SUPREME COURT OF THE AUSTRALIAN CAPITAL TERRITORY
COURT OF APPEAL

Case Title:	**R Developments Pty Ltd v Forth**
Citation:	**[2017] ACTCA 38**
Hearing Date:	2 November 2016
Decision Date:	31 August 2017
Before:	Refshauge, Burns and Collier JJ
Decision:	Appeal dismissed with costs.
Catchwords:	**APPEAL** – APPEAL FROM SUPREME COURT – primary Judge dismissed claim for damages for breach of contract – builder not entitled to terminate contract for failure of owner to comply with contractual requirement to supply evidence of capacity to pay – appeal that primary Judge erred in his decision – appeal dismissed **CONTRACT** – INTERPRETATION – standard form building contract – the effect and nature of contractual clauses – principles of contractual interpretation – owners' obligation to supply evidence of capacity to pay ended once builder commenced works – obligations waived by builder – no evidence that builder had demanded owner provide information pursuant to further contractual clause – notice did not adequately identify alleged breach – further clause not invoked
Cases Cited:	*Associated Newspapers Ltd v Bancks* (1951) 83 CLR 322 *Luna Park (NSW) Ltd v Tramways Advertising Pty Ltd* (1938) 61 CLR 286 *Hounslow London Borough Council v Twickenham Garden Developments Ltd* (1970) 1 Ch 233 *FPM Constructions Pty Ltd v Council of the City of Blue Mountains* [2005] NSWCA 340 *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Limited* [2007] HCA 61; 233 CLR 115
Parties:	R Developments Pty Ltd (Appellant) Andrew Stephen Forth (First Respondent) Ksenija Maria Nemet (Second Respondent)
Representation:	**Counsel** Dr A Greinke with Mr J Trust (Appellant) Mr B Katekar with Mr D Robens (Respondents) **Solicitors** Meyer Vandenberg Lawyers (Appellant)

	Kamy Saeedi Lawyers (Respondents)	
File Number:	ACTCA 7 of 2017	
Decision under appeal:	Court/Tribunal:	Supreme Court of the Australian Capital Territory
	Before:	Mossop AsJ
	Date of Decision:	4 February 2016
	Case Title:	R Developments Pty Ltd v Forth & Anor
	Citation:	[2016] ACTSC 8
	Court File Number:	SC 201 of 2014

THE COURT:

Introduction

1. At first instance in these proceedings the primary Judge dismissed a claim for damages for breach of contract (or in the alternative, restitution on a *quantum meruit* basis), interest, and costs. The contract the subject of the claim at first instance was a standard form building contract, entitled "ACT Home Building Contract" and published by the Master Builders Association of the Australian Capital Territory, and entered into by the parties on 27 February 2013. The contract set out the terms of agreement for the construction of a residence in Yarralumla for Mr Forth and Ms Nemet (now the respondents to this appeal) by R Developments Pty Ltd (now the appellant). His Honour referred to Mr Forth and Ms Nemet as "the Owners" and R Developments Pty Ltd as "the Builder". It is convenient for us to do the same.

2. The key issue before his Honour was whether the Builder was entitled to terminate the contract for failure of the Owners to comply with a requirement under the contract to supply evidence of their capacity to pay the amount required to be paid.

3. His Honour found that the Builder was not entitled to terminate the contract for this reason. Further, his Honour found that the Owners had failed to prove that they were entitled to any more than nominal damages for the wrongful repudiation of the contract by the Builder.

4. In an amended notice of appeal filed 7 April 2016, the Builder appealed the decision of his Honour. Before turning to the grounds of appeal, it is convenient to set out the background facts.

Background

5. These background facts are not controversial. The Owners owned a property at 12 Bailey Place, Yarralumla. They engaged an architect to prepare detailed plans for the construction of a new residence at this address. On 20 December 2012, the principal of the Builder, Mr David Rosa, provided the Owners with a quote of $972,000.00 for the construction of that residence. On 8 January 2013, the Builder gave the Owners a specification for the purposes of the Owners' loan application.

6. On 5 February 2013, the Owners received loan approval from Westpac Bank in the amount of $1.5 million. The Owners informed the Builder of the loan approval on or about that date. On 27 February 2013, the parties entered into the contract.

7. The contract provided that a deposit of $72,900.00 be paid before construction commenced. The Owners paid that deposit on 13 March 2013.

8. Building work was commenced by the Builder on the Owners' property on or about 27 February 2013. This work included:

    (a) excavation for the basement in March 2013;

    (b) pour of the basement slab and construction of formwork for the pool in April 2013;

    (c) construction of the pool and basement walls, and erection of formwork for the driveway walls in May and June 2013; and

    (d) ordering of windows by the Builder in June 2013 and payment of deposit in the amount of $27,944.00.

