LegalWise Seminar 26th Nov 2015

Reasonable Endeavours

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13 WENTWORTH SELBORNE CHAMBERS

1. There are numerous efforts or endeavours standards, including "best efforts," "reasonable efforts," "commercially reasonable efforts," "commercial best efforts," "all reasonable efforts," and "all efforts," to name a few.

2. The question of this paper is: what do they mean, in NSW?

CONTEXT: APPROACH TO CONSTRUCTION / INTERPREATION OF CONTRACTS

3. The purpose of contractual interpretation is to establish what the parties "intended" their contract to mean. When the contract has been wholly reduced to writing, the intention of the parties to the contract is established by determining what a reasonable person in the position of the parties would have understood the terms of the contractual document to mean: see eg Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd (2004) 219 CLR 165 at 179 [40]; Pacific Carriers v BNP Paribas (2004) 218 CLR 451 at 461-462 [22]. This establishes the objective intention of the

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parties. In the context of a commercial contract, the reasonable person is a reasonable businessperson: Electricity Generation Corporation v Woodside Energy Ltd (2014) 251 CLR 640 at 656-657 [35].

4. The intention of the parties is not established by considering the subjective beliefs or understandings of each party at the time they entered into the contract. Evidence of a party's subjective understanding of the contract is ordinarily inadmissible: see e.g. Toll (FGCT) at [35]; DTR Nominees Pty Ltd v Mona Homes Pty Ltd (1978) 138 CLR 423 at 429.[1]

5. Since the intention of the parties is established by determining what a reasonable person in the position of the parties would have understood the terms of the contractual document to mean, in interpreting the meaning of the words used in a written document it is relevant for the Court to consider the "surrounding circumstances" or "factual matrix" or "context" (these phrases being used interchangeably by Courts). When construing a commercial contract, the "surrounding circumstances" includes the commercial purpose of the contract, the genesis of the transaction between the parties, and the background, the context, and the market in which the parties were operating. See Pacific Carriers at [22]; Electricity Generation at [35].

6. It has traditionally been said that evidence of surrounding circumstances is admissible to interpret a contract, but only if the words used are ambiguous : see Codelfa Construction Pty Ltd v State Rail Authority of

[1] Exceptions include where the case is one for rectification or in deceit.

New South Wales (1982) 149 CLR 337 at 352. ("the rule in Codelfa") .

The question courts have grappled with is whether one must first consider whether the language is "ambiguous" before evidence of the surrounding circumstances is admissible; or only after such process.

The New South Wales Court of Appeal in two recent decisions, Franklins Pty Ltd v Metcash Trading Ltd (2009) 76 NSWLR 603 at [17] (Allsop P), and Mainteck Services Pty Ltd v Stein Heurty SA (2014) 310 ALR 113 at [79] (Leeming JA), has held in favour of the latter approach.

The High Court in Electricity Generation stated the "surrounding circumstances" rule without referring to the need to first identify any "ambiguity" (at [35]).

7. Another limit on the admissibility of evidence of surrounding circumstances is the "parol evidence rule": see LG Thorne & Co Pty Ltd v Thomas Borthwick & Sons (A/Asia) Ltd (1956) 56 SR (NSW) 81 at 88, 91. But that is for another lecture.

8. As to the vexed question of whether evidence of prior negotiations is or is not admissible as part of the surrounding circumstances, see further per Mason J in Codelfa at 352.

9. Various canons of construction are applied by to arrive, objectively, at the common intention of the parties. These are not inflexible rules and include as follows:

(a) The text is to be given its plain, natural or ordinary meaning. Courts construe the words so as to avoid making a commercial nonsense of the contract or working commercial inconvenience: Electricity Generation at [35]; and the Court will not take a "narrow" or "pedantic" approach to the words used: Upper Hunter County District Council v Australian Chilling and Freezing Co Ltd (1968) 118 CLR 429 at 437;

(b) Where the plain, natural or ordinary meaning of the words used would result in absurdity or inconsistency, the Court may supply, omit or correct words in order to avoid the absurdity or inconsistency: Fitzgerald v Masters (1956) 95 CLR 420 at 426-427;

(c) In interpreting any part of the text, the whole of the document or instrument must be considered, and the words of every clause must if possible be construed so as to render all the clauses in the document or instrument as harmonious; therefore, it is permissible to depart from the ordinary meaning of the words of one clause so far as it is necessary to avoid an inconsistency between that clause and the rest of the instrument: Australian Broadcasting Commission v Australasian Performing Right Association Ltd (1973) 129 CLR 99 at 109;

(d) Each clause of a written document should be interpreted to give meaning to it, so that no clause is superfluous, void or insignificant, "where it is possible to do so": see Peppers Hotel

Management Pty Ltd v Hotel Capital Partners Ltd [2004] NSWCA 114; (2004) 12 BPR 22,879 at [61], [84]; and

(e) The Court has no power to remake or amend a contract; therefore, the Court must give effect to the words used if the words are unambiguous, notwithstanding that the result may appear capricious and unreasonable and notwithstanding that it may be suspected that the parties intended something different; however, if the words used are susceptible of more than one meaning, the Court will adopt the meaning that avoids consequences which appear to be capricious, unreasonable, inconvenient or unjust: Australian Broadcasting Commission at 109.I

(f) One of the strict limitations on the sort of materials that can be used for the purposes of detecting the objective intention of the parties, is that subsequent conduct in not admissible on the question of construction: Franklins Pty Ltd v Metcash Trading Ltd [2009] NSWCA 407; (2009) 76 NSWLR 603

