IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA361/2023
[2023] NZCA 582

BETWEEN	CIVIC LANE LIMITED Appellant
AND	JOHN ANDREW DIBBLE Respondent

Hearing: 25 September 2023

Court: Gilbert, Peters and Hinton JJ

Counsel: R D Butler for Appellant
S E Wroe and T J M Ashley for Respondent

Judgment: 22 November 2023 at 9.30 am

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellant must pay costs to the respondent for a standard appeal on a band A basis and usual disbursements.

REASONS OF THE COURT

(Given by Gilbert)

[1] This appeal concerns the proper interpretation of an agreement for sale and purchase of a new apartment to be constructed in an existing building. The central issue is the price payable for the completed apartment, in particular whether the costs of modifying the standard layout to suit the purchaser's needs are included in the agreed price.

The facts

[2] Civic Lane Ltd is the developer of an apartment project in the heritage-listed former Civic Administration Building in central Auckland (now known as The CAB). The apartments were architecturally designed and offered for sale off the plans through Bayleys Real Estate Ltd. Construction company, Naylor Love Ltd, was responsible for the renovation of the building and construction of the apartments and common spaces.

[3] Mr Dibble and his wife have been living in Hong Kong for many years but plan to return to New Zealand to retire. When they were in Auckland in 2020, they met with Ms Suzie Paine from Bayleys and she introduced them to The CAB development. However, none of the standard apartments suited their needs because they were too small, and the sub-penthouse and penthouse apartments were too expensive. Ms Paine suggested that it might be possible to combine two standard apartments to create one bigger apartment. This idea appealed to the Dibbles.

[4] On 19 October 2020, Ms Paine sent an email to Mr Dibble advising that it would be possible to combine two of the standard apartments (B and C) to suit their particular needs:

> Attached is the sub-Penthouse floor plan, double click to expand. It appears that a BC combo plan hasn't been done so we have a fabulous opportunity here to bespoke something for you.
>
> Have a think about the 2 plans (both attached), and see if we can incorporate some features, ie the larger kitchen. The developer is happy to make the bathroom redesign with a bath and double vanity.

[5] It transpired that this option was not available on the higher floors and the Dibbles preferred to be as high up in the 22-storey building as possible. However, a combination of apartments C and D (80 m^2 and 71 m^2 respectively) on the 16th floor was available and the Dibbles were keen to pursue this. On 15 December 2020, Mr Dibble advised Ms Paine by email of his intention to make an offer of $2.9 million for apartment 16 C/D, but stating:

> It is key that I can work on the layout given the change of the loggia size and position recently.
> Working on the list of features needed.

[6] Ms Paine's response later that day included the following:

> I can put a vendor warranty in to give you the ability to work on the internal layout with the designer.
>
> …
>
> With your permission based on above I will fill in the signed paperwork I am holding on your behalf and present it.

[7] We interpolate here that the "vendor warranty" Ms Paine referred to was incorporated in the agreement that was later signed and is the key provision requiring interpretation. The agreement is otherwise in the standard form drafted for the sale of apartments off the plans. The vendor warranty was inserted to reflect that the sale to Mr Dibble did not involve a standard apartment and its internal layout had not been determined at the time the agreement was entered into.

[8] On 16 December 2020, Mr Dibble sought clarification from Ms Paine about the standard specifications which were to form part of the agreement:

> I just want to be clear what the standard specification is, especially regarding the kitchens, and including the appliances of the apartments.

[9] Ms Paine forwarded the standard specifications and made the following comments:

> The included appliances are Bosch. I suspect you may wish to choose something else. I think that this will all come down to how the final plan looks and therefore what costs they can shift around to make the deal work for you. Rest assured they will accom[m]odate where they can to satisfy you.

[10] That same day, Mr Dibble initialled the clauses in the agreement as instructed and returned this with the following comment:

> Looking forward to working with the Loves and yourself to create our ideal apartment.

Mr John Love is the sole director of Civic Lane.

[11] Ms Paine sent an email to Mr Dibble on 18 December 2020 advising that Mr Love agreed to add a second storage locker at no charge and would absorb all the

added costs of redoing the plans to conform to the Dibbles' requirements. However, Civic Lane counteroffered on the price, amending it to $2,995,000:

> Please see attached 2 pages. I have put in another storage locker at no charge however this is the overall number that [Mr Love] can do the deal at.
> He will absorb all the added costs of redoing plans etc and consultant costs to work with you to get a fabulous apartment that works for you.
> I just need 3 initial[s] by the storage, apartment price and total price and he will accept this.

