IN THE HIGH COURT OF NEW ZEALAND
ROTORUA REGISTRY

CIV 2008-463-000551

BETWEEN	TAUPO DISTRICT COUNCIL Plaintiff
AND	MOUNTAIN VIEW NURSERY LIMITED Defendant

Hearing: 28 July 2009

Appearances: J Temm and S Hickman for the Plaintiff
S Neville for the Defendant

Judgment: 30 July 2009

JUDGMENT OF
ASSOCIATE JUDGE CHRISTIANSEN

This judgment was delivered by me on
30.07.09 at 2.00pm, pursuant to
Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar
Date……

Solicitors/Counsel:
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Background

[1] The directors of the defendant (Mountain View) applied to the plaintiff (the Council) for resource consent to allow a 63 lot industrial subdivision of Mountain View's property at Crown Road, Taupö. It needed to connect its industrial subdivisional development to the Council's existing sewerage and water infrastructure. Mountain View's land was in an area which was located outside of the Council's water and wastewater catchment area and therefore was not covered by its then operative Development Contribution Policy. The Council agreed subject to certain requirements being met. On 8 August 2005 the parties signed a written Agreement setting out the Council's requirements and Mountain View's obligations. The document they signed was entitled a Deed of Arrangement (the Agreement). In fact, in form and in substance the parties' document was a contract requiring:

a) That in consideration of it being permitted to connect to the Council's services Mountain View was to carry out certain works at its own cost;

b) Mountain View was to construct assets of increased capacity over and above that required for the subdivision, if required by the Council and as determined by it, enabling the Council to either reimburse Mountain View or to set off any amount owing by it to Mountain View, provided those additional costs incurred were first approved by the Council in writing;

c) Mountain View to pay the Council $213,570 plus GST with respect to the water infrastructure and $123,480 plus GST with respect to the sewerage infrastructure; in total a sum of $337,050.

[2] The Agreement provided further that the aforesaid payments had to be paid prior to the issue of a certificate pursuant to s 224(c) of the Resource Management Act 1991 and that all payments were to be made without deduction, counter claim or set off.

[3] In essence the Agreement set out the basis upon which the Council would permit connection to its services, even though, as it transpired, the Council did not support the subdivision proposal. From the Council's viewpoint the Agreement was a matter for settlement ahead of Mountain View's resource consent hearing scheduled to proceed on 10 August 2005, before independent commissioners.

[4] Throughout and in its dealings with the Council, Mountain View was represented by Mr Jolly, a surveyor and Ms McHardy a planner, both of Central Surveys Limited (CSL). Ms McHardy gave evidence for Mountain View at the resource consent hearing. Before then Mr Jolly had communicated with the Council regarding its subdivision requirements.

[5] On 30 October 2007 the Council granted a s 224(c) certificate to Mountain View.

[6] When the Council's demand for $337,050 plus GST was not paid a meeting of the parties' representatives was arrange. Following this on 12 April 2008 Mr Jolly wrote to the Council:

> "The requirements of the Deed of Arrangement were not known to me at the time of 224(c) request. Consequently the issues which I will address below were not dealt with at the time. I was aware that DCs [Development Contributions] for roading had been paid at an earlier date and assumed that there were no other DCs…"
>
> "The Deed of Arrangement was put in place to ensure that the remainder of the Development Contributions were paid.
>
> The Deed calculates those contributions based on 63 industrial lots contributions to sewer and water infrastructure. This calculation is at item 10 of the Deed.
>
> I have attached a copy of the title plan of subdivision which shows that there are only 62 industrial lots. The basis upon which the figures at clause 10 of the Deed of Arrangement have been calculated is obscure…
>
> The developer has provided all of the necessary infrastructure to connect all lots of the subdivision to TDC's water and sewerage reticulation. This includes substantial works beyond the boundaries of the land being developed in order to connect to existing infrastructure. On this basis the developer should not be disadvantaged by being required to pay contributions by way of Deed of Arrangement that are in excess of those contributions they have been paid at time of 224(c) request…

> I have been told by G Davidson TDC that the amounts (of $3,390 per subdivision unit for water connection and $1,960 per subdivision unit for wastewater connection upon which the Council calculated the totals of $213,570 and $123,480 payable to it)… are the value of 1HEU [household equivalent unit] for water and sewer contribution from the Development Contribution Policy at the time of the agreement. The charging of a single HEU per lot is not in line with the DC policy at the time of the agreement. The DC policy at the time clearly indicates that [the policy for determining development contributions for industrial subdivisions not residential subdivisions should have been applied]…
>
> I believe that it is absolutely unacceptable to place a document in front of someone to require them to pay a total of $337,050 excl GST, without a breakdown of how that figure was arrived at. There is no way that anyone other than the author of the document could possibly verify the figures in that document.
>
> As the Deed of Arrangement is unreasonable, erroneous and has not been administered as it should have, I believe that it needs to be renegotiated and have set out below an acceptable method of calculating the balance of development contributions that should be payable."

