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> …
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> Flooring – carpet finish to all areas not tiled. Garage is to be concrete finish. please note that a PC sum of $9,000.00 has been allowed for the carpet, underlay, fitting etc.
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> …
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> Please note that all electrical work is to be contained within the PC sum of $12,000.00

[11] The contract stated that the work was to be undertaken in a "reasonable time". The first respondent indicated in a letter to the appellant before the agreement was signed that he expected it to take five months. Work commenced on the house in November 2005 and the house was built in accordance with a design prepared by the appellant's architectural designer.

[12] The first respondent travelled overseas for between six to eight weeks at the end of November 2005. The first respondent was also overseas for a brief period in May 2006.

[13] On 25 January 2006, the appellant entered into an agreement for sale and purchase of the house to Mr and Mrs Dallas (the purchasers). The appellant advised the first respondent of this on 26 January 2006. At the same time, the appellant advised the first respondent of a list of items he had agreed to supply to the purchasers and that these were to be incorporated into the construction of the house. The purchasers visited the site and required specific colours and changes to the interior. The purchaser's instructions required additional items to be installed.

[14] The appellant advised the first respondent that the sale was unconditional on 20 February 2006 and that settlement was 28 April 2006. The appellant sought the Code of Compliance by 14 April 2006.

[15] The work was completed around 4 May 2006. On 12 May 2006, the North Shore City Council issued a Code Compliance Certificate. Settlement proceeded on 17 May 2006.

District Court decision

[16] The District Court Judge dealt with 11 issues in her judgment which ran to 175 paragraphs. She initially summarised the claims as follows:

> [2] The First Plaintiff is seeking to recover from the Defendant the balance of his management fees, reimbursement for money paid on behalf of the Defendant and compensation for his time. The First Plaintiff is also seeking to recover monies for work undertaken by the Second Plaintiffs, who are contractors that worked on the house and have not been paid by the Defendant. The First and Second Plaintiffs also jointly seek payment in respect to work undertaken on the house by the Second Plaintiffs.
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> [3] The Defendant counterclaims for the following:-
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> (a) A credit for the contingency amount not utilised.
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> (b) A claim that the First Plaintiff abandoned his management contract and, therefore, the balance of the management fee of $4,500.00 is not payable.
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> (c) A claim under the maintenance warranty of $2,000.00.
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> (d) A claim of $5,500 for the Defendant's time.
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> (e) Accountancy fees of $2,700.00.
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> (f) A claim of $4,018.35 being his share of the Court appointed expert's costs.

[17] For the purposes of deciding the appeal, it is not necessary to consider every issue dealt with by the District Court Judge. The central issue concerns the interpretation of the agreement. The Judge relevantly stated:

> [51] When looking at the matrix of fact in this particular case, the contract between the parties is standard for the construction of a house. There is some disagreement as to the exact definition of the term "PC", i.e. whether it should be interpreted as "provisional cost" as stated by Mr Brown, or "prime cost" as stated by Mr Maiden. For the reasons I express later, in my view nothing of significance in this proceeding turns on that disagreement.
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> ….

> [54] The evidence supports the fact that both parties were aware of what the term means, i.e. that the cost was an estimate only and not fixed at the time of the contract…
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> …
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> [58] The subsequent contract for sale of the house entered into between Mr Mullaney and Mr and Mrs Dallas is of importance. Not only does it employ PC amounts but, also, by his actions in on-selling and insisting the terms of his contract with Mr and Mrs Dallas be incorporated into the construction agreement, he has unilaterally altered the terms of the construction contract.
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> …
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> [63] The use of PC sums in building contracts of this nature as stated in evidence by Mr Maiden is common. It cannot be said that Mr Mullaney was not aware of the term or the implications since he himself adopted the use of PC sums in his own sale.
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> [64] The use of PC sums was intentional in the contract. The price of these items had not been determined and Mr Mullaney had the intention of himself making the purchases and selecting these items.
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> [65] The use of the terms "PC sums" is also reasonable in respect to construction contracts in general, and also the use in the particular circumstances to enable Mr Mullaney to source his own items. It was clear Mr Mullaney wanted the option to undertake the purchases himself-something in some instances he passed on to Mr and Mrs Dallas.
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> [66] He was also aware that the fixed price or "maximum price" was determined on a combination of known construction figures and "PC" amounts. Knowing of the amounts set out in the attached schedule to the contract, he would have been fully aware that if he exceeded the PC figures there would not be sufficient funds to meet the construction costs.

