

Case study 3: Property sale dispute

This is a fictional case study that Auckland mediator and lawyer Carol Powell gives of a mediation between a dissatisfied property investor (“Greg Mountford”) and a property development company (“Blue Horizons Ltd”).

The parties are in dispute over building specifications not completed and a final purchase payment not made.

In 2006, Blue Horizons announced plans to develop a new luxury marina, canal and residential development at the northern edge of Whangarei Harbour. Called Kowhai Cove, it would boast 60 terrace houses with attached berths, direct access to the picturesque, deepwater harbour, a café and restaurant, magnificent views of Mt Manaia, and close proximity to the city.

Kowhai Cove was marketed as providing the perfect base for boat owners seeking to explore some of New Zealand’s most spectacular cruising, diving and game fishing grounds. The location was easily reached by road from State Highway One, was close to the beautiful ocean beach of Bream Bay, and was within a short distance of Whangarei city.

Auckland investor Greg Mountford was impressed by the developer’s vision, and bought five houses with attached berths off the plans, for a total sum of \$2.5 million. He was required to put in 10 percent or \$250,000 upfront as a deposit, with staggered payments required over the following 24 months.

After two years, the development was nearing completion. Mr Mountford took possession of the five terrace houses, having made his penultimate payment. The agreement was that he would make the final payment when the five houses were fully completed to the specifications.

However, according to Mr Mountford, this did not happen.

Mr Mountford made a list of unfulfilled specifications: that lesser quality thermal glazing had been installed, not a higher quality double glazing; several internal doors were timber laminate with veneer finish, not solid timber; the kitchen appliances were a mix of German and Korean, not fully German; the kitchen benchtops were not marble; the number of power points in each house was 5 percent less than specified; the bathroom of each house had been left out of the whole-house entertainment system with iPod dock; and the bathrooms’ Bain Ultra air jet massage tubs enjoyed water ‘glimpses’ not full water views; the carpet laid was not pure New Zealand wool but a wool/nylon blend from Australia; and the outdoor landscaping around his five properties included just 20 of the 25 transplanted, five-year old kowhai trees that had been promised.

Mr Mountford also claimed that the Kowhai Cove development did not have the promised ‘air of luxury’. Around a quarter of the houses were vacant and the café and restaurant were not in evidence. This had a material effect on the attractiveness of his five properties, which he had purchased as high-end tourist rentals.

Accordingly, Mr Mountford withheld his final payment to Blue Horizons, which across the five properties came to \$90,000.

Blue Horizons rejected Mr Mountford’s list of unfulfilled specifications, saying his five properties were built and fitted out to an exemplary standard. Further, the local impact of the global economic recession on the Kowhai Cove development went well beyond Blue Horizons’ control.

Months went by as the two parties exchanged increasingly heated written correspondence. Eventually, Blue Horizons instructed its legal representatives to initiate court proceedings against Mr Mountford, seeking the sum under dispute.

In a bid to avoid escalating legal costs, the two parties decide to try mediation.

So skeptical are the lawyers involved, they opt to pay the mediator on an hourly (not daily) rate, fully expecting the mediation to break down quickly. In the event, the parties spend the day in mediation. The mediator recalls one lawyer saying, in amazement, at about 2pm: "I can't believe we're still here!" As it happens, the parties achieve a productive and successful outcome.

At the start of the mediation hearing, the mediator asks the parties to share their respective sides of the dispute as she gathers key facts and dates.

For a period of time, she employs the lateral thinking technique, pioneered by Edward de Bono, of having the parties imagine themselves wearing different coloured hats to try out different types of thinking. In this way, she encourages them to identify creative options for moving forward.

Gradually, after a quick lunch, the essence of an agreement takes shape. The parties shake hands on it at 4pm.

The outcome is this: Mr Mountford agrees to rent four of his five terrace houses. He agrees to use Blue Horizons as his rental agent and property manager. The agreed fee is \$45,000, half of the sum under dispute.

Meanwhile, Mr Mountford agrees to employ Blue Horizons for an initial period of two years to undertake the ongoing gardening and maintenance of the landscaped areas around his properties. Blue Horizons, in turn, agrees to complete the landscaping plan, including planting the last of the five-year old kowhai trees that were originally promised.

In this outcome, the developer Blue Horizons earns a fee as a rental agent and property manager, and at least two years' income for grounds maintenance and landscaping.

The investor agrees to pay the sum in dispute in exchange for further valuable services provided by Blue Horizons.

"All in all, it was a true win – win for both parties," said Carol Powell.