

LEGAL NOTEBOOK

Recent cases, headline issues and new legislation by
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ALL ROAD(WAY)S LEAD TO A CONTRACTUAL DISPUTE

SNAPSHOT

The recent decision of *RV Pty Limited v Connector Park Pty Ltd (No 2)* [2017] TASSC 22 concerned a dispute between two land development companies in relation to a contract which required the construction of an access road.

The judgment provides a strong reminder of the importance of complying with contractual provisions, and doing so in a timely manner.

THE FACTS

- Two land development companies subdivided adjacent parcels of land on the outskirts of Launceston.
- The plaintiff, RV Pty Limited (RV), undertook a residential subdivision (Mount Pleasant Subdivision) and the defendant, Connector Park Pty Ltd (Connector Park), undertook a commercial and light industrial subdivision of its adjoining land.
- The two companies entered into a contract dated 26 August 2004 (Contract) which, amongst other things, required Connector Park to:
 - complete construction of a roadway by 6 January 2005 (Roadway); and
 - do all things necessary to ensure the Roadway was taken over as a road maintainable by the Launceston City Council (Council) by 6 July 2005.
- In breach of the Contract, Connector Park failed to do those things by the required dates.

THE PROCEEDINGS

RV commenced proceedings on 21 February 2006 seeking specific performance of the Contract and claiming damages.

On 17 June 2008, the Court ordered Connector Park to specifically perform its contractual obligations. The construction of the Roadway was ultimately completed in July 2008, almost three and a half years after the date specified in the Contract.

As a result of this delay, a large portion of RV's land remained unsubdivided until the granting of a permit for subdivision was issued by the Council in August 2009. RV's claim for damages proceeded before the Court in May 2016, and judgment was delivered in April 2017.

RV'S CLAIM

RV claimed damages for lost opportunity. It alleged Connector Park's failure to construct the Roadway in accordance with its contractual obligations represented a clear breach of contract and but for that breach:

- The Roadway would have been constructed no later than 6 January 2005, and Council would have taken over the Roadway no later than 6 July 2005.
- RV would have pursued development applications and planning permits from Council for the Mount Pleasant Subdivision about three and a half years earlier than it did.
- There was a substantial and not merely speculative prospect that RV would have acquired the benefit of subdivision approval from the Council about three and a half years earlier than it did.

RV also contended the failure of Connector Park to construct the Roadway delayed the receipt of cashflow from the developments which it was ultimately able to undertake and thereby caused it substantial financial loss.

RV adduced evidence at trial from a chartered accountant quantifying the losses, as at September 2014, as between \$1.879 million to \$2.71 million.

THE COUNTERCLAIM

Connector Park brought a counterclaim against RV for \$440,000 inclusive of GST.

Pursuant to the Contract, RV was required, subject to certain terms and conditions, to pay Connector Park three instalments totalling \$880,000 inclusive of GST. However, whilst RV paid the first instalment of \$440,000 in June 2005, it did not make any further instalment payments. RV contended that, on a proper construction of the Contract, it was not required to do so because its liability to pay was conditional



upon Connector Park performing its contractual obligations in relation to the construction of the Roadway in a timely manner.

FINDINGS

CONNECTOR PARK'S COUNTERCLAIM

The Court found Connector Park was entitled to judgment for \$440,000 on the counterclaim.

The Court applied the proper approach to the interpretation of the Contract as stated by the High Court in Toll (FCGT) Pty Ltd v Alphapharm Pty Ltd (2004) 219 CLR 165 at [40]: *The meaning of the terms of a contractual document is to be determined by what a reasonable person would have understood them to mean.*

That, normally, requires consideration not only of the text, but also of the surrounding circumstances known to the parties, and the purpose and object of the transaction.

Looking at the text of the relevant clause in the Contract, the Court found:

- If the parties had intended monies to be payable under the clause only if contractual obligations were fulfilled on time, they could have “very easily” used words to make that intention clear.