10. In Electricity Generation Corporation v Woodside Energy Ltd,[2] the High Court dealt with a 'reasonable endeavours' clause, see para [40-43]. The plurality observed that three general observations can be made about obligations to use reasonable endeavours to achieve a contractual

[2] [2014] HCA 7 at [41]; (2014) 251 CLR 640 at [41].

object.[3]

(i) An obligation expressed thus is not an absolute or unconditional obligation.[4]

(ii) The nature and extent of an obligation imposed in such terms is necessarily conditioned by what is reasonable in the circumstances, which can include circumstances that may affect an obligee's business.[5]

(iii) Some contracts containing an obligation to use or make reasonable endeavours to achieve a contractual object contain their own internal standard of what is reasonable, by some express reference relevant to the business interest of an obligor.[6]

11. Two of the cases cited were CPC Group Ltd v Qatari Diar Real Estate Investment Co [2010] EWHC 1531 (Ch) and Yewbelle Ltd v London Green Developments [2008] IP & CR 279. Those cases, in turn, refer to the analysis of 'reasonable endeavours' in Rhodia International Holdings Ltd v Huntsman International LLC [2007] EWHC 292 (Comm) at [30] et seq, and to Lewison J's analysis in Yewbelle v London Green Developments [2006] EWHC 3166(Ch) at 122-123

12. At [33-35] of Rhodia the Court concluded that reasonable endeavours was 'less stringent' than best endeavours and should be construed

[3] [2014] HCA 7 at [41]; (2014) 251 CLR 640 at [41].
[4] [2014] HCA 7 at [41]; (2014) 251 CLR 640 at [41].
[5] [2014] HCA 7 at [41]; (2014) 251 CLR 640 at [41].
[6] [2014] HCA 7 at [43]; (2014) 251 CLR 640 at [43].

accordingly. The distinction between the concepts, based upon the analysis in Rhodia, was applied by Refshauge J in Stepping Stones Child Care Centre (ACT) v Early Learning Services P/L [2013] ACTSC 173 at [277-283], where his Honour concluded that an obligation to use 'reasonable endeavours', simpliciter, "is not as onerous as one to use 'best endeavours' or 'all reasonable endeavours'".

(though see Kaymet's case, below, where this was not followed in NSW)

13. In Stepping Stones Child Care Centre (ACT) Pty Ltd v Early Learning Services Limited, a purchaser of several child-care centres was required to use their 'reasonable endeavours' to satisfy the conditions precedent to completion. Refshauge J, while accepting that 'best endeavours' is assessed on a standard of reasonableness followed English authorities which hold that there is a hierarchy, with 'best endeavours' the most onerous and 'reasonable endeavours' the least. However, HH did not articulate any significant distinction between the 'reasonable' and 'best' and, for the most part, his reference was made to case law analyzing the attributes of 'best' endeavours.

14. A helpful analysis of the meaning of the contractual phrases "best endeavours", or 'all reasonable endeavours" and "reasonable endeavours" is provided in S A Christensen and W D Duncan, The Construction and Performance of Commercial Contracts,[7] an excerpt from which is set out below:

[7] The Federation Press, 2013, para [9.4.1.4], Pages 254-257.

While accepting an assessment as to whether a party has used best or reasonable endeavours is made upon the principle that a party is required to do no more than they reasonably can in the circumstances to achieve the contractual object, the application of the principle to varying situations is not straightforward. What constitute reasonable endeavours may differ depending upon the nature of the agreement, the obligations of the parties under the contract and whether the parties have provided a contractual standard for measuring what is reasonable. The steps or actions a reasonable person will take depend on what objectively has to be done to fulfil the condition in the context of the agreement and, therefore, requires an individual assessment of each factual situation. Australian courts have emphasized that the covenantor does not need to go beyond the bounds of what is reasonable to fulfil the condition or risk financial ruin to achieve the required result. The relevant principles appearing in the case law may be summarised as:

- An obligation to use best endeavours to achieve an outcome is neither an unqualified obligation to achieve that outcome nor a warranty that it will be achieved.

- The content of the obligation to use 'best' or 'reasonable' endeavours must be measured having regard to the contract as a whole, and to the factual context in which the best endeavours fall, to be exerted. This will include the

qualifications, abilities and responsibilities of the person obliged to exert them and may, depending upon the commercial purpose of the contract and relevant market, include matters affecting the person's business or commercial interests.

- Both reasonable and best endeavours include an obligation to act honestly and not to hinder or prevent the fulfilment of the contractual purpose.

- Both reasonable and best endeavours may involve the outlay of money if such a liability is within the contemplation of the parties as a possible condition of approval and the amount involved is not disproportionate. A likelihood of failure does not necessarily relieve the relevant party from taking steps, but a party may take into account their own commercial interests.

- The parties may agree upon a contractual standard for measuring what is reasonable which includes the business interests of the covenantor".

(footnotes omitted)

CONSTRUCTION/ INTERPRETATION: ARE RIGHTS AND OBLIGATIONS INTERDEPENDANT?

15. The dispute in Sydney Attractions Group Pty Ltd v Frederick v Schulman [2013] NSWSC 858 centred around a share sale deed dated 5 July 2004 (the **Deed**) entered into by i.a. the the parties to the proceedings. The effect of the Deed was to transfer the ownership, from the defendant to the plaintiff, of the business known as "Skytour", and a then-unconstructed but Council-approved structure to operate a proposed second business known as "Skywalk".
16. The Deed contemplated that the plaintiff would incur capital expenditure capital expenditure incurred in relation to the construction and completion of Skywalk" (the Skywalk Capital Expenditure.")
17. Under the Deed, the defendant was required, subject to other requirements, to reimburse to the plaintiff all "Skywalk Capital Expenditure" incurred by the plaintiff in excess of $5 million.
18. The plaintiff failed in its claim for reimbursement.
19. The defendant unsuccessfully cross claimed that the plaintiff breached its "good faith" obligations (under clause 13.9 of the Deed), and also that that the plaintiff breached its "reasonable endeavours" obligation (under clause 13.1(a)).

