Supreme Court

New South Wales

Case Name:	The Owners – Strata Plan No 85561 v Omaya Holdings Pty Ltd
Medium Neutral Citation:	[2021] NSWSC 918
Hearing Date(s):	15 July 2021; further written submissions 20 & 21 July 2021
Date of Orders:	27 July 2021
Decision Date:	27 July 2021
Jurisdiction:	Equity - Technology and Construction List
Before:	Stevenson J
Decision:	Plaintiff entitled to judgment
Catchwords:	BUILDING AND CONSTRUCTION – claim against builder and developer for building defects – claim settled on date of hearing – settlement agreement – provision that rectification works be effected in accordance with remedial contract – provision in settlement agreement that if default occurs judgment to be entered in accordance with pre-signed short minutes of order – whether parties obliged to refer alleged dispute about whether there had been such default to expert determination – whether settlement agreement or remedial contract frustrated
Legislation Cited:	Home Building Act 1989 (NSW)
Texts Cited:	P Herzfeld and T Prince, Interpretation 2nd Edition (Thomson Reuters, 2020)
Category:	Procedural rulings
Parties:	The Owners – Strata Plan No 85561 (Plaintiff/Applicant) Omaya Holding Pty Ltd (First Defendant/Respondent)

	Al Maha Pty Ltd (Second Defendant/Respondent)
Representation:	Counsel: F P Hicks SC (Plaintiff/Applicant) G P McNally SC (Defendants/Respondents) Solicitors: Bannermans Lawyers (Plaintiff/Applicant) Fortis Law (Defendants/Respondents)
File Number(s):	2019/102548

JUDGMENT

1 The plaintiff is the Owners Corporation in respect of a residential development in Strathfield.

2 The development was constructed pursuant to a contract made on 27 October 2011 between the first defendant, Omaya Holdings Pty Ltd (the "Builder") and the second defendant, Al Maha Pty Ltd (the "Developer").

3 On 2 April 2019, the Owners Corporation commenced these proceedings against the Builder and Developer alleging that the building was subject to flammable cladding and waterproofing defects (the "Defects").

4 The proceedings were listed for hearing on 27 July 2020 and settled that day.

The settlement

5 The settlement was recorded in the terms of a document called "Settlement Agreement for Rectification of Defects and Finalisation of Supreme Court Proceedings" dated 27 July 2020 (the "Settlement Agreement").

6 Pursuant to the Settlement Agreement:

(a) the Developer agreed to rectify the Defects by performing the "Rectification Work" by 15 November 2020 pursuant to a "Remedial Contract" (Clause 4); and

(b) the Builder and Developer agreed to pay the Owners Corporation $243,394 by four equal monthly instalments ("the Instalments") concluding on 15 November 2020 (Clause 8).

7 It was also a term of the Settlement Agreement, within cl 4, that the Developer "provide" a Home Building Compensation Fund or "HBCF" insurance policy, being the policy required by s 92 of the *Home Building Act 1989* (NSW) (the

"HBCF Policy"). There is a dispute, to which I will return, as to whether the Settlement Agreement specified whether the Developer was obliged to procure the issue of an HBCF Policy *before* commencing the Rectification Work. As I set out below, the Developer contends that it has been unable to procure the issue of an HBCF Policy.

8 Clause 7.2 of the Settlement Agreement provided:

> "Should the Rectification Work not be completed in accordance with this Agreement, or there be default under the terms of this Agreement by [the Builder] or [the Developer] and such default continues for a period of 14 days after the Owners [Corporation] issue a Notice of Default to [the Builder] and [the Developer]. The Owners [Corporation] shall be entitled to enter judgement against [the Builder] and [the Developer] in accordance with **Annexure D**". (Emphasis in original)

9 "Annexure D" referred to in cl 7.2 was a document entitled "Short Minutes of Order" signed by the solicitor for the Builder and Developer that provided:

> "The Court Orders that:
>
> 1. Judgment for the [Owners Corporation] against the [Builder] and [Developer] in the sum of $1,212,250 comprising:
>
> a. Flammable Cladding Defects - $879,996
>
> b. Water Penetration Defects - $272,254
>
> c. Out of Pocket Remedial Works - $60,000.
>
> 2. The [Builder and Developer] to pay the [Owners Corporation's] costs of the [Owner Corporations] claim in the sum of $183,394."