[18] The Judge also stated:

> [71] Despite Mr Mullaney's equivocating it is clear throughout that purchases of the PC items was in the hands of the Defendant or the purchasers to whom he assigned responsibility. He cannot therefore now rely on the wording of the agreement to shift the responsibility for the increase in costs for PC items to Mr Brown.
>
> [72] He was also aware that the fixed price or "maximum price" was determined on a combination of known construction figures and "PC" amounts. Knowing of the amounts set out in the attached schedule to the contract, he would have been fully aware that if he exceeded the PC figures there would not be sufficient funds to meet the construction costs.

[19] The Judge considered that, if she were wrong, then the appellant had nevertheless waived his entitlements through his actions in obtaining some of the PC

items himself, directing the tradespeople without reference to the first plaintiff, or "assigning" responsibility for some of the PC items to Mr and Mrs Dallas: see [75]. The Judge further stated:

> [78] In the context of this case, Mr Mullaney clearly communicated by words and conduct that he wanted to take charge of the PC items one way or another. This applied, for example, to the bathroom fittings… In waiving the terms as discussed at paragraph [75], Mr Mullaney also caused the First Plaintiff to waive the clause requiring variations to the project to be made in written form and to be communicated to the First Plaintiff.
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> [79] The variation clause is clearly designed to protect the interest of the First Plaintiff. It would be absurd and unjust for Mr Mullaney to be able to vary the terms of the project as he pleased when he admitted to having no project management experience in evidence notwithstanding the wording of the agreement while expecting Mr Brown to accept all risks relating to costs overrun when he had no effective control of the matters now in Mr Mullaney's hands. The Defendant cannot therefore now rely on the wording of the agreement to shift the responsibility for the increase in costs for PC items to Mr Brown.

[20] The Judge also concluded that the brochure formed no part of the contract entered into between the parties:

> [67] …On his evidence Mr Mullaney stated that he read the brochure and that APM (Mr Brown) "would arrange all labour and materials to construct my home". This is a brochure that Mr Brown said was some eight years out of date, had an old phone number and had not been distributed for eight years.
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> [68] The critical point is that the brochure formed no part of the contract entered into- there is simply no evidence to support that it was ever part of the parties' contract.

[21] In conclusion, the Judge held that the PC sums were to be attributed the meaning of Provisional Costs and that the second plaintiffs were entitled to be paid the actual figure expended for each PC item when calculating the total cost of the building.

Test on appeal

[22] The appellant has a general right of appeal under s 72 of the District Courts Act 1947. Section 75 specifically provides that an appeal under s 72 is to be by way

of rehearing. The principles applicable to general appeals have recently been considered by the Supreme Court in *Austin, Nichols & Co Ltd v Stichting Lodestar* [2008] 2 NZLR 141. Giving the judgment of the Court, Elias CJ stated that:

> [16] Those exercising general rights of appeal are entitled to judgment in accordance with the opinion of the appellate court, even where that opinion is an assessment of fact and degree and entails a value judgment. If the appellate court's opinion is different from the conclusion of the tribunal appealed from, then the decision under appeal is wrong in the only sense that matters, even if it was a conclusion on which minds might reasonably differ. In such circumstances it is an error for the High Court to defer to the lower Court's assessment of the acceptability and weight to be accorded to the evidence, rather than forming its own opinion.