20. "The principles relevant to determining whether the relevant rights and obligations in the Deed are dependent on each other are:

    (1) the question is one of construction;
    (2) the more closely the obligations are linked to the rights, the easier it

will be to construe the rights as qualified by due observance of the obligation;

(3) if the obligation constitutes a substantial part of the consideration for the contract or right the court is likely to construe it as a dependent obligation. That is, to construe the right as qualified by due observance of the obligation; and

(4) a practical approach prevails, whereby the presumption is that obligations are dependent in character."

Para [45] Sydney Attractions Group Pty Ltd v Frederick v Schulman [2013] NSWSC 858.

DOES REASONABLE ENDEAVOURS EQUATE TO BEST ENDEAVOURS?

21. In Waters Lane v Sweeny [2007] NSWCA 200, Tobias JA (with whom Santow and Giles JJA agreed) discussed the approach taken by the primary Judge in that case and the comments of Gibbs CJ quoted above, and said (at [107]):

> "[107] If this means that there is no relevant difference between the standard constituted by the expression "all reasonable endeavours" and that constituted by the expression "best endeavours" then so be it. However, it is unnecessary to express any final conclusion on that possibility. Suffice it to

> say that in the present case the description articulated by Gibbs CJ in Hospital Products of what is required to satisfy the obligation to use "best endeavours" is directly applicable to the obligation to use "all reasonable endeavours" …

Waters Lane: Case Study

Sweeny owned a 200ha property at Denham Court, used as a horse riding range.

Howard saw potential to develop the property and entered into a Heads of Agreement (HoA) with the respondents. Pursuant to the HoA, in or about December 2003, Howard, through his companies, advanced a total of $9,900,000 to the respondents which was used to pay to their creditors. A comp-nay controlled by Howard took a mortgage.

The HoA included a clause (4.1) which provided:

"4.1 The Developer must use all reasonable endeavours to satisfy the Conditions Subsequent by the Sunset Date and shall for those purposes at its cost:"

The "Sunset Date" was defined as two years after the commencement of the HoA.

The appellants also had, under cl 4.5 of the HoA, a unilateral right to extend that sunset date by a further two years by serving a notice on the respondents to that effect. The "Conditions Subsequent" related to the rezoning of the property and the granting of a development consent to its development for residential purposes.

Cl 4.3 stipulated as follows:

The Developer must promptly notify Sweeney in writing if any Condition Subsequent is satisfied or cannot be satisfied.

Clause 12.1 of the HoA required Waters Lane to provide a further $2 million to the Sweeneys 30 days after giving a notice pursuant to cl 4.5. The original sunset date was 9 March 2006 and at no time did the appellants issue a notice compliant with cl 4.5.

The Sweeneys alleged (and the primary judge found) the following "material breaches" of the HoA.

"Breach 3

In breach of clauses 4.1 and 7.1 of the HoA, Waters Lane as the Developer has failed to use all reasonable endeavours to satisfy the conditions subsequent by the Sunset Date of 9 March 2006.

Breach 4

In breach of clause 4.1(a) of the HoA, Waters Lane as the Developer has failed to engage and retain appropriate experienced and qualified consultants for the preparation of all necessary designs, plans (including plans of subdivision) and specifications for the Project for the purpose of satisfying the conditions subsequent by the Sunset Date.

Breach 5

In breach of clause 4.3 of the HoA, Waters Lane as the developer has failed to promptly notify the Sweeneys in writing that any condition subsequent cannot be satisfied by the Sunset Date of 9 March 2006.

...

Breach 8

In breach of clauses 4.1 and 9.4(b) of the HoA, Waters Lane as the Developer has not lodged any applications for the Project or, alternatively, has not lodged all applications necessary to satisfy the condition subsequent by the Sunset Date."

22. In Wolseley Investments Pty Ltd v Gillespie (2007) 13 BPR 98,278, Santow JA (with whom Ipp and Tobias JJA agreed) said at [51]:

> [51] As was suggested in Waters Lane (above) there may be no relevant difference between the standard constituted by the expression "all reasonable endeavours" and that constituted by the expression "best endeavours". However as in that case so here it is not necessary to express any final conclusion on that proposition".

23. In Centennial Coal Company Ltd v Xstrata Coal Pty Ltd (2009) 76 NSWLR 129, Hodgson JA (with whom Tobias and Campbell JJA agreed) agreed with the trial judge, Brereton J, [2009] NSWSC 788, where Brereton J had said (at [26]) regarding a "best endeavours clause:

> "[26] ……..The obligation continues until the obligor "should reasonably judge in the circumstances that further efforts would have such remote prospects of success that they are simply likely to be wasted" [Hawkins v Pender Bros Pty Ltd [1990] 1 Qd R 135 at 150–151 and 152]; however, one must allow for events, including extraordinary events, as they unfold, as Lewison J said in Yewbelle Ltd v London Green Developments Ltd [2006] EWHC 3166 (Ch) (at [123]); affirmed [2007] EWCACiv 475 [29], [33], [122], [124]] …"