9. On 5 July 2013, Mr Rosa sent the Owners a document headed "Allowances 12 Bailey Place Yarralumla", referring to amounts totalling $519,000.00.

10. The Builder subsequently provided the Owners with a variation notice dated 24 July 2013 which, for the purposes of clause 15 of the contract, identified variations to be made in respect of the construction in the amount of $67,794.63.

11. On 27 July 2013, Mr Rosa met Mr Forth and gave him an invoice for $27,078.00 for in-floor cleaning and the difference in window pricing.

12. On 3 August 2013, Mr Rosa gave Mr Forth a number of documents, including a letter dated 2 August 2013 in the following terms:

> Construction of your new house is progressing well. The pool shell and basement are virtually completed, and we anticipate moving onto the construction of the slab very shortly. At Rdevelopments we appreciate how important it is that the contract is administered smoothly with documentation kept up to date for the entire life of the project. As such, we wish to draw your attention to the following housekeeping matters.
>
> **Evidence of funding**
>
> As construction of your residence is being funded by a bank, we need to ensure that there are sufficient funds available to cover the full cost of construction. As set out in clause 4 of the contract you were to provide Rdevelopments with evidence of this sufficiency of funds prior to the commencement of construction, however you have not yet done so.
>
> If this evidence is not supplied we are entitled to protect ourselves be [sic] ending the contract in accordance with clause 27, and we intend to do so if you do not provide evidence within 5 days.
>
> **Valuation notice**
>
> On the 24 July 2013 I supplied you with a variation notice regarding certain changes to the pool and basement, as well as a Cost Variation Notice setting out the additional cost of the in floor pool cleaning and windows in the sum of $27,078.00. Copies are enclosed for your convenience. I now also enclose the Cost Variation notice for the remainder of the variations in the sum of $67,794.63.
>
> Could you also supply evidence of sufficient funds available to cover the cost of the variations.
>
> **Extension of time**
>
> As you are aware we have had some periods of wet weather which have affected our ability to progress the construction in accordance with our planned program. I enclose Time Variation notices setting out the new Construction Period and anticipated Practical completion date.

13. Mr Forth and Mr Rosa met again on 7 August 2013, at which time Mr Forth made specific reference to the loan approval by Westpac, and agreed to pay the Builder $27,000.00 out of personal savings.

14. On 9 August 2013, Westpac provided the Owners with a letter indicating the loan was proceeding. The Owners did not provide a copy of this letter to the Builder.

15. Mr Forth paid the Builder $27,078.00 by way of three electronic transfers on 9, 10 and 11 August 2013. The primary Judge found that this was consistent with the Owners' understanding that the contract remained on foot.

16. On 13 August 2013, lawyers for the Builder wrote to the Owners in the following terms:

> On Saturday 3 August 2013 our client hand delivered to Mr Forth a notice dated 2 August 2013 pursuant to clause 27(b) … of the contract specifying that you are in default of your obligations under clause 4 of the contract and requiring you to remedy that default within 5 days. The notice stated that RDevelopments Pty Ltd intended to end the contract if you did not do so.
>
> Five days have now elapsed since the notice was served on you. You have not complied with your obligations under clause 4 of the contract, namely to supply to our client evidence of your capacity to pay the Contract Sum at the times and in the manner specified in the contract.
>
> As such, RDevelopments Pty Ltd now terminates the contract in accordance with clause 27(a).

17. The Owners wrote to the Builder's lawyers by letter dated 19 August 2013, rejecting the proposition that the Builder was entitled to exercise rights under clauses 4 and 27(b) of the contract. Relevantly, the Owners stated:

> We note that the builder commenced work on site on 22 February 2013.
>
> On 10 April 2013 and 17 June 2013 and again on 9 August 2013 our financier, Westpac have advised us that they wrote to David Rosa RDevelopments Pty Ltd (builder) advising that we had finance … Given that there was no complaint by David Rosa about the status of the evidence of our finance prior to the builder commencing work, nor any issue raised after receipt of the letters from Westpac, it is now inappropriate for David Rosa RDevelopments Pty Ltd to purport to use these contract provisions to seek to terminate.
>
> On numerous occasions including prior to contract signing on 27 February 2013, R Developments Pty Ltd was advised verbally by Mr Forth who referred to bank documentation that funding had been approved from the finance provider. Unfortunately a copy of this paperwork was neither provided by Mr Forth or Ms Nemet nor requested by RDevelopments Pty Ltd, and it is now understood by both parties that this was an oversight and an assumption that the notification from the bank directly (as mentioned above) was sufficient. Both Mr Forth and Ms Nemet apologise for this situation and did not intentionally desire to cause any concern or misconception to RDevelopments Pty Ltd. Please refer to attachments advising confirmation from Finance Broker and Westpac.
>
> It is clear that the residential construction at 12 Bailey Place Yarralumla by RDevelopments Pty Ltd is now substantially delayed. We note that notwithstanding commencement on 22 February 2013, progress still has not reached the point where the first progress payment would be payable.
>
> Accordingly we do not accept the purported termination of the contract, and RDevelopments Pty Ltd failure to proceed with the works and the proposed termination of the contract are matters of dispute under the contract.
>
> Given the issues between us, this letter is a formal dispute notice under clause 28 of the contract.