[23] With respect to those observations, the Court of Appeal in *Rae v International Insurance Brokers (Nelson Marlborough) Ltd* [1998] 3 NZLR 190, had observed that an appellate court should not review a factual finding unless compelling grounds can be shown for doing so. However, this may now be regarded as being too broadly stated. The Supreme Court in *Austin Nichols* was careful to limit the deference mentioned in *Rae* to instances where findings of fact were credibility dependent. The Supreme Court stated at [13] that:

> The appeal court must be persuaded that the decision is wrong, but in reaching that view no "deference" is required beyond the "customary" caution appropriate when seeing the witnesses provides an advantage because credibility is important.

[24] Accordingly, in a general appeal, the appellant has the onus of satisfying the appellate court that it should differ from the original decision. But the appellate court must come to its own view on the merits: see *Austin Nichols* at [3]-[5]. I therefore, approach the appeal on the basis that, after considering the record of the evidence, the exhibits and the submissions made on behalf of the parties, I should make an assessment of the matters of fact and degree raised in the case under appeal. I should also consider the reasoning of the District Court Judge in her decision in order to determine whether the appellant has established that the decision is wrong.

Applicable principles

[25] The critical issue on appeal concerns the meaning to be given to the contract between the parties, in particular the term "PC sum". The starting point for the interpretation of a written contract is that its interpretation is exclusively within the jurisdiction of the Judge. Traditionally, the parol evidence rule has limited the scope of admissible evidence relevant to interpretation. The parol evidence rule provides for the exclusion of extrinsic evidence to add to, vary or contradict a written document.

[26] There are established exceptions to the parol evidence rule. The first exception is that evidence may show a prior oral agreement, which by mistake has not been recorded correctly in the written contract. The second is that evidence may be admitted to prove a custom or trade usage. This evidence may add terms that do not appear on the face of the document and that give the document the meaning the parties intended. The third is that oral evidence may be used to show that it had previously been agreed to suspend the operation of the valid and immediately enforceable contract until the occurrence of some event. The last exception is where the parties intended their contract to be partly in writing and partly by word of mouth.

[27] It is also clear that evidence of surrounding circumstances for the purpose of interpretation is permissible through having regard to the matrix of facts in which the contract was formed. In *Prenn v Simmonds* [1971] 3 All ER 237, Lord Wilberforce stated at 239:

> …the time has long passed when agreements, even those under seal, were isolated from the matrix of facts in which they were set, and interpreted purely on internal linguistic considerations.

[28] In New Zealand, the matrix of fact approach has been subject to the "plain meaning" rule. The "plain meaning" rule required that if the words of the contract were plain and unambiguous, then that meaning stood and evidence of context would not be admissible to show that the parties intended something else: see *Benjamin Developments Ltd v Robt Jones (Pacific) Ltd* [1994] 3 NZLR 189 (CA); *Melanesian*

Mission Trust Board v Australian Mutual Provident Society [1997] 1 NZLR 391 (PC).

[29] However, the modern approach has adapted the "plain meaning" rule. This is because it has been recognised that language can only be understood properly in its proper context. Taking into account the context may reveal that the literal meaning would have absurd unintended consequences: see *Yoshimoto v Canterbury Golf International Ltd* [2001] 1 NZLR 523 (CA).

[30] The principles applicable to interpretation of documents were summarised by Lord Hoffman in *Investors Compensation Scheme Ltd v West Bromwich* [1998] 1 All ER 98 (HL) at 114-115:

> (1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.
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> (2) The background was famously referred to by Lord Wilberforce as the 'matrix of fact', but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.
>
> (3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.
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> (4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax (*see Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] 3 All ER 352, [1997] 2 WLR 945).
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> (5) The 'rule' that words should be given their 'natural and ordinary meaning' reflects the commonsense proposition that we do not easily accept

> that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in *Antaios Cia Naviera SA v Salen Rederierna AB, The Antaios* [1984] 3 All ER 229 at 233, [1985] AC 191 at 201:
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> > "... if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense."