NO PERSON CAN TAKE ADVANTAGE OF THEIR OWN WRONG

24. The maxim (that no party may take advantage of its own wrong) is well established at common law. It has its roots in the sixteenth century where it can be found in the writings of Sir Francis Bacon and Sir Edward Coke. Its influence on the law of contracts has been discussed notably by Reading CJ in the English Court of Appeal in The New Zealand Shipping Co Ltd v the Societe des Ateliers et Chantiers de France [1917] 2 KB 717 at 723-4 (see also [1919] AC 1), by the House of Lords in Alghussein

Establishment v Eton College [1988] 1 WLR 587 and in NSW's Courts in TCN Channel 9 Pty Ltd v Hayden Enterprises Pty Ltd (1989) 16 NSWLR 130 at 147 and Mitchell v Pattern Holdings Pty Ltd (2002) NSWCA 212 where many of the cases are cited and discussed by Powell JA at [55]. It was recognised in New South Wales in Green v Woodroffe (1828) Dowling Select Cases Vol 1 per Forbes CJ, Stephen and Dowling JJ. In Suttor v Gundowda Pty Ltd (1950) 81 CLR 418 at 441 the High Court said that:

> "If the stipulation be that the contract shall be void on the happening of an event which one or either of them can by his own act or omission bring about, then the party, who by his own act or omission brings that event about, cannot be permitted either to insist upon the stipulation himself or to compel the other party, who is blameless, to insist upon it, because to permit the blameable party to do either would be to permit him to take advantage of his own wrong, in the one case directly, and in the other case indirectly in a roundabout way, but in either way putting an end to the contract." (emphasis added).

25. The principle enunciated by Lord Diplock in Cheall v Assn of Professional Executive Clerical and Computer Staff [1983] 2 AC 180 at 189, was that "[a] man [or woman] cannot be permitted to take advantage of his [or her] own wrong". See also New Zealand Shipping Co Ltd v Societe desAteliers et Chantiers de France [1919] AC 1 at 6, 8, 9, 15.

26. That principle has a long history, dating back to cases such as Rede v Farr (1817) 6 M&S 121 at 124 ; 105 ER 1188 at 1189 and Doe d Thomas Bryan v Bancks (1821) 4 B & Ald 401 at 409 ; 106 ER 984 at 987. See also Suttor v Gundowda Pty Ltd (1950) 81 CLR 418 at 440–1.

27. That maxim has since been applied widely. [8]

28. In Hope Island Resort Holdings Pty Ltd v Jefferson Properties (Qld) Pty Ltd [2005] QCA 315 at [49], Jerrard JA, after considering these authorities, concluded:

> "Those authorities Mr McKenna SC relied on do establish, as a general rule of construction, the principle that in the absence of clear provision of the contrary, it is presumed that the parties to an agreement did not intend that the other should be entitled to obtain a benefit under the contract on account of that other party's breach of it and where the party in breach is thereby taking advantage of that party's own wrong."

29. In Alghussein Establishment v Eton College [1991] 1 All ER 267 the House of Lords was faced with a question of construction. A literal construction of the relevant provision of a lease would have led to an absurd result that a contractor who failed to complete a development without fault could not call for a lease, whereas a contractor who wilfully defaulted

[8] *Alghussein Establishment v Eton College* [1988] 1 WLR 587; *TCN Channel 9 Pty Ltd v Hayden Enterprises Pty Ltd* (1989) 16 NSWLR 130 at 147–8, 161; *Brothers v Park* (2004) 12 BPR 22,501; *Shilkin v Taylor* [2011] WASCA 255 at [43]; *Perpetual Nominees Ltd v Rytelle Pty Ltd (rec & mgr apptd) (No 4)* [2013] VSC 9; *Sydney Attractions Group Pty Ltd v Schulman* [2013] NSWSC 858.

could do so. Lord Jauncey's judgment (with which the other Law Lords agreed) was, as noted in the headnote to the report, to the effect that:

> "In the absence of clear express provisions in a contract to the contrary it was not to be presumed that the parties intended that a party should be entitled to take advantage of his own breach as against the other party was not limited to cases where a party was relying on his own wrong to avoid his obligations under the contract but applied also where a party sought to obtain a benefit under a continuing contract on account of his breach.
>
> …
>
> The principle that a party in default under a contract cannot take advantage of his own wrong is in general a rule of construction rather than an absolute rule of law and morality, although there may be situations, such as self-induced frustration, where an absolute rule exists".

30. The principle was accepted in TCN Channel 9 Pty Ltd v Hayden Enterprises Pty Ltd (1989) 16 NSWLR 130 (at 147 per Hope JA, with whom Priestley and Meagher JJA agreed).

31. In Brothers v Park (2004) 12 BPR 98,114, Giles JA (with whom Ipp JA Wood CJ at CL agreed) said (at [82]):

> "[82] There was reference … to a … principle, described by Lord Diplock in Cheall v Association of Professional Executive

> Clerical and Computer Staff [1983] 2 AC 180 at 189 that "a man cannot be permitted to take advantage of his own wrong". An application of the principle is that a party to a contract terminating upon an event or conferring a benefit upon an event cannot rely on his own breach of contract bringing about the event; many of the cases are discussed in the speech of Lord Jauncey in Alghussein Establishment v Eton College [1988] 1 WLR 587, and a local illustration of this application is TCN Channel 9 Pty Ltd v Hayden Enterprises Pty Ltd (1989) 16 NSWLR 130 at 147–8 and 161. It is applied as a rule of construction (ibid), but has also been seen as an implied term: Thompson v ASDA-MFI Group Plc [1988] Ch 241; [1988] 2 All ER 722. The principle itself has a broader reach, for example in the interpretation of statutes (Grozier v Tate (1946) 16 LGR (NSW) 57 at 61; Allen v Bega Valley Council (NSWCA, Full Court, No CA 40500 of 1994, 22 December 1994, unreported, BC9403478)) and in the common law rules that an arsonist cannot recover under a fire insurance policy and murderer cannot claim in the estate of his victim".