18. By letter dated 29 August 2013 the lawyers for the Builder responded, materially:

> The 5 days referred to in clause 27(b) does not run from the date of termination. Rather, it runs from the date the builder notifies you that there is a default and states that it is its intention to end the contract if the default is not remedied. That notification was served you personally by our client on 3 August 2013.
>
> You did not provide the evidence of funding within the 5 day period. Accordingly a notice of termination was issued on 13 August 2013. The contract is now at an end.
>
> …

Decision of the primary Judge

19. Before his Honour, the Builder claimed breach of contract by the Owners in failing to comply with clause 4(a), in that the Owners did not supply the Builder with evidence of their capacity to pay the contract sum at the times and in the manner specified in the contract, and at no time provided the Builder with evidence that the Owners had obtained finance pursuant to clause 27(a)(v) of the contract. The Builder sought damages for breach of contract or alternatively restitution on a *quantum meruit* basis, interest, and costs. The loss claimed by the Builder was calculated by reference to:

    (a) the costs of the works carried out at the Owners' property (including variations) in the amount of $381,580.20 (including GST);

    (b) the forfeited deposit for windows ordered by the Builder, in the amount of $27,994.00;

    (c) amounts paid by the Owners under the contract totalling $99,978.00 (including GST) being the deposit plus the cost of certain variations; and

    (d) profit, being the 20% builder's margin (in the amount of $162,000.00 including GST) and 20% builder's margin on the works set out in the cost variations (being $18,974.53).

20. The Owners disputed the Builder's claim, and in turn counterclaimed for losses they claimed they suffered arising from the breach of contract by the Builder following the Builder's abandonment of the work and purported termination of the contract on 13 August 2013.

21. After a detailed recitation of the background facts, his Honour turned to the key question before him, namely the manner in which clause 4 of the contract operated. His Honour explained:

    > 97. The issue between the parties as to the interpretation of cl 4 is whether the builder has a single opportunity to obtain information about title and capacity to pay prior to commencement of works which is then lost if the builder makes the choice, notwithstanding the absence of that information, to start the works or, instead, the builder is able, if the information is not provided in the time required by cl 4, to compel production at any later time during the course of the contract and terminate the contract if it is not provided.
    >
    > 98. The issue only arises because of two unusual features of this case:
    >
    > (a) the Builder chose to commence the works without requesting documentary evidence of title or finance prior to the commencement of work under the contract and only sought to insist upon provision of that information some six months after the contract was signed, at a time when the works were well advanced; [and]
    >
    > (b) the Owners, not realising the gravity of the situation or the intent of the Builder, failed to provide that evidence within the five day period permitted by the contract or the ten day period actually given before the notice of the termination of the contract was served, even though they could have done so.

22. His Honour noted that the contractual construction of clause 4 advanced by the Builder was to treat the obligation of the Owners to provide satisfactory evidence as one which can be insisted upon at any time during the course of the contract so long as 10 days have passed since the date of the contract and provided notice is given under section 27(b). While his Honour accepted that this construction gave the clause a reasonable operation, his Honour concluded at [111] that it failed to give effect to the actual words used in the contract and the context in which they appeared. In summary, his Honour noted:

    (a) The scheme of the contract was such that the builder was protected by a number of defined features, but did not have a perfect protection in relation to capacity to finance or title. His Honour observed that:

        113. … on any reading of cl 4 it only provides the builder with one opportunity to obtain evidence from the owner and does not provide an entitlement to continual reassurance in relation to those issues.

    (b) Clause 4 was located early in the contract, and was referable to matters ***before commencement of work***. The effect of clause 4 was that there was a relatively short period during which the owner needed to sort out title and finance, or the builder was entitled to terminate the contract and use its resources elsewhere.

    (c) Clause 4 imposed a single obligation rather than separate obligations. Clause 4(b) did not impose a separate obligation to clause 4(a).