10 The Instalments were payable pursuant to cl 8 of the Settlement Agreement, which provided:

> "[The Developer] and [the Builder] shall pay to the Owners [Corporation] by [4] equal monthly instalments of $60,848.50, starting on 15 August 2020, the sum of $243,394 being:
>
> 8.1 The sum of $60,000 for the remedial work undertaken the Owners [Corporation] to date the subject of the Out of Pocket Claim; and
>
> 8.2 In satisfaction of the Costs orders contained in Annexure C and D, the Owners [Corporation's] Legal and Expert Costs of $183,394 being the agreed costs of:
>
> (i) Experts fees of $60,530.
>
> (ii) Counsel's fees of $12,000.
>
> (iii) 75% of $147,819 solicitors fees = $110,864."

11 The figures in cll 8.1 and 8.2, $60,000 and $183,394, corresponded to the figures in cll 1c and 2 of the Short Minutes of Order, comprising Annexure D to the Settlement Agreement.

12 Finally, cl 9 provided for Dispute Resolution and was in the following terms:

> "9.1 In the event of a dispute arising under this Agreement, including as to a party's obligations and/or the interpretation of this Agreement, a party shall give the other party within 7 days a written notice of dispute adequately identifying and providing details of the dispute.
>
> 9.2 Within 7 calendar days after receiving a notice of dispute, the parties shall confer at least once to resolve the dispute or to agree on a method of doing so. At every such conference each party shall be represented by a person having authority to agree to such resolution or method. All aspects of every such conference except the fact of occurrence shall be privileged and/or confidential.
>
> 9.3 Should the dispute not be resolved by agreement then it shall be provided to, in descending preference and priority, Janet Grey, Mark Bullen (or if they are unavailable, an Expert to be nominated by the Institute of Arbitrators and Mediators Australia NSW Chapter) for expert determination in accordance with the Institute of Arbitrators & Mediators Australia (Resolution Institute) – Expert Determination Rules – 2010 Edition – October 2010."

The dispute

13 The Developer has not performed the Rectification Work.

14 The Builder and Developer have paid only an amount equal to approximately two of the Instalments, leaving an amount of $121,394 owing.

15 The Owners Corporation alleges that the Builder and Developer have thereby made default under the Settlement Agreement and, on 12 February 2021, served a Notice of Default specifying the Events of Default as being:

(a) the Developer's failure to procure an HBCF Policy;

(b) the Developer's failure to complete the Rectification Works by 15 November 2020; and

(c) the Builder's and Developer's failure to pay all of the Instalments.

16 The Builder and Developer responded to that Notice of Default by a letter from their solicitor dated 26 February 2021. By that letter, the Builder and Developer:

(a) stated that they were unable to procure the issue of an HBCF Policy;

(b) did not dispute that they had not effected the Rectification Works and asserted an entitlement to an extension of time to do so;

(c) did not dispute and thus in effect admitted not paying the outstanding Instalments and proposed a timetable to do so; and

(d) asserted that the letter was a "written notice of a dispute" under cl 9 of the Settlement Agreement.

17 The Owners Corporation contends that, in the events that have happened, it is by reason of cl 7.2 of the Settlement Agreement entitled to enter judgment against the Builder and Developer in accordance with the Short Minutes of Order set out at [9] above.

18 By Notice of Motion filed on 25 May 2021, the Owners Corporation seeks that relief.

19 The Builder and Developer contend that the disputes thereby arising must be referred to expert determination pursuant to cl 9 of the Settlement Agreement and, on 21 June 2021, served on the Owners Corporation a "Notice of Dispute" under that clause.

Has there been a default for the purposes cl 7.2 of the Settlement Agreement?

Non-payment of the Instalments

20 There is no doubt that the Builder and Developer have made default in the payment of the Instalments.

21 That default is, in effect, admitted in the Builder's and Developer's solicitor's letter of 26 February 2021.

Rectification Work

22 Nor can there be any dispute that the Developer has not effected, indeed has not started, the Rectification Works.

23 The Developer contends that the reason it has not effected the Rectification Works is that it has been unable to procure the issue of an HBCF Policy and that the Owners Corporation has refused to allow it to embark on the Rectification Works until an HBCF Policy has been issued.

24 That contention raises the question of whether, on the proper construction of the Settlement Agreement and of the Remedial Contract, the Developer was

obliged to procure the issue of an HBCF Policy *before* it commenced the Rectification Works.

25 The Settlement Agreement itself does not specify a time by which the Developer was obliged to procure the issue of an HBCF Policy.

26 By cl 4 of the Settlement Agreement, the Developer agreed to enter into the Remedial Contract and to carry out and complete the Rectification Work in accordance with that contract, by 15 November 2020.

27 The Remedial Contract was "Annexure B" to the Settlement Agreement and included, as "Annexure Part D", a document called "Home Building Act 1999 (NSW) Checklist" which included this clause:

> **Home Building Compensation Fund**
>
> The contractor must provide you with a certificate of insurance under the Home Building Compensation Fund before the contractor commences work and before the contractor can request or receive any payment.