32. Giles JA, in the later case of Ruthol Pty Ltd v Tricon (Aust) Pty Ltd (2005) 12 BPR 98,225 gave further consideration to the principle and said (at selected passages from [19]–[24], Santow JA and Hunt AJA agreeing):

"[19] … the principle is not concerned with arriving at compensatory damages for breach by the wrongdoer, but with whether the wrongdoer can enforce its contractual right.

[20] … in the absence of clear words, a contractual entitlement upon a particular event will not be enlivened if the event came about through breach of the party seeking to rely on it …

[21] … But … the operation of the principle is qualified … [citing Hooper v Lane (1859) 6 HL Cas 443 at 460–461 per Bramwell B]:

… that rule only applies to the extent of undoing the advantage gained, where that can be done, and not to the extent of taking away a right previously possessed. Thus, if A lends a horse to B, who uses it, and puts it in his stable, and A comes for it and B is away, and the stable locked, and A breaks it open, and takes his horse, he is liable to an action for the trespass to the stable, and yet the horse could not be got back, and so A would take advantage of his own wrong.

[22] Thus a party in breach of contract may be precluded from relying on a contractual entitlement arising from the breach,

but will not be precluded from relying on a contractual entitlement which does not arise from the breach.

[24] … the maxim only applies to the extent of undoing the advantage gained by the wrongdoer and not the extent of taking away a right previously possessed".

LICENCE AGREEMENTS

33. In Terrell v Mabie Todd & Co Ltd (1952) 69 RPC 234, a licence agreement included a "best endeavours" clause, Sellers J. held that that the licensees' obligation "was to do what they could reasonably do in the circumstances" (1952) 69 RPC 234, at p 237.

A "best endeavours" clause thus prescribes a standard of endeavour which is measured by what is reasonable in the circumstances, having regard to the nature, capacity, qualifications and responsibilities of the licensee viewed in the light of the particular contract"."

SALES AGREEMENTS

34. In Transfield Pty Ltd v Arlo International Ltd (1980) 144 CLR 83, licensee of a patented process for the manufacture and erection of a steel pole for the purpose of electricity transmission lines (the Arlo pole)

covenanted 'to use its best endeavours in and towards the … selling" of the pole. Stephen J said, at p 94:

> "An obligation to use best endeavours to sell Arlo poles implies a prohibition upon the offering for sale and selling of competitive poles, at least to the extent that to do so will prejudice the sale of Arlo poles".

35. In Transfield, Mason J cited Terrell (ibid) (at 100–101).

36. Mason J in Transfield took a narrower view of the effect of the clause holding [9] , at p 101, that the licensee's obligation was "to use all its efforts and skills towards (inter alia) the selling of the ARLO pole to the extent that it was reasonable so to do in the circumstances and to energetically promote and develop a market for it" and that he could see "no adequate basis for importing into this positive obligation a negative implication that the appellant will not use or for that matter sell a pole which competes with the ARLO pole, whether that pole be manufactured by the appellant or by another". He added, at p 102, that the licensee might do all that was within its power to comply with the clause yet find that it had no practical alternative but to use or sell a competing pole and that the clause did not prohibit or prevent such use or sale. Wilson J said, at p 107, that the licensee was obliged to do "all that could reasonably be expected of it having regard to the circumstances of its business operations". An undertaking to use best endeavours or best efforts to promote the sale of one product does not

[9] As observed by Gibbs CJ in *Hospital Products* para [24]

necessarily impose an obligation not to sell a competing product (see Van Valkenburgh, Nooger & Neville, Inc v Hayden Publishing Co (1972) 330 NYS 2d 329, at p 333, and cases there cited) although it may do so in some circumstances, as was held to be the case in Randall v Peerless Motor Car Co (1912) 99 NE 221".

37. The upshot of the case was that the term did not prohibit the licensee from using any pole other than the Arlo pole.

DISTRIBUTION AGREEMENTS

38. Hospital Products Ltd v United States Surgical Corporation (1984) 156 CLR 41, involved a distribution agreement, including a consideration of what level of obligation the distributor had to perform. In that context, Gibbs CJ said para [24], (at 64–65):

" The implied obligation to use best efforts to promote the sale of the goods necessarily imported the obligation not to take any deliberate steps to damage the market for those goods in Australia. …… the meaning of particular words in a contract must be determined in the light of the context provided by the contract as a whole and the circumstances in which it was made, and that decisions on the effect of the same words in different context must be viewed with caution. On the one hand, an express promise by an agent to use his best endeavours to obtain orders for another and to influence business on his behalf "necessarily includes an obligation not to hinder or prevent the fulfillment of its purpose": Shepherd v Felt and Textiles of Australia

Ltd (1931) 45 CLR 359 at 378.