    (d) Unlike other clauses in the contract which provided for termination (for example, clause 5(b)), clause 4 did not provide for the recovery of the actual costs incurred by the builder up to the point when the contract was ended. This suggested that clause 4 was intended to operate in the period immediately after the contract was executed and before construction commenced.

    (e) The words "Before the commencement of the Works" in clause 4 were significant, and qualified the obligation imposed by clause 4.

    (f) Under clause 7 there was no obligation on the builder to commence works until 30 days after the period by which the owner was required to provide information under clause 4. It followed that the scheme of the contract allowed the builder to terminate the contract ***before*** commencement of works by reason of the combined operation of clauses 4 and 7 if the owner did not produce the evidence referred to in clause 4(a).

23. His Honour concluded:

    123. **Conclusion**: My conclusion as to the operation of cl 4 is as follows. The function of the words "Before the commencement of the Works" is to fix the point at which the obligation arises. If that point is passed then the obligation no longer exists. If by reason of satisfaction or otherwise the builder chooses to commence the works then it has extinguished any obligation upon the owner to provide the evidence that it might have insisted upon.

    124. Such an outcome could be described as the builder making an election to proceed with the works and to not require compliance with cl 4 …

    …

    126. The Builder has made an election in the sense that it has made a decision to take action which under the contract ends the period during which the obligation upon the

> owner exists. By doing so it necessarily disentitled itself from insisting upon compliance with cl 4(a) or taking the steps under cl 4(b) consequent upon a failure by the owner to comply with that obligation. Whether this is in fact described as an election or simply an interpretation of the contract which confines the operation of cl 4 to the period before the commencement of works does not really matter. The ultimate point is that the clause ceases to have effect at the point where building works under the contract have been commenced and it is no longer open to the builder to assert any non-compliance with that obligation.

24. Next, his Honour examined the contention of the Builder that the Builder was entitled to rely on clause 27(a)(v) to support the validity of the termination of the contract, because clause 27(a)(v) provided a freestanding obligation on the Owners to provide the Builder with evidence of having obtained finance and the Owners had breached this obligation. His Honour noted the argument that, by including failure to provide evidence of finance from a Lending Authority as a ground for termination, the contract had elevated this obligation to an essential term entitling the Builder to damages for loss of bargain upon its breach.

25. His Honour noted that some of the grounds for ending the contract under clause 27 did not involve breach of contract on the part of an owner (for example, the occurrence of an insolvency event), however a number of the grounds did involve breach including clause 27(a)(ii) which was referable to clause 4 of the contract. His Honour observed that it was possible for an owner to have complied with clause 4 (and therefore not have breached clause 27(a)(ii)) but have failed to provide evidence of having obtained finance (referable to clause 27(a)(v)). However his Honour continued:

> 143. It was suggested by the Builder that there should be implied, by reason of the terms of subparagraph (v), that to have failed to provide evidence of having obtained finance from the Lending Authority or to have the finance withdrawn is a breach of the contract. That contention might be supported by the reference in cl 27(b) to there having been a "default". However I do not consider that to be the correct approach. Having regard to the clause as a whole, involving some subparagraphs which identify breaches of obligations found elsewhere in the contract and another which clearly involves no breach of such obligations, the implication of a breach of contract as a result of the terms of subparagraph (v) is not warranted.
>
> 144. Rather, each of the subparagraphs in cl 27(a) merely provides a circumstance which might lead to the ending of the contract and any question of breach of that contract is dealt with by the statement at the end of cl 27(a) that the ending of the contract does not affect a builder's "other rights". Such an interpretation means that subparagraphs (v) and (vi) are, in contrast to the earlier subparagraphs, triggers for the ending of the contract which do not involve a breach of the contract.

26. His Honour also concluded that there was no entitlement to damages on the part of the Builder arising from clause 27(a)(v), because the existence of facts that fell within the scope of either of the limbs of clause 27(a)(v) did not constitute a breach of the contract. Critically, his Honour said:

> 146. … the present case involves, in relation to cl 27(a)(v), the exercise of an entitlement to end the contract for reasons that do not involve a breach of the contract by the Owners.

27. However, his Honour concluded at [152] that even if he were wrong in his interpretation of clause 27(a)(v), and a failure on the part of the Owners to provide to the Builder evidence that the Owners had obtained finance amounted to a breach of the terms of the contract, it would no longer be open to the Builder to rely upon that failure in order to support the validity of the termination of the contract. Notice was not given by the Builder of any intention to terminate the contract on the ground identified in clause 27(a)(v) – the letter dated 2 August 2013 clearly related to clause 27(a)(ii) (which was, in turn, referable to clause 4 of the contract).