[7] According to Mr Jolly at most Mountain View would be responsible to pay a sum of $64,845.61 inclusive of GST. He indicated that Mountain View would be claiming for construction costs with the construction of additional capacity in the stormwater disposal system and for some other items which he expected to be offset against any liability proved for development contributions.

[8] In its initial Notice of Opposition to the Council's summary judgment application Mountain View claimed:

1. No valid or enforceable Deed of Arrangement existed between the parties.

2. Mountain View had not provided free and informed consent to the terms of the deed.

3. The deed contained no attestation.

4. Because the deed was unenforceable no liability existed.

5. The Council did not provide Mountain View with an opportunity to take advice as to the terms of the deed.

6. The terms of the deed are oppressive.

7. The Council issued a s 224(c) certificate without requiring payment of any further development contributions.

8. The Council did not raise or issue any invoice for the payment and has advised that all contributions for development had been paid, thereby waiving reliance upon the terms of the deed.

9. In all the circumstances it is inequitable to enforce the terms of the deed.

[9] In an amended notice of opposition recently filed it is with respect to grounds 5 and 6 only that changes have been made. Latterly it has been claimed:

> "5. (Because no provision of opportunity to take advice was given) the deed should be set aside as an unconscionable bargain; and
>
> 6. The entry of summary judgment would be oppressive or unjust because "the circumstances of the preparation and execution of the deed."

[10] In essence it is upon those two expanded grounds that this hearing focussed.

Evidence in opposition to the claim

[11] Mr Jolly said he was never consulted regarding the Council's requirement for payment of contributions for connection to existing sewerage and storm water infrastructure even though CSL was Mountain View's agent for the development. He only became aware of the Agreement after demand for payment was made by the Council in December 2007.

[12] Mr Jolly said the Council is only entitled to levy sums which reflect the costs incurred by the Council to provide services and/or infrastructure in response to development or growth. He said there was no correspondence from the Council regarding the requirement for any such payment. As the Agreement was never known to him there was never any negotiation regarding the value of work done or

regarding any deduction claimable against the assessed contributions contemplated by the Agreement.

[13] Mr Davidson is a director of Mountain View. He deposes to having no knowledge of the circumstances in which the Agreement was executed. He does not recall previously sighting the document or signing it although he accepts it bears his signature.

[14] Mr Davidson stated that discussions in relation to payments required were handled through Mr Jolly. Also Mountain View instructed law firms Le Pine & Co initially, and later Swarbrick Dixon in respect of the development and the resource consent application. He said Council's letter of demand came as a complete shock to him. Also when the s 224(c) certificate had issued there has been no mention of any further funds payable to the Council in respect of the development.

[15] Mr Davidson said he received no legal advice in relation to the terms of the deed. He said both Le Pine & Co and Swarbrick Dixon have advised him that they have no record on their files of any correspondence regarding the Agreement or any negotiations or correspondence in respect of same. Had he been aware of the existence of such a document then he would have referred the matter to Mr Jolly and to the solicitors for advice.

[16] Ms McAlley is also a director of Mountain View. She too has no recollection of signing the Agreement but accepts it bears her signature. She too is unaware of any documentation regarding the existence of the Agreement. In reviewing the files of their solicitors she can find no correspondence or file notes regarding negotiation of the terms of the Agreement.

[17] Ms McHardy had corresponded with the Council regarding securing the resource consent needed. She said at no time was she consulted about any requirement to make payment of contributions for sewerage and wastewater. Nor was she made aware of the existence of the Agreement.

[18] There was correspondence between the parties regarding payment of development contributions which were assessed in the sum of $119,563.50 plus GST, and which were paid. She noted that the development contributions paid related to roading undertaken. In none of the other correspondence was there reference to the sums of money subject of the Council's claim.

[19] Ms McHardy understood that when the Council issued the s 224(c) certificate it was done on the basis that development contributions payable had been met completely. She was not at any time aware of the existence of any other contribution which may be required or which she would have expected in circumstances where the costs of development of the waste water and sewerage infrastructure had been met by Mountain View.