CONTRACTS FOR THE SALE OF LAND

39. Ruthol involved a breach of a contract for the sale of land by the vendor. The vendor did not complete a contract for sale of land on the date fixed for completion. The purchaser was in possession as lessee. The vendor/lessor claimed arrears of rent from the date of contractual completion to the date of actual completion. The purchaser submitted that the vendor was prevented from relying upon its own wrong. The purchaser claimed damages for breach by the vendor. After discussing the principle that a party cannot take advantage of its own breach (see quoted passages above), Giles JA held that the principle had no application to the case (at [25]):

> "[25] In my opinion, the principle did not apply to preclude the appellant from recovering the rent claimed. The respondent was obliged from the beginning to pay the rent to the appellant for the term of the lease and while holding over as a monthly tenant, and to pay it without any set-off or deduction. The respondent remained in possession of the property, and its right to possession was referable only to its position as lessee and then as tenant holding over; it did not have a right to possession under the uncompleted contract for sale. The appellant's breach of contract by failing to complete the contract for sale on 19 July 2001, or its breach

> of a contract found in the lease with its option to purchase rather than the contract for sale (which I doubt is correct), meant that the respondent was obliged to pay the rent for longer than would otherwise have been the case; but the obligation to pay the rent did not arise from the breach of contract".

APPLICATION OF LEGAL PRINCIPLES IN "OFF THE PLAN" CASES IN NEW SOUTH WALES

40. Two scenarios must immediately be distinguished:
    First, the unamended standard form of contract, where the cases in NSW say that compliance is said to be a condition of being able to rescind; and second, situations where the standard form contract has been modified, such as Wang v Kaymet.
41. [consider cases regarding the unamended standard form contract]
42. What is said below, relates to situation where the standard form contract has been amended.
43. Restrictions on exercise of rights of rescission recurringly occur in contracts for the sale "off-the-plan" of dwellings in proposed strata developments.[10]

[10] *Munro v Bodrex P/L* [2002] NSWSC 122 at [49] (Bryson J).

44. A right of rescission may be restricted by implied terms to be discerned on the whole view of the parties' contract, or by the application of implications arising under general contract law.[11] These implications include an obligation by one party to a contract to do all such things as is necessary on their part to enable the other party to have the benefit of the contract.[12]

45. The law also implies a negative covenant not to hinder or prevent the fulfilment of the purpose of the express promises made by the contract.[13]

46. A party to a contract is not entitled, as against the other party, to rely on an event resulting from the first party's wrongful act.[14]

47. The issue of whether the non-obtaining of registration of a strata plan within the period stipulated resulted from a breach by the defendant of contractual obligations, rests on the Plaintiff.[15] All evidence is, however, to be weighed according to the proof which it was reasonably within the means of one party to produce or of the other to contradict.[16]

48. Where the relevant facts are peculiarly within the knowledge of the vendor, there may be an evidentiary onus on the vendor to lead

[11] *Munro v Bodrex P/L* [2002] NSWSC 122 at [49] (Bryson J).
[12] *Peters (WA) Ltd v Petersville Ltd* (2001) 75 ALJR 1385 at 1393 [36]; *Butt v McDonald* (1896) 7 QLJ 68 at 70-71; *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd* (1979) 144 CLR 596 at 607-608.
[13] *Shepherd v Felt & Textile of Australia Ltd* (1931) 45 CLR 359 at 378.
[14] *Suttor v Gundowda Pty Ltd* (1950) 81 CLR 418 at 440-443; *New Zealand Shipping Co Ltd v Societe Des Ateliers et Chantiers de France* [1919] AC 1 at 7-8 and 12; see also *Alghussein Establishment v Eton College* [1988] 1 WLR 587 at 591-594.
[15] *Plumor Pty Ltd v Handley* (1996) 41 NSWLR 30 at 35A-36B (McLelland CJ in Eq).
[16] *Hunyor & Anor v Tilelli* (1997) 8 BPR [97667] 15,629 at 15,631 (McLelland CJ in Eq).

evidence as to what happened, because if the vendor does not do this, inferences may be drawn against the vendor, for example by unexplained delays: see Apollo Shower Screens Pty Ltd v Building and Construction Industry Long Service Payments Corp (1985) 1 NSWLR 561 at 565-6; Hawes v Cuzeno Pty Ltd (1999) 10 BPR 18,011 at [41]; Masters v Belpate Pty Ltd [2001] NSWSC 169 at [59] (Hodgson CJ in Eq).

49. The relevant principles may be summarised as follows: a party to a contract is not entitled, as against the other party, to rely on an event resulting from a first party's wrongful act; but if the failure by the rescinding party to obtain some relevant consent or registration within the contractual period resulted from any default by him in the performance of express or implied obligations, that party is not entitled to exercise a right of rescission otherwise available; and causation of the failure to obtain consent or registration by the wrongful act must be proved unless the terms of the contract made containing the consent or registration a condition for the exercise of the right of rescission.[17]

CAUSATION: SUBSTANTIAL CHANCE THAT THE CONDITION WOULD HAVE BEEN FULFILLED

50. If one can say that, if the breach had not occurred, there was a substantial chance that the condition would have been fulfilled, that would be enough to deprive the vendor of the right to rescind.[18]

[17] *Shenk v Acn 081 123 140 P/L* [2002] NSWSC 123 at [20] (Bryson J).
[18] *Masters v Belpate Pty Ltd* [2001] NSWSC 169 at [66] (Hodgson CJ in Eq).

51. The test for causation is that if the reason the strata plan was not registered by the date for registration the vendor was in breach of the obligation to use reasonable endeavours, or if such a breach materially contributed to the strata plan's not being registered by that date, then the vendor is not entitled to rely on the clause conferring a right of rescission.[19]

52. McLelland CJ in Eq in Hunyor v Tilelli (1997) 8 BPR 15,629 directed his thoughts to causation at p 15,633 and the particular problem of multiple causes. He rejected the "but for" test and he rejected what he called the "common-sense" approach and analysed the problem, coming to the conclusion that:

"A party to a contract is not entitled as against the other party to rely on an event caused or materially contributed to by the first party's own breach of the Contract."