28. Finally, his Honour considered the Owners' counterclaim, which in his Honour's view arose from a characterisation of the invalid termination and refusal to continue with the building project as a repudiation of the contract or abandonment of the contract entitling the Owners to put an end to the contract under clause 26. The Owners sought damages to put themselves into the position they would have occupied had the contract been performed, namely $40,900.00. However, his Honour examined the method by which the Owners had calculated the damages they claimed, and concluded that it did not account for contractual variations. Accordingly, the Owners failed to prove their damages with the result that they were entitled only to nominal damages.

Appeal

29. The Builder appealed against the decision of his Honour on the following grounds:

    (a) the primary judge erred in finding that the Owners' obligations under clause 4 of the Contract ceased upon the commencement of works by the Builder;

    (b) the primary judge erred in finding that by commencing works the Builder made a binding election;

    (c) the primary judge erred in finding that clause 27(a)(v) did not impose obligations upon the Owners or permit the Builder to terminate the Contract;

    (d) the primary judge erred in finding that clause 27(a)(v) was not an essential term of the Contract; and

    (e) the primary judge erred in finding that upon termination of the Contract the Builder was not entitled to claim damages.

30. In support of the appeal the Builder argued, in summary:

    (a) The contract is to be interpreted in accordance with the meaning which would be conveyed to reasonable persons in the situation of the parties.

    (b) The parties to the contract in question were lay persons using a standard form agreement.

    (c) Clause 4 of the contract fixed the time by which the Owners were to provide evidence of their capacity to pay the contract sum, namely prior to the commencement of the works (clause 4(a)) or within 10 days of entering into the contract (clause 4(b)). Clause 4(a) and clause 4(b) were separate obligations. The Owners were in breach of these separate obligations.

    (d) The primary Judge erred in his interpretation of the contract. His Honour's interpretation assumed the contract created a scheme which limited or curtailed the rights of the Builder. Protections of the Builder would be enhanced by recognition of continuing obligations on the part of the Owners to provide evidence of their capacity to pay for the works if for any reason they failed to provide that evidence before the works commenced.

    (e) It would be an uncommercial and unrealistic interpretation of the contract if as soon as the Builder performed such rudimentary tasks as turning a sod of soil, putting up a fence or installing a portable toilet on the site, the obligation of the Owners to provide evidence of their capacity to pay for the works were forever extinguished.

(f) In this case the primary Judge found that the works commenced on the same day that the contract was signed, which meant that pursuant to his Honour's interpretation the Owners never had an obligation to comply with clause 4.

(g) The primary Judge's interpretation rendered otiose the words "within 10 days of this Contract" in clause 27(b).

(h) Clause 4 should be read as having a similar operation to clause 20, which required the Owners to pay the deposit before the commencement of the works. Failure to pay the deposit was a breach that triggered the right to terminate under clause 27(a)(iv).

(i) His Honour erred in relying on clauses 5, 15 and 16 of the contract. Each of these clauses involved grounds to terminate without any default by the Owners. Clause 4 imposed an obligation on the Owners, which is not conditional upon any request by the Builder, unlike clauses 6(e) and 15(c)(iv) where the Builder "may require" the Owner to produce evidence.

(j) The Owners did not plead a case of election. The primary Judge made no findings about whether the Builder made any conscious decision to act.

(k) The Builder was entitled to rely upon clause 27 (a)(ii) of the Contract to terminate, and did not need to rely upon clause 27(a)(v). The finding of the primary Judge that the notice was defective because it "failed to expressly cite sub-clause 27(a)(v)" involved an overly technical interpretation of the contract.

31. The Owners submitted, in summary, that:

(a) The primary Judge's reasoning was correct.

(b) The express words of clause 4 clearly show that the obligation is to be fulfilled before commencement of the works.

(c) The Court should reject the argument that clauses 4 and 20 operate similarly.

(d) Clauses 5, 15 and 16 are relevant in the interpretation of clauses 4 and 27.

(e) The Builder elected to commence work without requiring the Owners to comply with clause 4.

(f) Clause 27(a)(v) was a trigger for termination but did not contain a freestanding obligation.

(g) Clauses 4, 7 and 27(a)(ii) set out a regime for provision of evidence of the owner's capacity to pay and the consequences of compliance and non-compliance. Clause 27(a)(v) provides a mechanism for termination of the contract, but there was no anterior obligation.

(h) For a termination notice to ground a valid termination on the basis of a failure to comply with clause 27(a)(v), it had to specify that as the default requiring cure. No default under clause 27(a)(v) was specified in the termination notice.