The Council's evidence in reply

[20] It was given in an affidavit by Mr Anderson the Council's infrastructure services group manager. He said the Council's records indicate that Mr Jolly first raised the issue of the Agreement on 25 May 2005 when he contacted the Council's corporate solicitor, Mr Hickman. That approach was in response to a letter from the Council which sought a copy of the connection agreement permitting connection to the Council's water supply and wastewater disposal networks. Details were sought by the Council of the names or entities that were to be parties to the connection agreement. Mr Jolly responded with the advice:

> "The connection agreement will be for: Mountain View Nursery Limited, P O Box 514, Taupo".

[21] On 26 May 2005 Mr Hickman emailed Mr Jolly advising him he had instructed a Mr Fanning at Le Pine & Co to prepare an agreement. Mr Hickman noted his understanding that Le Pine & Co also acted for Mountain View and sought confirmation that Mountain View was agreeable to Mr Fanning preparing an agreement.

[22] Mr Jolly responded confirming Mountain View was happy for Mr Fanning to prepare an agreement. Mr Hickman forwarded a copy of that response to Mr

Fanning who responded seeking engineering requirements and a copy of the resource consent application.

[23] In short, Mr Anderson says records disclose that Mr Jolly and Le Pine & Co solicitors, as agents for Mountain View, were aware of the Agreement. He reiterated that the payments required under the Agreement were not 'development contributions' as Ms McAlley referred to them i.e. because that term strictly only related to land within an area covered by Council's Operative Development Contribution Policy.

[24] Further, and by reference to Ms McAlley's evidence given at the resource consent hearing it is clear she and Mr Davidson were familiar with the Council's planner's report wherein there is reference to the Agreement having been entered into. That report records:

> "A supply agreement has been entered into between the Council and [Mountain View]. That agreement details the quantum of payments required to be made and the physical works, which must be completed in order that the water supply be connected into the public system… [and] in order that the sanitary drainage be connected into the public system."

[25] Mr Anderson concludes:

> "It is simply inconceivable that Mr Jolly would state that … at no time was there any discussion with him or Mr Davidson and Ms McAlley regarding the deed or any requirement for it. It was Mr Jolly who advised Council of the name of the entity that would be a party to the deed (Mountain View Nursery Limited). It was also Mr Jolly who advised Council that his clients had no issue with Le Pine & Co, solicitors preparing the deed given the conflict of interest which was identified by Council.
>
> As far as Ms McHardy is concerned, it is my position that she would have carefully reviewed the planning report [which was necessary in order for Ms McHardy to refer to it in her evidence presented to the resource application hearing]. The planning report clearly noted that the deed had been entered into requiring certain payments to be made for works to be completed."

Amendment to grounds of opposition

[26] Mountain View filed its amended notice of opposition on 18 June. I have earlier referred to the amendments made. The application for leave to file the amended notice was supported by an affidavit from Mr Jolly. He recalled Le Pine & Co having been instructed to prepare the agreement. He said he did not see that

Agreement nor any draft of it prior to it being signed. He said there was no consultation with he or Ms McHardy regarding the quantum of any payment to be made for connection to the Council's infrastructure.

The case for Mountain View

[27] It is that the directors of the defendant had not previously been involved in property development and were heavily reliant upon their advisors in respect of the Taupö development. Mountain View says it provided all the necessary infrastructure to connect to the water and sewerage reticulation; that it provided substantial work beyond the boundaries of its land and addressed at its cost many changes to meet the changing requirements of the Council.

[28] The directors have no recollection of ever being presented with or having signed the Agreement. Given the terms of that Agreement and their ignorance in matters of property development, they would have taken advice on its terms had they appreciated the nature of the document they have signed.

[29] Mountain View says that since December 2007 there has been correspondence in an attempt to understand the basis on which the deed was executed and how the sum claimed was calculated. They assert that the Council's only response has been to state that its 2004 Development Contribution Policy was applied. It appears that the Agreement has been copied from the plaintiff's Development Contribution Policy.

[30] Ms Neville submits that the Council has failed to apply the terms of that policy as they relate to industrial developments. Rather it applied the policy as it related to residential developments. Also that the Council has failed to take into account the cost of the works undertaken by Mountain View to address the affects of the development.

[31] Mountain View asserts there are four arguable defences.

Unconscionable bargain

[32] In this context it is claimed the Council was the stronger party and exploited the weakness of Mountain View in circumstances amounting to actual or equitable fraud. Proof of that does not require "an active extortion of a benefit, an abuse of confidence, a lack of good faith by the party seeking to hold the bargain". *Nichols v Jessup* [1986] 1 NZLR 226.