Accordingly, one does not have to see that the default was the whole cause of the non-fulfilment of the condition, nor must the opposing party necessarily be blameless. One has got to look at whether the person seeking to rescind the contract materially contributed to the non-performance of the condition on which it now bases its rescission."

53. This was considered good law by the hon Justice Young (As HH then was) in Sanctuary Investments Pty Ltd v St Gregory's Armenian School

[19] *Blumor Pty Ltd v Handley* (1996) 41 NSWLR 30 at 34 (McLelland JC in Eq). *Masters v Belpate Pty Ltd* [2001] NSWSC 169 at 58-66 (Hodgson CJ in Eq); *Munro v Bodrex P/L* [2002] NSWSC 122 at [51] (Bryson J); *Gauld v Obsidian Holdings Pty Ltd* [2009] NSWSC 924 at [38]; *Sanctuary Investments Pty Ltd v St Gregory's Armenian School Incorporated* [1998] NSWSC 788, p4 of 9 (Young J).

Incorporated [1998] NSWSC 788 . Young J was considering Special Conditions 29 and 30 in the contract there at hand, which seem analogous to special conditions 51 and 52 at hand.

54. The above formulation of causation is consistent with that in Joseph Street Pty Ltd & Ors v Tan & Ors [2012] VSCA 113 where their Honours, at para [47] unanimously held [20]:

> ”It is well established that a party wishing to rescind cannot take advantage of its own ineffective or inefficient measures to comply with its contractual obligations, and that where a vendor’s default has deprived the purchaser of a ‘substantial chance’ that the condition would have been fulfilled, the vendor cannot exercise the right of rescission.”

55. Lianghong Mei v West Apartments Pty Ltd [2011] NSWSC 662 took a similar approach, citing at paragraphs 35 ff Munro v Bodrex.

56. One does need to be aware however, of what was said in Plumor v Handley (1996) 41 NSWLR 30 at 43 C- E , that whilst one only needed to find a “sufficient causal relationship between the defendants non-compliance and failure to do the relevant act (in the case at hand, obtain registration of the SP).

“If that failure would have occurred in any event, non-compliance with the obligation would not affect the defendants right of rescission”.

[20] citing Brereton J in *Mordue v Kroone* [2009] NSWSC 255, at [16] and the “*numerous cases* “ gathered by Brereton J,

EQUITABLE REMEDIES IF VENDOR CAPRICIOUS AND UNCONSCIONABLE

57. The exercise of a right of rescission, even if authorised by the terms of the parties' contract, maybe deprived of the effect by equitable remedies referred to by Viscount Radcliffe speaking for the Judicial Committee in Selkirk v Romar Investments Ltd [1963] 1 WLR 1415 at 1422-3 in these terms:

> "It does not appear to their Lordships, any more than it did to the judge who tried the action, that there is any room for uncertainty as to the nature of the equitable principle that is invoked in these cases. It has frequently been analysed, and frequently applied, by Chancery judges, and, although the epithets that describe the vendor's offending action have shown some variety of expression, they are all related to the same underlying idea, and their variety is only due to the fact that, as each case is decided according to the whole context of its circumstances and the course of conduct of the vendor, one may illustrate more vividly than another some particular aspect of that idea. Thus, it has been said that a vendor, in seeking to rescind, must not act arbitrarily, or capriciously, or unreasonably. Much less can he act in bad faith. He may not use the power of rescission to get out of sale 'brevi manu,' since by doing so he makes a nullity of the whole elaborate and protracted transaction. Above all, perhaps, he must not be guilty of

'recklessness' in entering into his contract, a term frequently resorted to in discussions of the legal principle and which their Lordships understand to connote an unacceptable indifference to the situation of a purchaser who is allowed to enter into a contract with the expectation of obtaining a title which the vendor has no reasonable anticipation of being able to deliver. A vendor who has so acted is not allowed to call off the whole transaction by resorting to the contractual right of rescission: see In re Jackson and Haden's Contract [1906] 1 Ch. 412, CA; Baines v Tweddle [1959] Ch 679."

58. For the purpose of considering the question of a defendant's default, the knowledge, acts and omissions of the defendant's solicitors or other agents, in that capacity, are to be attributed to the Defendants.[21] The knowledge, acts and omissions of independent contractors otherwise than in the capacity of agents for the Defendants are not, however, to be so attributed.[22]

INDEPENDENT CONTRACTORS

59. There are matters which may be considered matters of specialist expertise, which a developer would normally leave to an architect, engineer or builder: to an architect, the drawing of plans and

[21] *CSS Investments Pty Ltd v Lopiron Pty Ltd* [1987] 76 ALR 463 at 474-5; *Hunyor & Anor v Tilelli* (1997) 8 BPR [97667] 15,629 at 15,631 (McLelland CJ in Eq).
[22] *Woodcock v Parlby Investments Pty Ltd* (1988) 4 BPR 97301; *Hunyor & Anor v Tilelli* (1997) 8 BPR [97667] 15,629 at 15,631 (McLelland CJ in Eq).

supervision of building works; to an engineer, similar tasks; and to a builder, actual execution of the work.[23] In those matters, the independent contractors should not be regarded as agents of the developer in carrying out the developer's role in obtaining registration of the strata plan.[24] Delays attributable to independent contractors and carrying out those tasks would not ipso facto involve a breach of the vendor's obligation. Thus, where a builder caused delay by walking off the site because of problems the builder had which were unrelated to the job, that was not considered a breach of the vendor's obligation.[25]