(i) Even if clause 4 had been an essential term of the contract, once the Builder chose to commence demolition of the Owners' house without having obtained evidence of finance any residual obligation under clause 4 lost the quality of essentiality. It follows that the Builder would not be entitled to terminate the contract on that basis.

Consideration

32. No factual findings by his Honour relevant to the appeal were challenged by the parties.

33. The case turns on the operation of key contractual provisions, including the following:

(a) Clause K in **PART 1 – OVERVIEW** which provided:

K. OWNER'S RESPONSIBILITY BEFORE COMMENCEMENT OF WORK:

a) Evidence of building and planning approvals if it is the **Owner's** responsibility;

b) Evidence that the **Owners** own the property, eg Certificate of Title or Rates Notices;

c) Evidence from the lending authority that monies are approved;

d) Evidence or some other proof that the **Owners** have the capacity to pay the **Builder** in the Manner specified in the Appendix B item B1;

e) Any other proof that the **Builder** may require the **Owner** to show the capacity to pay the Contract price.

(b) Clause 4 in **PART 3 – GENERAL CONDITIONS OF CONTRACT** which provided:

OWNER'S RESPONSIBILITIES BEFORE COMMENCEMENT OF WORK

a) Before the commencement of the Works, the **Owner** will show the **Builder** reasonably satisfactory:

i) evidence of the **Owner's** title; and

ii) evidence of the **Owner's** capacity to pay the Contract Sum to the **Builder** at the times and in the manner specified.

b) If the **Owner** does not produce that evidence within ten (10) days of this Contract, the **Builder** may end this Contract under Clause 27.

(c) Clauses 5 in **PART 3 – GENERAL CONDITIONS OF CONTRACT** which provided:

BUILDING APPROVAL

a) The party identified in Item A8 of Appendix A will obtain and pay for all planning and **Building Approvals**.

b) If **Building Approval** is not issued within sixty (60) days of this Contract, either party may by written notice to the other, end it without liability to the other except that the **Builder** is entitled to be paid the **Actual Cost** incurred plus the percentage in Item A18 of Appendix A up to the date this Contract is ended.

(d) Claus 6(e) in **PART 3 – GENERAL CONDITIONS OF CONTRACT** which provided:

For that part of the Contract Sum to be provided by a Lending Authority:

…

e) The Builder may require the Owner to produce written consent of the Lending Authority to, any, variation before the variation is done.

(e) Clause 7(a) in **PART 3 – GENERAL CONDITIONS OF CONTRACT** which provided :

a) The Builder will commence the Works:

i) On the date in Item A9 of Appendix A or;

ii) Within thirty (30) days of the **Owner** complying with Clause 4 (**Owner's** responsibility); or

iii) Within fifteen (15) days of receipt of the **Building Approval**, whichever is the latest.

(f) Clause 27 in **PART 3 – GENERAL CONDITIONS OF CONTRACT** which provided :

THE BUILDER ENDING THIS CONTRACT

a) If the **Owner** :

i) Refuses the **Builder** access to the Site at any time after commencement of the Works;

ii) Fails to comply with Clause 4;

iii) Fails to pay the **Builder** any progress payment within seven (7) days of a written request or within the period in Item A 1 of Appendix A, whichever is longer;

iv) Fails to pay the deposit required by Clause 20;

v) Fails to provide the **Builder** with evidence that the **Owner** has obtained finance from the Lending Authority or has the finance withdrawn; or

vi) Being a natural person becomes insolvent or being a corporation suffers an **Insolvency Event**;

the **Builder** may, without affecting the **Builder's** other rights, by notice in writing end this Contract.

b) If the default in sub-Clause (a) is capable of remedy, the Builder may not end this Contract unless the default continues for five (5) days after notice in writing has been given to the Owner specifying the default and stating the Builder's intention to end this Contract.

34. Appendix A to the Contract set out details the Owner and the Builder were required to complete. Clause A8 of Appendix A provided for "Planning and Building Approvals", and required nomination of the relevant party to obtain and pay for planning and building approval to commence "the Building Works". Clause A8 provided further:

> (If no person nominated, then the Builder is responsible)

35. The identity of the relevant party to obtain and pay for this approval was left blank in the contract, meaning that the Builder was responsible.

36. Clause A9 of Appendix A required nomination of the "Commencement Date". This was also left blank. The fine print to Clause A9 provided:

> A specific starting date should only be specified if all planning and Building Approvals have been obtained and have been received by the Builder.

37. The key issues identified by the parties in their written and oral submissions were:

(a) the effect of clause 4 of the contract; and

(b) the nature of clause 27(a)(v) of the contract.