[12] This led to the following email from Mr Dibble to Ms Paine on 19 December 2020:

> Is it [a bit] different to what we discussed? Thought it was $2945?
> Please remind me what is the additional purchaser elections charge?

Schedule 1 to the agreement was a purchaser election form enabling purchasers to elect upgrades at stated costs. One of these options was for heat pumps in the living area and master bedroom. The cost of this upgrade was $20,000 and Mr Dibble circled "yes" to this election.

[13] Ms Paine responded that day:

> Yes I tried to call you back to discuss.
>
> I spoke to [Mr] Love just after you and got him to agree [to] the extra storage however he can't change the cost of the apartment. He will do the deal at $2,995,000 and he will absorb consultant costs etc going forward as he will be redesigning your apartment making it bespoke.
> The purchaser elections are the heat pumps.

[14] Mr Dibble returned the signed agreement on 21 December 2020. Ms Paine replied forwarding a copy of the complete agreement and asking whether Mr Dibble had a lawyer who would be acting for him on the purchase. She also asked him to send her a sketch of the proposed layout.

[15] The agreement for sale and purchase records the purchase price as being a total of $2,995,000 comprising $2,700,000 for the principal unit, $250,000 for two car parks, $25,000 for two accessory storage units and $20,000 for additional purchaser elections (two heat pumps).

[16] The principal unit is described as "16C/D", being "**all the units** shown in **red** on the attached plan". The "attached plan" in the agreement is sch 2 and is the standard layout plan showing apartments A to F on level 16 as originally conceived.[1] Apartment C featured two bedrooms, two bathrooms, an open-plan kitchen, dining room and lounge, and a loggia. Apartment D, which was slightly smaller, is represented on this plan as having two bedrooms and an open-plan kitchen, dining room and lounge, but only one bathroom and no loggia. This layout was obviously not representative of the layout of the apartment Mr Dibble was purchasing, but the plan showed the outline of the space. The fact that the layout had not yet been agreed was confirmed by a handwritten notation on the plan "16 C/D combined — plan to be provided & agreed with purchaser".

[17] Schedule 3 of the agreement contains "outline specifications" covering "exterior structure", "fire compliance", and "apartment appliances, fittings, and finishes". The latter category included "kitchen joinery and fittings", "bathroom and ensuite fittings", "wardrobes", "internal floors", "internal walls", "internal doors", "ceilings", and "balconies/loggia". Under the heading "kitchen joinery and fittings", seven items are specified:

- Stainless steel undermount dual bowl sink
- Natural stone Benchtop
- Lacquer paint finish kitchen with soft close cabinetry
- Single lever selected finish 'tower' or similar kitchen mixer
- LED strip lighting to selected areas
- Sliding concealed rubbish bin
- Cold water supply to fridge space

[18] The outline specifications in sch 3 also covered internal common areas.

[19] Clause 20 of the agreement contained the vendor warranty to address the need for further agreement on the layout:

> 20.0 Vendor warranty
>
> The vendor warrants that they will work with the purchaser to design an acceptable plan/layout of the apartment.
>
> The purchaser acknowledges that should they request any specification outside that of the standard specification for the apartment then the purchase

[1] Apartment D on the plan is labelled D2.

> price may be adjusted accordingly to reflect such additions and in agreement with the purchaser.
>
> The Purchaser understands that the Vendor has the right to refuse any change, which in the Vendors sole opinion may disrupt or delay the construction programme or otherwise be detrimental to the development and its [timely] completion.

[20] Corresponding through Ms Paine, the parties agreed on a floor plan for the apartment in late January or early February 2021. Mr Dibble then prepared an electrical plan showing where he wanted such things as lights and power points to be located. Ms Paine sent this to Mr Love on 18 February 2021. Mr Love responded that his "consultants are currently coordinating [Mr Dibble's] preferred lighting, power, data etc into the plans". Final details of the kitchen design were agreed in April 2021.

[21] On 4 May 2021, Mr Dibble sent Ms Paine a plan showing where he wanted thermal and acoustic insulation:

> See attached.
> But need to know exactly which products available. Ideally stronger acoustic needed for living area where AV systems will operate.
> The wine cellar needs high grade thermal.
> Am I understanding correctly that only the external wall and wall dividing apartments will have acoustic but no thermal insulation?
> No floor or ceiling insulation at all correct?