THE CONSEQUENCES FOR A BREACH OF CONTRACT WILL DIFFER DEPENDING ON WHETHER A CONTRACT HAS EXPRESS PROVISIONS WHICH MAKE TIME OF THE ESSENCE

- The use of the word “consideration” in the relevant clause suggested an intuition that Connector Park was to be paid for doing what it promised to do, as opposed to only getting paid if its contractual obligations were completed within a certain time.

RV'S CLAIM FOR DAMAGES

Ultimately, the Court entered judgment for RV against Connector Park for \$2.52 million on the primary claim.

WAS TIME OF THE ESSENCE?

The consequences for a breach of contract will differ depending on whether a contract has express provisions which make time of the essence. For example:

- Where time is of the essence, the innocent party may be entitled to terminate the contract following a breach.
- Where time is not of the essence, the innocent party may be entitled to damages at common law following a breach.

In this case, the Court accepted, even though there were express provisions in the Contract which provided time was not of the essence, this made no difference in relation to RV's claim for damages. This was because:

- At common law, stipulations as to time were deemed to be of the essence of a contract, so that a failure to adhere to a time stipulation would entitle the other party to terminate the contract.
- However, Courts of equity developed a doctrine that, as a general rule, time stipulations would be treated as not of the essence.

- Now that the rules of common law and equity are administered concurrently, the equitable rules prevail - and Courts of equity never held that a party who failed to perform a contractual obligation on time was not liable for damages for breach.

A FAILURE TO MITIGATE?

The Court dismissed Connector Park's contention that RV failed to mitigate its loss by failing to engage another contractor to complete the Roadway within a reasonable time after the alleged breach.

It was accepted by RV that, in accordance with common law principles, it had a duty to take all reasonable steps to mitigate its loss. In this situation, the Court held there were no reasonable steps available to RV, primarily due to the fact “*the land over which the [R]oadway was to be constructed belonged to [Connector Park]*”. Whilst RV had a right of carriageway, Connector Park was at all time the dominant owner. As stated by the Court:

[RV] did not have a legal right to complete all the roadworks that the [C]ontract required [Connector Park] to complete. It or a contractor could only have completed the relevant works by committing an actionable trespass.

SUBDIVISION OBSTACLES

Ultimately, RV was able to demonstrate a history of “*repeated and reasonable efforts to proceed with the Mount Pleasant [S]ubdivision beyond Stage 1*”.

In looking at the chronology of RV's development applications over a period of five years, the Court was satisfied that but for Connector Park's breach of contract, RV would have acquired the benefit of subdivision approvals from the Council much earlier than it did. Despite recognising many obstacles to Council subdivision and planning

approval (including traffic, storm water, heritage, visual impact, demand, and orderly planning issues), the Court found that, if the Roadway had been constructed in accordance with the Contract (that is, by 6 January 2005), RV had a strong chance of satisfying the Council in relation to each of the issues.

OVERALL

In light of the above, it was clear from the history of RV's dealings (including with the Council) that the only substantial obstacle to the granting of permits for the subdivision development after Stage 1 was the absence of a suitably constructed Roadway. It was this obstacle which ultimately caused RV loss.

Connector Park was therefore found liable to RV in damages for breach of contract in respect of the loss of the opportunity to develop the Mount Pleasant Subdivision earlier than was ultimately possible.

QUANTUM

The Court considered the competing expert evidence relating to the calculation of loss in detail, and determined that a payment of \$2.2 million in September 2014 would have been appropriate to compensate RV for its lost commercial opportunity. Once interest of \$320,000 (calculated at 5.65 per cent) was added to this sum, the total judgment sum came to \$2.52 million.

CONCLUSION

The decision confirms the well accepted approach to the interpretation of critical words in a contract is: what would a reasonable person have understood them to mean? In that way, if parties have a specific intention, they should make that intention clear by using precise language. Ambiguity or lack of clarity is a recipe for disaster.

The decision also confirms the well-known importance of complying with all contractual provisions, and doing so in a timely manner - regardless of whether time is said to be of the essence.



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