38. In our view, his Honour's conclusions on those issues were correct for the reasons his Honour gave.

39. In this appeal extensive submissions were made in respect of principles of contractual interpretation, the proper interpretation of clause 4 of the contract, and the relevance of clause 27(a)(ii) and clause 27(a)(v) of the contract. Key issues identified, in particular by the Builder, concerned the operation and effect of these clauses.

40. The principles of contractual interpretation identified by the Builder were not controversial and need not be addressed in detail. It is sufficient to accept and, as we do, apply the principles that the interpretation is an objective one, giving the words used a meaning that would be conveyed to a reasonable person in the situation of the parties, giving each and every one of the words used a meaning, avoiding overly narrow, technical or artificial interpretations and avoiding an interpretation that leads to an unreasonable, inconvenient or unjust result but one consistent with business common sense subject to the objective meaning of the actual words used.

41. Clause 4 provides the Builder with protection, entitling the Builder to terminate the contract without expending time or money on the work the subject of the contract if the Owner does not provide evidence of its title and capacity to pay the contract sum. Clause 4(a) should be read with clause 4(b), which prevents the Owner delaying the provision of information to which clause 4(a) refers. In this respect, clause 4(b) imposes a time limitation of 10 days by when the Owner is required to provide the Builder reasonably satisfactory evidence of the Owner's capacity to pay the contract sum to the Builder, in default of which the Builder may elect to terminate the contract.

42. It follows that until this evidence was provided to the Builder, the Builder was not obliged to "commence the Works" the subject of the contract.

43. Fundamentally, however, and as his Honour explained in detail, even if clause 4 created an obligation on the part of the Owners, breach of which entitled the Builder to terminate the contract, it was an obligation that ended when the Builder commenced the Works. On the facts of the case the Builder had clearly elected to waive compliance by the Owners with clause 4, and waive the protection afforded to the Builder by that clause. It is not in dispute in this case that the Builder chose to commence demolition of the Owners' house – thus undoubtedly "commencing" the Works on these facts – on the day the contract was signed. The Builder chose not to wait even one day from the date the contract was signed, much less the 10 days to which he was entitled, before commencing work in accordance with the contract. It follows that, as a result, the Builder was not entitled to rely on the absence of evidence provided by the Owners under clause 4 as a basis to terminate the contract.

44. Equally, we consider that in this case the Builder can take no comfort from either clause 27(a)(ii) or clause 27(a)(v) in its claim that it was entitled to terminate the contract on account of the Owners' breach of the contract.

45. Clause 27(a)(ii) specifically entitles the Builder to terminate the contract where the Owners have "failed to comply" with clause 4. However, in this case the Owners did not "fail" to comply with clause 4. The Builder commenced work before the Owners provided evidence to the Builder of title or capacity to pay the contract sum. The obligations of the Owners under clause 4 were, accordingly, waived by the Builder. Indeed, the result of the Builder's actions in commencing work prior to the provision of the evidence by the Owners was that the Owners were left ***unable*** to comply with clause 4 according to its terms.

46. Clause 27(a)(v) is expressed in general terms referable to the failure of the Owner to provide the Builder with evidence that the Owner had obtained finance from the lending

authority. Clause 27(a)(v) may be compared with clause 4 and clause 27(a)(ii), which refer to the obligation on the Owners to provide evidence of their ability to pay the contract sum to the Builder. As his Honour noted, the right of the Builder to terminate the contract conferred by clause 27(a)(ii) related directly to circumstances where the Owners were in breach of the obligation imposed on them by clause 4. No equivalent contractual obligation was imposed on the Owners to which clause 27(a)(v) related.

47. In this case we do not see how the Owners "fail[ed] to provide the Builder with evidence that the Owner ha[d] obtained finance from the Lending Authority". Even if his Honour was incorrect in finding that no implied contractual obligation was imposed on the Owners to do so by clause 27(a)(v) – and we are not satisfied that his Honour's reasoning was flawed in this regard – there was no evidence before his Honour that the Builder had demanded the Owner provide this information pursuant to clause 27(a)(v). Further, and equally significantly, at no point did the Builder purport to terminate the contract on the basis that the Owners had "fail[ed] to provide the Builder with evidence that the Owner ha[d] obtained finance from the Lending Authority". In the letter of 2 August 2013, lawyers for the Builder wrote:

> As construction of your residence is being funded by a bank, we need to ensure that there are sufficient funds available to cover the full cost of construction***. As set out in clause 4 of the Contract you were to provide RDevelopments with evidence of the sufficiency of funds prior to the commencement of construction, however you have not yet done so***.
>
> If this evidence is not supplied we are entitled to protect ourselves be [sic] ending the contract ***in accordance with clause 27***, and we intend to do so if you do not provide evidence within 5 days.
>
> (emphasis added)

