

**IN THE DISTRICT COURT
AT AUCKLAND**

**CIV-2015-404-002633
[2016] NZDC 24024**

BETWEEN CHIRAG KANUBHAI PATEL
Plaintiff
AND RAYLAND INVESTMENTS LIMITED
Defendant

Appearances: E St John and S Maloney for the plaintiff
No appearance for or by the defendant

Judgment: 29 November 2016

RESERVED DECISION OF JUDGE NICOLA MATHERS

[1] This matter came before me by way of a formal proof hearing. In view of the number of different causes of actions and the number of authorities referred to me, I reserved my decision so that I could consider counsel's submissions and the authorities cited to me.

[2] I note there was no appearance of the defendant.

[3] The background to the proceedings is that the parties entered into an agreement for sale and purchase on 8 August 2014 whereby the plaintiff agreed to purchase from the defendants land and a dwelling to be built.

[4] The relevant agreed terms and conditions of the contract included:

- (a) the purchase price of \$780,000;
- (b) a deposit of 5% payable upon the agreement being declared unconditional, with a further 5% due on 29 August 2014;

- (c) the balance of the purchase price to be paid on settlement, being 27 November 2014 or five working days from issue of the Code Compliance Certificate, whichever was the later;
- (d) the interest for late settlement of 12%;
- (e) clause 18 included a sunset clause whereby the plaintiff could cancel the contract with a full refund of any deposit paid if the Code Compliance Certificate was not issued by 13 February 2015;
- (f) clause 19 provided that the vendor warranted to give possession to the purchaser once the house was finished and signed off by the Council.

[5] On 8 August 2014 the parties signed a variation to the contract which provided that the purchasers would pay interest of 8% per annum to the vendors once the building consent was issued and construction work had started on the site, with interest being paid monthly.

[6] The plaintiff says that at all material times the defendant and its agent represented that the dwelling would be constructed by the end of January 2015 or a short time thereafter.

[7] The defendant did not obtain a Code Compliance Certificate until 13 October 2015.

[8] The defendant issued a settlement statement to the plaintiff which demanded interest at 8% per annum from 15 October 2014 until 21 October 2015 on the sum of \$702,000 for 372 days at \$153.86 per day, totalling \$57,235.92.

[9] The plaintiff paid the settlement amount but on a without prejudice basis to his right to recover the interest paid by him to the defendant.

[10] The plaintiff issued proceedings with four causes of action as follows:

1. There was no consideration for the variation entered into on 8 August 2014 and the variation is therefore invalid. The plaintiff

claims relief in the sum of \$57,235.92 being the payment of interest from 15 October 2014 until 12 October 2015.

2. If the variation was valid then it is subject to an implied condition that the defendant would complete the building works with due diligence and there has been a breach of the implied term. The plaintiff claims damages in the sum of \$40,465.18 being the interest payment that he made after 31 January 2015.
3. A breach of the Fair Trading Act 1986. The plaintiff says that the defendant was in trade within the meaning of the Fair Trading Act 1986, it and its agent represented that the construction would be completed by the end of January 2015 or a short time thereafter, further that the defendant's conduct was misleading and deceptive and that it took a further nine months to complete the work. The plaintiff claims \$40,465.18.
4. The plaintiff says the agreement was a consumer contract within the meaning of s 11 of the Credit Contracts and Consumer Finance Act 2003. In breach of the act the defendant failed to make disclosure as referred to in the Act and therefore has no right to claim interest. In the alternative the variation clause and the defendant's subsequent actions were oppressive within the meaning of s 118 of the Act. The plaintiff asks that the contract be reopened and that there be a declaration that no interest is payable under the variation, or such interest as the Court deems appropriate.

[11] I have read the lengthy affidavit and supporting documents of the plaintiff in support of the application for judgment by way of formal proof.

[12] The plaintiff says that he signed the variation to the agreement in August 2014 because the defendant's agent, Mr Mody, recommended that he did so on the

basis that the builder would require extra funds over the course of the construction of the dwelling because no progress payments were provided for in the contract.

[13] The plaintiff says that he was very reluctant to sign the variation but relied on Mr Mody's representation that the dwelling would be constructed by the end of January 2015 or shortly thereafter. He says that he relied on the assurances given to him, and in particular that he would only be obliged to pay interest payments for a period of four months.

[14] He said it was important to him that he was not required to pay any more interest than the four month period because he would be renting another house while the new house was being built and he did not want to pay rent and interest for any longer than was absolutely necessary.

[15] The plaintiff says that construction started in mid October 2014 but stopped just before Christmas 2014 with no work being done over the next three calendar months despite him making numerous requests to the defendant to explain why work had stopped and when it would be commencing again.

[16] The plaintiff attended a meeting at his solicitors with Mr Mody confirming that he wished to proceed with the purchase but nothing was said about the variation and it transpired that the plaintiff's solicitor had not been sent the variation by Mr Mody.

[17] Despite requests, very little progress was made with the construction of the house between March and June 2015. Mr Mody was pressuring him to authorise the release of the deposit and the plaintiff agreed to do so upon receiving confirmation of a final completion date of the house.

[18] On 19 June 2015 the vendor's solicitor sent a copy of the variation to the plaintiff's solicitor demanding payment of interest from 15 October 2014 to 15 June 2015, totalling \$42,600. The plaintiff through his solicitors advised the defendant that he would pay interest through to 31 January 2015 being the date that the

defendant's agent had originally advised would be the completion date. This offer was not accepted.

[19] In relation to the first cause of action, Mr St John submits that it is well established that a promise by one party to perform that party's already existing obligations under a contract does not normally constitute valid consideration and any variation made in reliance on such a promise is therefore unenforceable, and refers me to the decisions of *Stilk v Myrick* (1809) 170 ER 1168 and *Cook Island Shipping Co Limited v Colson Builders Limited* [1975] 1 NZLR 422. He then refers me to the decision of *Williams v Roffey Bros and Nicholls (Contractors) Limited* [1991] 1 QB 1 where it was accepted that a benefit "in practice" is sometimes capable of constituting sufficient consideration for a variation, even if the party receiving the benefit was legally entitled to it under the contract. The Court held that where a party to a contract promised to make an additional payment in return for the other party's promise to perform his existing contractual obligations and as a result secured a benefit or avoided a detriment, the advantage secured by the promise to make the additional payment was capable of constituting consideration therefore, provided that it was not secured by economic duress or fraud.

[20] Mr St John submits that in the present case there was no practical benefit to the plaintiff in agreeing to the variation because the defendant was already obliged to complete the dwelling and in spite of the variation the defendant still took nine months longer than anticipated to achieve completion.

[21] I accept that submission of Mr St John and distinguish the present case from that of *Williams* on the basis that the plaintiff did not secure a benefit because the defendant ceased work on the dwelling early in November with no further work being done until the middle of February, and then completion not taking place until mid October.

[22] I am therefore satisfied that the variation clause is unenforceable for want of consideration and the plaintiff is entitled to be repaid the sum of \$57,235.92 which was wrongfully paid to the defendant, together with interest in terms of s 62B(4) District Courts Act 1947, costs on a 2B basis payable from 22 October 2015 to

17 November 2015, expert costs of \$1,950.63, and disbursements as fixed by the registrar.

[23] In view of the fact that I have found that the first cause of action has been established, I do not propose to consider the other causes of action.

Nicola Mathers
District Court Judge