28 Although the document "Annexure Part D" was not included in the recital of the "Contract Documents" contained in cl 2 of the Formal Instrument of Agreement of the Remedial Contract, it was physically included within the contract, after an annexure "Part C" and before an annexure "Part E". It was plainly intended by the parties to form a part of the contract.

29 Clause 4 of that document made clear that the Developer was obliged to provide the Owners Corporation with a certificate of insurance under the Home Building Compensation Fund, that is, evidence that it had procured the issue of an HBCF Policy *before* commencing the Rectification Works.

30 The Developer did not procure the issue of an HBCF Policy and did not effect the Rectification Works.

Frustration?

31 In those circumstances, Mr McNally SC, who appeared for the Builder and Developer, submitted that "the fact that HBCF insurance could not be obtained has frustrated the performance of the contract".

32 This submission was not developed beyond statements to that effect.

33 But if any contract was frustrated, it was the Remedial Contract, and not the Settlement Agreement. Clause 7.2 of the Settlement Agreement is directed precisely to the circumstances that have occurred, and makes clear that the intention of the parties was that if the Developer was unable to carry out the Rectification Works, the Owners Corporation would have the remedy there provided.

34 The Developer's position is that it cannot procure the issue of an HBCF Policy. Assuming that that is correct, that it cannot in those circumstances effect the Rectification Works, and that the Remedial Contract was thereby frustrated, it cannot follow that the Settlement Agreement is also frustrated. That is because cl 7.2 provides a ready solution to the problem; namely, that the Owners Corporation obtains judgment for an amount evidently intended to approximate the likely costs of rectification.

The Expert Determination clause

35 In these circumstances, cl 7.2 of the Settlement Agreement is engaged. The Rectification Work has not been completed and there has been default under the Settlement Agreement, which default has continued for 14 days following service of a Notice of Default.

36 According to the terms of cl 7.2, the Owners Corporation is now entitled to judgment as set out at [9] and as sought in this Notice of Motion.

37 The Builder and Developer contend that nonetheless the matter must be referred to expert determination under cl 9 of the Settlement Agreement.

38 I do not agree.

39 The parties have made precise provision for the consequences of the Rectification Work not being completed or there being a default under the Settlement Agreement.

40 Were it now necessary for all those matters to be referred to expert determination, the precise provision made by the parties in cl 7.2 would be rendered otiose.

41 It is well established that where a document contains general and specific provisions concerning the same subject matter, the specific provisions will prevail over the general provisions to the extent of inconsistency.[1]

42 In any event, in order that the dispute resolution process in cl 9 be enlivened, it is necessary that the party seeking to invoke the clause gives the other, "within 7 days a written notice of dispute adequately identifying and providing details of the dispute".

43 That seven days must be measured against the date when the dispute arises. In this case, that is no later than when the Owners Corporation served its 12 February 2021 Notice of Default, being 19 February 2021. No such notice was given within that time.

44 Although the Builder's and Developer's solicitor's letter of 26 February 2021 purported to be a notice under cl 9 of the Settlement Agreement, it was not. This is because, first, it did not identify any dispute, and second, it did not adequately identify and provide details for the dispute.

Owners Corporation entitled to judgment

45 In these circumstances, the Owners Corporation is entitled to the remedy for which the parties made specific provision in cl 7.2 of the Settlement Agreement, namely, judgment in accordance with the Short Minutes that I have set out at [9] above.

46 Mr McNally submitted that such judgment should only be for an amount equal to the unpaid Instalments.

47 I can see no reason why the Owners Corporation entitlement should be so qualified.

Developer relieved from performing Rectification Works?

48 The Settlement Agreement makes no provision for the consequences of the Owners Corporation becoming entitled to exercise its rights under cl 7.2. However, as the effect of the entry of judgment as contemplated by cl 7.2 will be that the Owners Corporation has a judgment against the Builder and Developer for an amount evidently intended to correspond to the likely costs of

[1] P Herzfeld and T Prince, Interpretation 2nd Edition (Thomson Reuters, 2020) at [24.40].

rectifying the Defects, it would appear to follow that the Builder and Developer will be relieved from any further obligation to effect the Rectification Works.

49 However, as that issue does not arise for determination in these proceedings, I say no more about it.

Conclusion

50 I enter judgment for the plaintiff against the defendants for $1,212,250.00.

51 I order that the defendants pay the plaintiff's costs of the plaintiff's claim in the proceedings in the sum of $183,394.00.

52 If there is any dispute as to what orders should be made in respect of the costs of the Owners Corporation's Notice of Motion on 25 May 2021, the parties should confer and agree on a timetable for written submissions. I will deal with that matter on the papers.

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