48. The Builder submitted, in substance, that the terms of the letter of 2 August 2013 should be read to refer to events contemplated by both clause 27(a)(ii) and clause 27(a)(v). We do not accept this argument. In the letter of 2 August 2013, the Builder specifically referred the Owners to their alleged failure to comply with ***clause 4*** of the contract, which was in turn relevant to clause 27(a)(ii). Demonstrating an owner's capacity to pay the contract sum (clause 4 and clause 27(a)(ii)), and the provision of evidence that an owner has obtained finance from a lending authority (clause 27(a)(v)), are separate matters. While the letter from the Builder's lawyer noted that the Owners were obtaining bank funding, there was no complaint in the letter that the Owners had "failed" to provide the Builder with evidence that the Owner had obtained finance from the relevant lending authority, which complaint would have been referable to clause 27(a)(v).

49. In *FPM Constructions Pty Ltd v Council of the City of Blue Mountains* [2005] NSWCA 340, Basten JA observed:

> 147 What constitutes a sufficient specification of an alleged substantial breach, so as to satisfy the terms of cl 44.3(b)? On one view, it may be sufficient to specify a breach in terms of one of the paragraphs in cl 44.2, or by identifying some other course of conduct at an equivalent level of generality. On the other hand, it may be argued that greater particularity in relation to the specific conduct or lack of activity on the part of the contractor may be required. Thus, in *Re Stewardson Stubbs and Collett Pty Ltd v Bankstown Municipal Council* (1965) NSWLR 1671 at 1675 (50) Moffitt J noted in relation to a contractual provision in somewhat simpler terms:
>
> > "A default can be specified in two ways; one is by directing attention to the provision in the contract in respect of which default is made. The other is by giving particulars of the manner in which a breach has occurred. ***In order to specify the default I think at least the former must be pointed out. But each case will depend on its own circumstances as to whether in order to specify the default there must be added some particulars such as will identify the particular breach alleged*** … The question of what precisely constitutes a failure to proceed with reasonable diligence is

> a matter of some difficulty. However, it is an allegation of a general failure to proceed with that degree of promptness and efficiency that one would expect of a reasonable builder who has undertaken a building project in accordance with the terms of the contract in question."
>
> 148 A similar approach was adopted by Megarry J in *Hounslow London Borough Council v Twickenham Garden Developments Ltd* (1970) 1 Ch 233 at 265. In considering the precision with which a "default" needed to be identified, Megarry J stated:
>
> I do not read the condition as requiring the architect, at his peril, to spell out accurately in his notice further and better particulars, as it were, of the particular default in question. All that I think that the notice need do is to direct the contractor's mind to what is said to be amiss … If the contractor had sought particulars of the alleged default and had been refused them, other considerations might have arisen.

50. The Builder sought to rely on the reference by Moffitt J to the fact that "each case will depend on its own circumstances", but that referred to the extent to which particulars must be given of the manner of the breach and does not qualify the clear requirement in any event to point out the provision of the contract in respect of which default is alleged to have been made. In this case, the only default mentioned was the claimed breach of clause 4.

51. As we noted earlier, we consider persuasive the extensive and thoughtful discussion by his Honour that clause 27(a)(v) did not create a freestanding obligation on the part of the Owners. In any event however, we are satisfied that the termination notice of the Builder dated 2 August 2013 did not, either expressly or by implication, invoke clause 27(a)(v). To the extent that the Builder sought to rely on clause 27(a)(v), the notice did not adequately identify the alleged breach of contract or, to adopt the language of Megarry J in *Hounslow London Borough Council v Twickenham Garden Developments Ltd* (1970) 1 Ch 233, direct the Owners' minds to what was said to be amiss. We take this view in circumstances where clause 27(a) sets out different triggering events entitling the Builder to terminate, and it is reasonable that the Owners on whom a termination notice is served be explicitly informed as to the reason for termination so as to give them adequate opportunity to respond. To that extent, we consider it unnecessary to consider whether clause 27(a)(v) constituted an essential term of the contract as explained in such cases as *Luna Park (NSW) Ltd v Tramways Advertising Pty Ltd* (1938) 61 CLR 286 at 304-305, *Associated Newspapers Ltd v Bancks* (1951) 83 CLR 322 and more recently by the High Court in *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Limited* [2007] HCA 61; 233 CLR 115 at [43]-[56].

Conclusion

52. In our view the grounds of appeal of the Builder are not substantiated. The appeal should be dismissed, with costs.

I certify that the preceding fifty-two [52] numbered paragraphs are a true copy of the Reasons for Judgment of the Court.

Associate:

Date: 31 August 2017