[33] Ms Neville submits that equity may intervene to set aside an unconscionable bargain and refers the Court to the decision of the Privy Council in *O'Connor v Hart* [1985] 1 NZLR 159 wherein an unconscionable bargain was described as "a bargain of an improvident character made by a poor or ignorant person acting without independent advice which cannot be shown to be a fair and reasonable transaction". Further "fraud in its equitable context does not mean, nor is it confined to, deceit; it means an unconscientious use of the power arising out of the circumstances and conditions of the contracting parties… it is victimisation, which can consist either of the active extortion of a benefit or the passive acceptance of a benefit in unconscionable circumstances".

[34] Mountain View worked throughout through its advisors. It says it was not provided with an opportunity to take advice as to the terms of the Agreement. Its surveyor and planning consultant depose they were unaware of the contents of the Agreement and that it was not provided to them for advice before execution. Their solicitor's files disclose no correspondence or advice as to the terms of the Agreement. The circumstances of the execution of the Agreement are unclear. The directors say had they been aware they were signing a document requiring them to pay a sum in excess of $330,000 they would have sought advice from those whom they were heavily reliant upon. Ms Neville submits the Council is unable to explain the circumstances of the execution of the Agreement. She submits expert evidence from Mountain View is that the quantum recorded as payable in the Agreement is incorrect/flawed and arises from a mistake by the Council in the application of the provisions of its district plan. Therefore it is arguable there has been:

a) An inadequacy of consideration.

b) Procedural inpropriety.

c) Absence of independent advice.

No valid and enforceable deed

[35] It is submitted the deed was prepared at the instruction of the Council, by its solicitors, and was prepared as a deed and provided for execution by both parties as a deed. But no pages of the deed have been initialed. Ms Neville submits that there is no consideration provided for the deed and certainly not by the grant of resource consent by independent commissioners hearing the resource consent application.

[36] Pursuant to s 367 (3) or the Property Law Act 207 deeds entered into before 1 January 2008 are governed by the Property Law Act 1952. Section 4 of that Act requires that deeds are signed by the party to be bound thereby and attested to by at least one witness with the witness adding his signature, his place of abode and calling or description. The deed has not been witnessed. That said Ms Neville accepts that an unattested deed might be effective for certain purposes though as not a valid deed. Nevertheless she submits there is no Agreement and/or it is inequitable to enforce the executed document. There is no evidence of negotiation as to its terms. Therefore it is arguable there is no consensus ad idem.

Waiver

[37] At no time prior to the s 224(c) certificate on 30 October 2007 was demand made for payment of any further development contributions, or any payment under the terms of the deed. Therefore, by its issue of the certificate the Council has waived the requirement for payment.

Entry of judgment would be inequitable and/or unjust

[38] The Local Government Act provides that in performing its role a local authority must conduct its business in an open, transparent and democratically accountable manner (s 14(1)(a)(i)). Ms Neville submits that has not occurred.

[39] The Council has asserted that the sums payable under the deed are not a development contribution. However Ms Neville submits the Council is entitled to require payment of development contributions only to the extent required to address the affects of Mountain View's development. In *Neil Construction v North Shore City Council* (2008) NZRMA 275, Potter J said that the Act required proof of a causal nexus between the proposed development and the increased need for infrastructure before a Council could impose development contributions.

[40] Ms Neville submits that in view of the works undertaken by Mountain View, at its cost, to address the effects of the development, it is not evident that the Council is entitled to claim payment in this instant.

Principles

[41] These are not in dispute. They include relevantly:

a) the Council must satisfy the Court that Mountain View has no arguable defence to the claim against it.

b) Generally disputed issues of fact based on affidavit evidence alone, particularly when issues of credibility arise, are not suitable for summary judgment.

c) The Court should be robust although accepting that summary judgment is inappropriate where ultimate determination can only properly be reached after a full hearing of all the evidence.

d) The Court is not bound to accept uncritically any claim of a dispute of fact which calls for further investigation or every statement in an affidavit which may lack in precision or be inconsistent with undisputed contemporary records, or if in itself it may be inherently improbable.

e) The Court can use its residual discretion to refuse summary judgment where there is a possibility of injustice for example, where the procedure may result in oppression to a defendant.

Considerations

[42] At face value the claim was simple i.e. to recover a debt Mountain View agreed to pay. The Agreement bears the signature of two of its directors. The Agreement clearly describes the purpose for which the payment was due.