[22] Mr Love responded through Ms Paine answering Mr Dibble's questions:

> I've spoken with the team and they will use a mammoth product as close to R 2.8 as they can fit inside the studs for the cellar.
> Acoustic will be the same as intern tenancy which is not the nova hush but the soft roll type.
> The floors are 130mm thick concrete and also have an acoustic underlay under the carpets, timber and tiles. There is also a layer of 13mm gib on the ceiling.
> The windows are double glazed, the internal corridor acts as a heat break.
> The top floor of the building has a warm roof installed.
> The concrete floors act as heat sinks.

[23] When Mr Dibble sought further clarification, Mr Love responded on 5 May 2021:

> No — no more questions no more changes.
> I will get a R rated product in for the cellar and acoustic in the walls marked.
> Once they are in I will advise what we managed to get.

[24] It was not until nearly 10 months later that Mr Dibble was advised that Mr Love intended to charge for various costs associated with the completion of the redesigned apartment. On 17 February 2022, Mr Love sent an email to Mr Dibble seeking payment of an invoice for $31,027 for "various additional engineering services including fire, electrical, comms and hydraulic". Further invoices followed for design fees of $19,677.94 and "kitchen and builders work changes" of $75,603.99 (the Naylor Love variations). Civic Lane subsequently withdrew its claim for the first two of these invoices but maintains its claim for the Naylor Love variations. Mr Love explains in his affidavit how the amount of $75,603.99 (being $65,742.60 plus GST) was arrived at:

> On 1 March 2022, I emailed Mr Dibble a copy of the variation pricing worksheets provided by Naylor Love for the costs involved in constructing the bespoke kitchen and changes required to other parts of the apartment. In the covering email, I noted that I had absorbed costs associated with the development, including P&G and quantity surveying fees. …
>
> The pricing worksheets for the kitchen works illustrate how the costs were charged. The sum for a standard kitchen was deducted, and then the additional costs associated with the Variation were added on, including two stone benchtops and the addition of the scullery as per the sub-contractor's quotation.
>
> The result was a total cost of $65,742.60 plus GST.

[25] The first of the two Naylor Love variation pricing worksheets totals $22,196.40 (excluding GST) and commences with an entry "Omit Kitchen x 1" in the sum of $12,250 and then adds the costs incurred to construct Mr Dibble's apartment. The most significant items were "Scullery added" ($7,500), "Stone benchtop & Splashback for scullery" ($11,000), "Large pantry" ($4,500), and "Stone benchtop for pantry" ($5,055). The second Naylor Love worksheet provided a breakdown of costs by trade. These totalled $43,545.86 (after some deductions) and included plumbing and drainage, mechanical services, fire protection services, electrical services, builders works associated with services trades, painting and stopping, and timber floors.

[26] In addition to the Naylor Love variations, Civic Lane claims for "project management costs, sundry costs, and incidentals in relation to specification changes" totalling $80,000. No invoice or other documentation was produced to support the calculation of this claim. However, Mr Love explains how this figure was arrived at:

> The project management costs were based on a conservative assessment of the time and cost involved in achieving the final built outcome for the Dibbles. This included liaising with the head contractor, client supply agents such as Heathcotes (appliances) and Franklins (sanitary fixtures) and, where necessary, subcontractors such as Greenmont Espies (bespoke kitchen) to complete the significant physical works on site. A large quantity of time was required to be devoted to ensuring the works were completed in accordance with the plans. This is because changes like those requested by Mr Dibble veer away from the normal style of building where each apartment / typology is essentially a 'cookie cutter' replication.

[27] We mention in passing that Mr Dibble accepted responsibility for two other invoices, for changes to the appliances in the sum of $7,110.76, and for sanitary fixture charges in the sum of $5,080.39.

[28] The parties each served settlement notices requiring settlement in accordance with their respective assessments of the amounts payable. Neither was prepared to settle on the basis of the notice served by the other. Mr Dibble then applied for summary judgment seeking specific performance in accordance with the terms of his settlement notice. Civic Lane counterclaimed for an order for specific performance requiring Mr Dibble to settle in accordance with its settlement notice.