[31] In *Boat Park Ltd v Hamilton* [1999] 2 NZLR 74, the Court of Appeal adopted Lord Hoffman's above formulation.

[32] Relevant to the present case is the law relating to terms implied by custom. In *Hutton v Warren* (1836) 1 M. & W. 466, Baron Parke discussed the underlying rationale:

> It has long been settled, that, in commercial transactions, extrinsic evidence of custom and usage is admissible to annex incidents to written contracts, in matters with respect to which they are silent. The same rule has also been applied to contracts in other transactions of life, in which known usages have been established and prevailed; and this has been done upon the principle of presumption that, in such transactions, the parties did not mean to express in writing the whole of the contract by which they intended to be bound, but a contract with reference to those known usages.

[33] The leading New Zealand decision on terms implied by custom is *Woods v NJ Elingham & Co Ltd* [1977] 1 NZLR 218. In *Woods*, Henry J discussed the elements that must be present to imply a term by custom. First, the custom must have acquired such notoriety that the parties must be taken to have known of it and intended for it to be part of the contract. Second, the custom must be certain. Third, the custom must be reasonable. Fourth, until the courts take judicial notice of a custom it must be proved by clear and convincing evidence. Finally, the custom must not be inconsistent with the express contract.

[34] The principles enunciated in *Woods* have been applied in recent New Zealand decisions: *Oraka Technologies Ltd v Geostel Vision Ltd* HC HAM CIV 2005-419-809 18 February 2009; *Trelise Cooper Ltd v Cooper Watkinson Textiles Ltd* HC AK CIV 2007-404-4307 and 4308 20 June 2008; and *Everist v McEvedy* [1996] 3 NZLR 348.

Appellant's submissions

[35] The appellant submitted that the District Court decision contained a number of errors. First, the appellant submitted that the District Court Judge had incorrectly interpreted the maximum price payable under the contract. The appellant submitted that the maximum price to be charged by the first respondent was $333,750 unless the appellant upgraded the specifications of items supplied under the contract or increased the quantities of items supplied under the contract. The appellant submitted that the maximum price of $337,750 including both GST and all PC sums. The appellant relied on the part of the contract that said where no written variations have been made and where no upgrades in the specifications or increases in the quantities were made, any costs over the maximum price must be incurred by the first respondent.

[36] The appellant submitted that his subjective intention was that "the PC sums formed part of the contract" and that the maximum price payable under the contract was the figure of $333,750 as stipulated in the contract.

[37] The appellant also submitted that the first respondent failed to indemnify him as required in the contract. Further, in his written submissions the appellant submitted that the District Court Judge was incorrect when she held that the brochure formed no part of the contract entered into. The appellant stated that the brochure induced him to contact the first respondent and inquire into his project management services. Also the appellant contended that the damages made in favour of the first respondent were wrongful and that the factual findings made against the appellant were in error in various respects.

Respondent's submissions

[38] The respondents submitted that the District Court Judge issued a carefully reasoned decision based on the evidence presented at the hearing. The respondents submitted that the appellant has failed to show any basis for disturbing the Judge's decision.

[39] The respondents submitted that the maximum price payable under the contract increased to $370,870.41 as a result of the appellant's actions. In particular, under the agreement for sale and purchase, the appellant specified the items to be supplied under the PC sums and the purchasers also required the supply of additional items not allowed for in the contract.

[40] Further, the respondents submitted that the legal interpretation of the contract and the factual findings on waiver should be upheld on appeal. The respondents accepted that the sum of $308,398.09 had been paid. The respondents submitted that the $62,472.32 was the sum outstanding. The orders made correctly allocated this total between the plaintiffs.