[43] The Council is sceptical, even scathing regarding the claim of Mountain View's directors, and its agents that they had no knowledge of the Agreement or could not remember signing it. Mr Jolly provided the name of his client for the purpose of drawing the Agreement. In her evidence Ms McHardy said she had read the Council's planner's report. The Council says that if she had she would have read the reference in that report to the Agreement.

[44] The directors of Mountain View claim inexperience and ignorance and total reliance upon employed advisors. Such a claim usually attracts no sympathy for those intent upon a large commercial undertaking in an expectation of significant profit. If there is substantial reliance upon professional advice then any issues arising from the performance of advisors should better be pursued with those advisors.

[45] But, there is more to these claims on behalf of Mountain View than can so easily be dismissed by comments of the type in the proceeding paragraphs. I will explain more shortly but first I should deal with those parts of Mountain View's claim which clearly cannot succeed.

[46] There is no evidence, but only speculation to support a claim of an unconscionable bargain. Only inference or suspicion supports a claim of unconscious use by the Council of its powers. There is no evidence of circumstances to suggest that equity should intervene in this case. If Mountain View cannot

explain the circumstances of the execution of the Agreement by its two directors, then it is unlikely the Council can.

[47] In the beginning of this judgment I expressed the view that whilst entitled a Deed of Arrangement the document was in fact a contract. Consideration was provided by allowing Mountain View to connect to existing services. A company can be bound by the signatures of two of its directors. It does not require those signatures to be witnessed.

[48] Nor can the claim of waiver succeed merely because the Council did not insist upon payment before issuing the s 224(c) certificate on 30 October 2007. Neither in writing, nor by its conduct, has the Council waived payment of the sum it says is due.

[49] Although for these expressed reasons I consider there is no defence to the Council's claim, I am firmly of the view it would be inappropriate to enter judgment summarily upon the claim. There is indeed an element of mystery surrounding the execution of the Agreement by Mr Davidson and Ms McAlley. I cannot so simply dismiss their claims of no recollection. Curiously although the document was prepared by Mr Fanning of Le Pine & Co no correspondence can be found from solicitors or from CSL regarding that document, its contents, or showing any invitation for the directors to call and sign it.

[50] Neither, do I share the Council's scepticism of Mr Jolly's claims. He was Mountain View's agent and he did provide Mountain View's full name to Mr Hickman. He did confirm that there would be no objection to Mr Fanning preparing an Agreement. But the circumstances of those events are not without the possibility of confusion. Correspondence referred to a 'Connecting Agreement'. What was prepared and signed was a 'Deed of Arrangement'. Also there is no basis not to accept Mr Jolly's claims that he never saw the document in question and that he was unaware of the significant financial obligation contained in it.

[51] It is clear that although Mr Fanning may have assisted Mountain View with legal advice at some early stage, the services of Swarbrick Dixon were engaged to

assist with the planning application. This, because Mr Fanning and Le Pine & Co acted for the Council at that time. Strictly, Mr Fanning was the Council's solicitor and not the solicitor of Mountain View and that was the reason Mr Hickman enquired of Mr Jolly whether there would be any objection to Mr Fanning being requested to draw the Agreement.

[52] Ms McHardy needs to accept responsibility for her assertion of familiarity with the Council's planner's report. Even though, some confusion may have been caused by the reference in it to a 'Supply Agreement'. There is no reason however not to accept her claim about never having seen that document or being consulted regarding it.

[53] Of concern is the lack of evidence to explain the Council's calculation of those amounts which were inserted into the Agreement. It is only in April 2008, as evidenced by Mr Jolly's letter at that time, does the position appear clearer. Statements made and assumptions reported by Mr Jolly have not been answered. The Court can assume for present purposes that although the Council does not accept the Agreement required payment of 'Development Contributions' in reality that is exactly what the Agreement did require. They are nonetheless Development Contributions because they related to land in an area not covered by Council's Development Contribution Policy. Moreover Mr Jolly's claim that the Council has adopted a rate chargeable for residential development rather than using its policy rate for industrial subdivisions has not been answered.

[54] If the Council has misapplied policy guidelines then an injustice may occur even though in that outcome there may still be a debt due to the Council. In the circumstances of this case it is not appropriate to assume such a liability will occur. Rather it is a matter upon which the Court needs to hear full evidence including that, if any, which supports Mountain View's claim of an offset.

[55] In short, I consider it appropriate for the exercise of the Court's discretion not to grant summary judgment even though it is more probable than not that in the outcome a debt to the Council can be proved.

Judgment

[56] The application for summary judgment is dismissed.

[57] This is a proper case to reserve costs for determination in the outcome of a trial.

Associate Judge Christiansen