High Court judgment

[29] Associate Judge Brittain granted Mr Dibble's application for specific performance in accordance with the settlement notice he served dated 2 November 2022.[2] The Judge accepted Mr Dibble's argument that cl 20 of the agreement for sale and purchase did not give Civic Lane the right to adjust the purchase price for the costs incurred in converting the standard floor plan and layout of principal units C and D into the floor plan and layout of a single apartment.[3] The Judge considered there was a distinction between the developer's costs associated with the new floor plan and layout of the new apartment, and any changes to the specified products and materials in the outline specifications which were to the purchaser's account.[4] On the Judge's interpretation of the agreement, Civic Lane assumed the commercial risk and associated cost of constructing a single apartment

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2 *Dibble v Civic Lane Ltd* [2023] NZHC 1582 [High Court judgment].
3 At [47].
4 At [48].

instead of two smaller apartments.[5] Any adjustment to the price had to be with Mr Dibble's agreement.[6] It followed that Civic Lane was not entitled to claim for the Naylor Love variations or the $80,000 for project management costs because Mr Dibble had not agreed to pay extra for these works.[7]

Submissions

[30] Counsel on both sides carefully analysed the three paragraphs in cl 20. There is no issue with the Judge's conclusion that the first term — "[t]he vendor warrants that they will work with the purchaser to design an acceptable plan/layout of the apartment" — is consistent with the notation on the floor plan in sch 2 of the agreement where it states, "plan to be provided [and] agreed with purchaser". Mr Butler, for Civic Lane, acknowledges that these costs were its responsibility.

[31] Mr Butler also agrees that the second term, which refers to purchaser's requests for "any specification outside that of the standard specification for the apartment" refers to the outline specifications in sch 3 of the agreement. However, he submits that the Judge was wrong to interpret this provision as requiring Mr Dibble's agreement that any requested changes to the specifications would result in an increase in the price. He argues that this provision should have been interpreted so that Mr Dibble's agreement must be given reasonably, or not withheld unreasonably. Alternatively, in the event of disagreement over the adjusted price, a term should have been implied that the purchaser would pay a reasonable price for any variations.

[32] Mr Butler submits that the Judge's interpretation permits Mr Dibble to request changes to the specification but then withhold agreement to a price adjustment without any justification. He argues that this interpretation should be rejected as being contrary to commercial common sense. He says Mr Dibble requested the changes and should not have the benefit of the works without paying for them.

[33] Mr Butler says the interpretation he contends for is also consistent with the background to the agreement, which was for the sale of an apartment in a development

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5 At [49].
6 At [51] and [55].
7 At [71] and [74].

off the plans. Civic Lane's construction costs were fixed with reference to the standard specification and the floor plans and any changes to the specification were likely to incur a cost. The actual costs would not be known until the works such as the kitchen fit out were complete towards the end of the building sequence. This could be months or even years after the agreement was entered into. This explains Civic Lane's delay in providing invoices for the increased costs.

[34] Mr Butler refers by way of example to Mr Dibble's request for thermal and acoustic insulation to suit his requirements, referred to at [21] above. He argues that this request, and others like it, were outside the "outline specifications" in sch 3. He says it is at least arguable that the changes requested did not relate to consolidation of the floor plans for the two apartments, or at least not exclusively.

[35] Ms Wroe, for Mr Dibble, submits that cl 20 provides no scope for Civic Lane to unilaterally vary the purchase price for any aspect of the layout of the apartment. The clause does, however, allow for changes to a particular specification, departing from the outline specifications in sch 3, where such requests could not be accommodated within the contractual price. The second part of cl 20 expressly contemplates that the price "may [not will] be adjusted … in agreement with the purchaser".

[36] Ms Wroe submits that when the three paragraphs in cl 20 are read together in the context of the agreement as a whole and against the relevant background, their effect is as follows:

(a) Civic Lane was obliged to build the apartment to a layout acceptable to Mr Dibble.

(b) Mr Dibble was free to make requests as to specification but if a change in specification could not be accommodated within the contractual price and Civic Lane wished to adjust the purchase price, it had to obtain Mr Dibble's agreement.

(c) If no adjustment was agreed, or if a request would cause delay or be disruptive or detrimental to the development, Civic Lane could decline Mr Dibble's request.

(d) If Civic Lane incorporated a specification at Mr Dibble's request that was not standard, but it did not seek agreement to an adjustment to the price until much later, it carried the risk that Mr Dibble might not agree, in which case there would be no price adjustment in relation to that specification.

[37] Mr Ashley, who presented this part of the argument for Mr Dibble, submits that there was no basis to imply a term as suggested. He says that this is also not a case of contractual decision-making subject to an implied restriction not to act arbitrarily, capriciously or in bad faith of the type considered in *Braganza v BP Shipping Ltd*.[8] He argues that summary judgment was appropriately ordered.