60. Even where delay arises from the conduct of independent contractors in carrying out matters of specialist expertise, there may be associated breaches by the vendor/developer itself, for example in selection of the contractors, in provision of instruction and information, in monitoring progress, and/or in failing to replace the specialist expert when this should have been done.[26]

ONUS IN NSW CASES

61. Plumor P/L v Handley (1996) 41 NSWLR 30, seems to establishe that the onus of proof where the power to rescind is said to have been not available because of a 'breach' by the vendor, rests with the Plaintiff: see

[23] *Hardy v Wardy* [2001] NSWSC 1141 at [64] (Bryson J).
[24] *Hardy v Wardy* [2001] NSWSC 1141 at [64] (Bryson J).
[25] *Woodcock v Parlby Investments Pty Ltd* (1988) 4 BPR 9568; *Hardy v Wardy* [2001] NSWSC 1141 at [64] (Bryson J).
[26] *Hardy v Wardy* [2001] NSWSC 1141 at [65] (Bryson J).

McLelland CJ in Eq at 36(A) read with 35(C-G). Although the Plaintiff carries the onus of proof, questions of the shifting tactical onus, based upon the parties' means to establish proof, come into play : see Munro at [53] citing Hunyor.

RAIN AS A REASON FOR DELAY

62. Where a builder says it has been delayed, despite using "reasonable endeavours", due to rain, then it is apt to bear in mind what Davies AJ held in AJDJ v Pacific West Developments [2001] NSWSC 1174 at [25]:

"There is no evidence that the rainfall was above average or more than was to be expected. Of course, it did delay the work but rain must be taken into account when building in Sydney".[27]

EXPRESS AND IMPLIED TERMS

63. The law is settled at intermediate appellate court level, by unanimous Victorian Court of Appeal in Etna v Arif [1999] VSCA 99 paragraph [55], that the obligation to use reasonable endeavours can endure on the basis of express contractual terms up to the date for registration of the SP, and thereafter on the basis of an implied term, up and until the date of rescission. This was referred to with obiter approval in para [7] by a differently constituted unanimous Victorian Court of Appeal, in Joseph

[27] *Ajdj v Pacific West Developments* [2001] NSWSC 1174 at [25] (Davies AJ).

Street Pty Ltd & Ors v Tan & Ors [2012] VSCA 113

64. **CASE STUDY**: Wang v Kaymet Corporation Pty Ltd [2015] NSWSC 1058

The proceedings concerned the development of two towers of apartments at Wolli Creek. Since the towers were adjacent to the East Hills railway line, the “concurrence” of RailCorp was required to the DA; and until their “concurrence” was to hand, the DA would remain conditional and as such, work could not start.

By contracts entered into with the defendants between November 2009 and April 2010, the plaintiffs agreed to purchase "off the plan" 43 of the 94 residential apartments proposed to be built in the development. Each contract contained a promise by the defendants to use their "reasonable endeavours" to complete the project within 30 months of contract, and provided that either party could rescind the contract if completion did not take place within that time.

The project was not completed by the relevant date. In the period of significant delay, the property market rose substantially.

The defendants rescinded the contracts. The plaintiffs sought specific performance.

One issue that the Defendants raised that it took an unforeseeably long

time to extract RailCorp's "concurrence", and this was thus "unforeseeable delay.

The Defendants tendered a report by Mr Wynn-Jones, a practising building surveyor and certifying authority. His instructions were:

"...to review the **actual time** required to obtain an operative Development Consent ('**the Consent**') and the construction certificates for the development, and to provide my opinion on whether some of the actual time was **unforeseeable time**." [Emphasis in original]

Mr Wynn-Jones deposed that that "foreseeable time" was the "estimated time allowed to complete an event or stage" of the development and that "a reasonable developer would estimate the time allowed for the various stages and events therein to be completed".

HH inferred from that statement that Mr Wynn-Jones envisaged that the estimate of time to which he refers is that which would be made by a "reasonable developer".

"Unforeseeable time" was defined as time which is not "foreseeable".

One difficulty that Stevenson J saw with Mr Wynn-Jones's report was that "there is no exposition by him of the basis upon which the hypothetical reasonable developer would make the estimate to which Mr Wynn-Jones refers."

Mr Wynn-Jones deposed that:

"It is my opinion that a reasonable certifying authority would act in a manner that (at the time the service was provided) was widely accepted in Australia by peer professional opinion as competent professional practice."

His report did not set out any assumptions he made other than to refer globally to various documents set out at an appendix.

HH concluded that the opinions Mr Wyn Jones expressed, were mere ipse dixit, and rejected the report.

65. [consider the substantive judgment in Wang v Kaymet]

66. LEGISLATIVE CHANGES, ENOUGH IS ENOUGH

17 November 2015 Media Release

"NSW Parliament today approved amendments to the Conveyancing Act 1919, strengthening protections for buyers who purchase properties off the plan.

Minister for Innovation and Better Regulation Victor Dominello said the new laws are intended to prevent rogue developers from rescinding contracts using the sunset clause to make windfall profits.

"The NSW Government has listened to the community's concerns and acted swiftly to provide home buyers with greater certainty," he said.

"Any developers who are thinking of acting unethically should know that their behaviour will no longer be tolerated."

Sydney Jacobs
13 Wentworth Selborne Chambers
26th Nov 2015

Comments and constructive criticism welcomed to:

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