Hearing of the appeal

[41] Although the written submissions had been filed by the appellant in person, he was represented at the hearing by Mr Smyth. Counsel limited his oral submissions to the following issues:

a) What is the correct interpretation of the contract and the maximum price payable;

b) Did the appellant waive his entitlements under the contract;

c) Did the brochure form part of the contents of the contract; and

d) Should the respondents have indemnified the appellant;

[42] Mr Smyth also canvassed the findings of the Judge on the second and third causes of action. In the end, he accepted that the total amount found to be owing by the appellant was the sum of $62,472.32, plus the sum of $1,622.51: see [137] of the District Court judgment. Although these amounts had been allocated in favour of the plaintiffs in a slightly different way (see [139]), the effect for the appellant of the orders made was the same. No issue could be taken with that approach.

Discussion

Interpretation of the contract

[43] The central issue in the appeal concerns the correct interpretation of the contract. In particular, the issue relates to the maximum price payable by the appellant. This issue turns on the interpretation of the term "PC sum". The contract provides that the maximum cost will be $333,750 including GST and PC sums to the value of $49,000 for kitchen, bathroom fittings, electrical, tiling and excavation.

[44] It is correct that the contract does not define the term "PC sum". It then becomes necessary to determine the meaning of such term as used in context. The question is whether the term PC sum refers to a provisional cost of items to be procured under the contract allowing for the possibility of an increased amount to be payable if the allowed amounts for the items concerned are exceeded.

[45] I agree with the Judge's conclusion that the contract between the parties is relatively standard for the construction of a house. Further, it is clear from the evidence that both parties knew what a PC sum was in the context of such a contract and that the term was an estimate only for the items concerned that could not be determined at the time of the contract. It is also the case that use of references to "PC sum" in building contracts is common in the building and construction industry. This is established from the evidence of the expert witness Mr Maiden, which the Judge accepted. The question is then whether the meaning of such a term can be implied in a contract where it had not been expressly defined in the contract. The Judge, relying on *Woods* held that a term might be implied by custom in appropriate circumstances.

[46] In *Woods*, as discussed above, the requirements for implying a term by custom are five-fold. They include that the custom must have acquired such notoriety that the parties must be taken to have known of it and intended for it to be part of the contract, that the custom must be certain, that the custom must be reasonable, that the custom must be proved by clear and convincing evidence (unless

the courts take judicial notice of it) and that the custom must not be inconsistent with the express contract. There is no question that the last requirement is met.

[47] I am satisfied that the use of the term PC sum was intentional. The Judge found that both parties knew of the term and its meaning in the context of the building contracts. Hence, the term PC sum was used in this case to reflect industry practice, because the price of some of the items in the contract had not been determined.

[48] Such custom and industry usage was proven by clear and convincing evidence. Mr Maiden's evidence as an expert was relied upon by the Judge for this purpose. Such evidence is plainly admissible under an exception to the parol evidence rule and confirmed that the customary usage had acquired the appropriate degree of notoriety. The appellant has not established any basis upon which the evidence should not have been used.

[49] I am also satisfied that the use of PC sum in the contract was reasonable. It is common practice and regularly used in contracts in the construction industry. It is entirely reasonable that the parties would use the term PC sum as it enabled the appellant to have the option of purchasing the items himself. Indeed, having on sold the property to the purchasers, it enabled him to meet their requirements for such items.

[50] Finally, I am satisfied that the term PC sum has the level of requisite certainty and has clear application in the circumstances of this case.

[51] I therefore conclude that the maximum price payable under the contract was $333,750 including GST, but plus any amounts above the estimated PC sums. The appellant by his actions caused the maximum price payable to increase by requiring the items to be supplied to be at a cost greater than the estimated PC sums. No doubt this came about by virtue of the appellant's obligations to the purchasers under the agreement for sale and purchase. Once the purchasers required items that were in excess of the PC sums in that agreement for sale and purchase, the appellant's requirement in turn was that the second respondents provide such items under the

construction contract. This meant that the cost of such items in excess of the PC sums (in the contract) could be recovered from the appellant. That is because, where the PC sum is in excess of the estimated or provisional sum, it is to be adjusted upwards to reflect the actual cost.

Waiver

[52] Even if the above analysis were incorrect, I agree with the District Court Judge's conclusion that the appellant waived his entitlement to rely upon a fixed maximum price payable under the contract. On this point, the applicable legal principles are not in dispute. The appellant's entitlement was in relation to the clauses in the contract that made it the first respondent's responsibility to obtain all materials and allocated all risks of costs overruns that were not the subject of written variations to the first respondent. The contract stated that "any costs over and above the figure of $333,750 including GST, where no written variation have been made, will be incurred by the project manager".

[53] However, the appellant in meeting his obligations under the agreement for sale and purchase obtained some of the PC items himself and either directed the tradespeople without reference to the first respondent or assigned responsibility for some of the PC items to the purchasers. To the extent that it was the respondents' responsibility to obtain all the materials for the construction of the house, the appellant by his conduct waived his contractual rights both in that regard and in relation to his ability to insist upon the fixed maximum price of $333,750 including GST.

[54] I am satisfied that the appellant's conduct resulted in the first respondent waiving the clause requiring variations to made in writing and communicated to the first respondent. I agree with the Judge that the legal requirements for waiver in *Neylon v Dickens* [1978] 2 NZLR 35(PC) are satisfied on the facts. The appellant has shown no basis for disturbing these findings regarding waiver. It would be absurd and unjust if the appellant was able to make variations to the project and expect the first respondent to accept all risks relating to cost overruns, with the first respondent having no control over the variations. I agree with the District Court

Judge's conclusion that the appellant cannot now rely on the wording of the contract to attempt to shift the responsibility for the increase in costs for PC items.

[55] As a result of the above conclusions on the interpretation point and waiver, there is no need to deal with the indemnity issue. Mr Smyth properly accepted that, if the decision of the District Court Judge on the contract interpretation and waiver was upheld, the indemnity argument fell away.

Brochure

[56] Finally, the appellant submitted that the brochure was part of the contract, as it had induced him to contact the first respondent and inquire into his project management services. The appellant claimed to have been "spurred on" by the brochure to deal with the first respondent. The District Court Judge held at [68] that there was no evidence to support the claim that the brochure was part of the contract between the parties.

[57] The point is that the brochure is not mentioned in the contract at all. Even if the appellant had in mind the contents of the brochure at the time of entering into the contract, there is no evidence that the brochure was intended by the parties to become part of the contract or that the first respondent knew of the appellant's possession of, or reliance on, the brochure. There is nothing to show it was incorporated into the contract by reference. Moreover, the evidence established that much of the information in the brochure was out of date. The appellant also did not make any claims based on misleading or deceptive conduct under the Fair Trading Act 1986. I am satisfied that Judge's findings that the brochure did not form part of the contract should not be disturbed.

Miscellaneous issues

[58] The remaining issue concerned the award of damages made in favour of the first respondent. The appellant submitted that it could not be supported on the evidence. Further, the appellant submitted that the fourth cause of action was not properly pleaded.

[59] So far as the pleading point is concerned, the cause of action is not particularly well expressed. But it is clearly a claim for breach of contract. The amount claimed is for "additional and unnecessary work" caused by the failure of the appellant to perform his payment obligations under the contract.

[60] The Judge carefully considered the legal submissions and found that loss was caused to the first respondent by the conduct of the appellant. The Judge took a global approach to damages resulting in a modest award of $2,500. I am not satisfied that the appellant has shown that such finding was wrong.

Result

[61] For the reasons discussed above, the orders made by the Judge at (1) to (4) cannot be challenged. The appeal is therefore dismissed.

[62] The respondents are entitled to costs on a 2B basis. By consent, I direct that such costs be settled between counsel and are to be paid from the security provided by the appellant for the purposes of the appeal.

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Stevens J