Assessment

[38] The issue for the Court is to determine objectively what the parties must be taken to have intended cl 20 to mean. The clause must be construed in the context of the agreement as a whole and determined by applying the familiar approach to contractual interpretation confirmed by the Supreme Court in *Firm PI 1 Ltd v Zurich Australian Insurance Ltd*:[9]

> [T]he proper approach is an objective one, the aim being to ascertain "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".

[39] Mr Dibble did not agree to buy an apartment with the standard layout for two apartments (four bedrooms, two kitchens etc), nor was he buying an empty shell. The standard layout is irrelevant, having been replaced by an "acceptable plan/layout" that Civic Lane warranted it would work with Mr Dibble to design. Agreement having

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8 *Braganza v BP Shipping Ltd* [2015] UKSC 17, [2015] 1 WLR 1661.

9 *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* [2014] NZSC 147, [2015] 1 NZLR 432 at [60] per McGrath, Glazebrook and Arnold JJ quoting *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 (HL) at 912 per Lord Hoffmann.

been reached on the design of the final layout without any price adjustment being sought or agreed, Civic Lane was obliged to construct the apartment conforming to that layout and cannot unilaterally impose a price increase for doing so.

[40] There is no provision in the agreement enabling the price to be adjusted for conveying the apartment constructed in accordance with the "acceptable plan/layout". For example, the agreement does not provide for the price to be adjusted using the standard layout for two apartments as the benchmark. The Naylor Love variations are claimable under its construction contract as departures from the standard specifications, but that does not mean they can be passed on to Mr Dibble under the agreement for sale and purchase, at least not to the extent that they represent the costs of constructing the agreed layout. Mr Love's explanation (set out at [24] above) for adding the Naylor Love variations to the purchase price is based on a misconception of the agreement. It was not appropriate, for example, to deduct the cost of a standard kitchen and add the costs of the scullery.

[41] Our interpretation not only reflects the express wording of the agreement, but it is also supported by the background context in which the agreement was signed, including the various representations made by Ms Paine on behalf of Civic Lane such as "[Civic Lane] will absorb all the added costs of redoing plans etc and consultant costs to work with you to get a fabulous apartment that works for you."

[42] We conclude that any costs associated with the new layout are included in the purchase price. This would include all but one of the items in the first of the Naylor Love variation pricing worksheets referred to at [25] above, which largely comprises the costs of the scullery and pantry. The only item on that list that does not fall into this category is the change in the paint finish from white to blue. If anything, that is a change to the outline specifications which we address below. Similarly, the items in the second of the Naylor Love worksheets, summarising trade costs, are not recoverable. These are described by Naylor Love on its variation pricing worksheet summary as "[c]hanges associated with the conversion of apartments 16c & 16d2 into a single apartment 16 c/d". For the reasons already given, these costs cannot be passed on to Mr Dibble.

[43] For the same reasons, the project management costs referred to at [26] above cannot be added to the purchase price. Mr Love explained that these costs reflect the time required to ensure the works were completed in accordance with the plans and were necessary "because changes like those requested by Mr Dibble veer away from the normal style of building where each apartment / typology is essentially a 'cookie cutter' replication". The problem with this explanation is that the apartment sold to Mr Dibble was not the normal style enabling cookie cutter replication. Right from the outset, it was contemplated that the apartment would be bespoke and this is what was agreed.

[44] The change in paint colour has nothing to do with the agreed plan/layout of the apartment. The issue is whether this was a requested specification outside the standard specifications in terms of the second part of cl 20. The outline specifications refer to lacquer paint finish in the kitchen, but no colour is specified. Clause 20 contemplates that the price may be adjusted for such a change, but this would need to be in agreement with the purchaser. Mr Dibble was not told that his preferred colour choice could only be accommodated if he agreed to pay an additional price. The purchase price could only be adjusted for requested changes to the outline specifications if Civic Lane stipulated when agreeing to the request that a price adjustment would be required, and Mr Dibble agreed to this. The default position absent any such agreement would be that Civic Lane could reject the requested variation and proceed in accordance with the standard outline specifications.

Result

[45] The appeal is dismissed.

[46] The appellant must pay costs to the respondent for a standard appeal on a band A basis and usual disbursements.

Solicitors:
Chapman Tripp, Auckland for Appellant
Pidgeon Judd, Auckland for Respondent
Solicitors: