Blackbear (NT) Pty Ltd v Want & Anor [2013] NTSC 55

PARTIES:	Blackbear (NT) Pty Ltd ACN 116 222 005 v Want, Gary John and Want, Geraldine Elizabeth
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	18 of 2012 (21207410)
DELIVERED:	27 AUGUST 2013
HEARING DATES:	29 APRIL 2013
JUDGMENT OF:	KELLY J

CATCHWORDS:

CONTRACTS—Construction contract—Due diligence—Whether failure to proceed with "due diligence" a defect capable of remedy—Whether gives rise to right to terminate—Held that lack of due diligence capable of remedy—No right to terminate contract
CONTRACTS—Construction contract—Notice of default—Notice required under contract—Whether form of notice was adequate—Held that correspondence was not sufficient to put builder on notice that contract would be terminated—No right to terminate contract
BUILDING AND CONSTRUCTION—Due diligence—Requirement to perform work with due diligence—Whether failure to proceed with due diligence a defect capable of remedy—Held that failure is a breach capable of being remedied

Re Stewardson Stubbs & Collett v Bankstown Municipal Council [1965] NSWR 1671; *Batson v De Carvalho* (1948) 48 SR (NSW) 417, applied

Hooker Constructions Pty Ltd v Chris's Engineering Contracting Co [1970] ALR 821, followed

REPRESENTATION:

Counsel:

Plaintiff:	T Liveris
Defendant:	K Sibley

Solicitors:

Plaintiff:	Paul Maher
Defendant:	De Silva Hebron

Judgment category classification:	B
Judgment ID Number:	KEL13011
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Blackbear (NT) Pty Ltd v Want & Anor [2013] NTSC 55
No. 18 of 2012 (21207410)

BETWEEN:

BLACKBEAR (NT) PTY LTD
ACN 116 222 005
Plaintiff

AND:

GARY JOHN WANT
First Defendant

AND:

GERALDINE ELIZABETH WANT
Second Defendant

CORAM: KELLY J

REASONS FOR JUDGMENT

(Delivered 27 August 2013)

[1] The plaintiff Blackbear (NT) Pty Ltd is a building company owned by Michael Beare which trades under the name "Beare Homes".

[2] In April 2009 the defendants, Mr and Mrs Want, entered into negotiations with Beare Homes for the construction of a new home. Beare Homes was advertising "house and land packages" and Mr and Mrs Want had visited their display home. They signed a contract with a third party to purchase a

block of land at Humpty Doo and negotiated a price with Beare Homes for the construction of a three bedroom house on that land.

[3] Eventually Mr and Mrs Want entered into a contract with Beare Homes to construct a house on that land. The contract was dated 3 June 2009, but Mr Want deposed that it was not signed until 19 August 2009, the date that they completed the purchase of the block of land. Nothing turns on the date of the contract.

[4] The contract price was $399,620.00 inclusive of GST to be paid in accordance with a progress payment schedule annexed to the contract. The appendix to the contract specified the date of commencement of the works to be "approx 2 weeks after building permit issued" and the due date for practical completion[1] was specified as "approx 24 weeks after main slab complete".

[5] Work was slow in starting. Plans and drawings were approved by the engineer on 19 October 2009 and a building permit was issued on 29 October 2009.

[6] According to Mr Beare, Beare Homes took possession of the site on 20 November 2009 and completed laying the main slab on 21 November 2009.

[7] On 25 November 2009 Mr and Mrs Want moved onto the block in temporary accommodation consisting of a demountable and Winnebago.

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[1] This is defined in clause 19 as "that stage when the Works are completed except for minor omissions and/or defects which do not prevent the Works from being reasonably fit for occupation and/or use by the Proprietor for the purpose intended".

[8] On 26 November 2009 Beare Homes issued Mr and Mrs Want with an invoice for the first progress payment due under the contract. The invoice was for $83,573.70 and was said to be for "First Progress payment for house ….. As per progress payment schedule". Under that schedule the first progress payment was due when work described as "under slab plumbing cast in plate concrete slab" was completed. This was said in the schedule to constitute 20% of the work (or 21% of the work, depending on which column one refers to). Mr and Mrs Want paid that invoice on 7 December 2009.

[9] On about 26 November 2009 pallets of blocks were delivered to the site for use in building the house. However, no further work was done towards construction of the house until 20 January 2010, some three months after the issue of the building permit. In his affidavit, Mr Beare said that it kept raining and the bricklayer could not start work for two to three weeks after the slab was laid because the blocks were wet. However, in cross examination he conceded that Beare Homes closed down for three weeks over the Christmas New Year period.

[10] On 25 February 2010, Beare Homes issued Mr and Mrs Want with an invoice for $119,391.00. As with the first invoice, this simply stated that it was for "Second Progress payment for house ….. As per progress payment schedule". Under the progress payment schedule the second progress payment was due when work described as "blockwalls windows and door frames corfill structural steel conduits for electrician and plumber installed

hold down bolts" [sic], had been completed. This was said in the schedule to represent a further 30% of the work. Mr and Mrs Want paid that invoice on 1 March 2010.

[11] On 11 March 2010, Beare Homes issued Mr and Mrs Want with an invoice for the third progress payment for an amount of $111,431.60. The format was the same. Under the schedule, the third progress payment was due when work described as "roof trusses erected 1st fix electrician 1st fix plumber underground electrical" had been completed. This was said in the schedule to represent a further 28% of the work (a total of 79%). Mr and Mrs Want paid that invoice on 19 March 2010.

[12] In his affidavit, Mr Beare deposed that Beare Homes "continued to construct the house in accordance with the contract and on 1 July 2010 it issued the Defendants with tax invoice 985 in the sum of $81,583.85 for work to completion of stage 4 of the contract". However, that glosses over what really happened.

[13] It appears that work on the site came to a virtual standstill and, not unnaturally, the Wants became frustrated. Mr Want deposed that he had initially been told that the house would be completed and ready for occupation by Christmas 2009. It soon became clear that that was not going to happen.

[14] On 8 May 2010, Mr Want sent a letter to Beare Homes by registered post expressing his concerns. In that letter he pointed out that under the contract

practical completion was due approximately 24 weeks after the main slab was complete, which he calculated was about 8 May 2010, the date of the letter. He complained (accurately) of the "ongoing failure of Beare Homes to complete the works in accordance with the terms of the contract (clause 8 and items A, B and B1)". He pointed out, correctly, that clause 9 of the contract required the Builder to forthwith notify the Proprietor[2] of any delays of the kind set out in that clause (including inclement weather), stating the nature, cause and extent of the delay. Unfortunately, he seems to have misconstrued the purpose of clause 9, which is to entitle the Builder to "a fair and reasonable extension of the time provided for completion" provided the requisite notification has been given. Mr Want appears to have construed it as a mandatory provision requiring the Builder to give such details. He also requested copies of all building permit applications and approvals, copies of all building inspection reports and approvals and notification of the date when the Builder expected to reach practical completion, all purportedly "in accordance with clause 9". Clause 9 does not require the Builder to provide any of this information. The letter ends: "In accordance with notifications as identified in the contract I expect a response within 5 days from the date of this letter." I am unsure what this refers to. There is no requirement in the contract for the Builder to respond to correspondence from the Proprietor within 5 days. Perhaps this figure came from clause 9 which provides that if the Proprietor does not dissent

[2] "Builder" and "Proprietor" are both defined terms in the contract and refer to Beare Homes and the Wants respectively.

from a claimed extension of time within 5 days, the Date for Practical Completion (as defined in the contract) shall be adjusted in accordance with the claim. Perhaps he misunderstood the provisions of clause 24 which applies where the Builder is in default for one of the reasons specified in that clause and enables the Proprietor to terminate the employment of the Builder if he remains in default for 5 days after notice has been given in accordance with clause 24. Perhaps neither. In any case there is nothing in the contract which specifies such a requirement.

[15] Beare Homes simply ignored the letter of 8 May. Mr Want says that he has in his possession a signed original undated letter purporting to respond to his letter of 8 May. That letter simply says that there was a lot of rain and gives some figures for November, December, January and February. Mr Want says that he does not know when (or how) he got this letter but does not believe he received it before he sent his subsequent correspondence to Beare Homes. Mr Beare's evidence about this supposed reply was unsatisfactory. He did not mention it in his affidavit. In cross examination he said that he responded to the letter of 8 May by email giving details of the weather. The Wants say they did not receive any such email and Mr Beare did not produce one; moreover an email communication would not have resulted in Mr Want receiving a signed original letter. Even if that letter had been sent by Beare Homes, it would not have complied with the requirements of clause 9 of the contract for the purpose of entitling Beare Homes to an extension of time for practical completion. Later in cross

examination Mr Beare said he "most likely" gave the Wants notification of delays due to inclement weather orally when they came into the office. I do not accept that evidence.

[16] I find that Beare Homes did not provide the Wants with notification of any delays in the Works[3] in accordance with clause 9 of the contract and that the provisions of clause 9 do not apply to entitle Beare Homes to an extension of time for the due date for practical completion under the contract.

[17] On 14 May 2010, Mr Want again emailed Beare Homes complaining that virtually no work had been done since the beginning of May and saying: "As it appears the construction period has gone past practical completion date we need to be informed on how Beare Homes will meet the terms of the contract regarding completion." (The letter also complained of rubbish left on site and contractors defecating in the surrounding bush.)

[18] The only response was a terse email dated the same day which said (in full): "I have just spoken to Richard as we are trying to organise a tiler for your place." Not surprisingly, Mr Want was not mollified. He replied, by email dated 16 May, pointing out that this should have been arranged in advance and stating: "Programming the works to meet the terms of the contract is Beare Homes responsibility and accountability." He made a number of other complaints and ended: "As previously requested we require notification of completion date as family will be visiting the first week in June, to stay with

3 another defined term

us in our new home. They have already cancelled their flights three times due to Beare Homes delays in completing the works and are unable to cancel again."

[19] This did not produce a response (apart from some correspondence about payment for extras) and on 1 June 2010, Mr Want again emailed Beare Homes complaining about delays in completing the tiling and starting work on the verandah. The email ended, "Please advise Mike that we are yet to receive a reply from our letter to Beare Homes which is now overdue in accordance with the terms of the contract." Evidently this was a reference to the letter of 8 May. As stated above, there was no requirement under the contract for correspondence to be answered within 5 days – or any other specified time frame.

[20] There being still no response, Mr Want wrote to Beare Homes again on 21 June 2010. I will set out the substantive part of that letter in full.

> "As an ongoing failure of Beare Homes to complete the works in accordance with the terms of the contract (clause 8 and items A, B and B.1), lack of response to notification (Clause 28) and provision information requested in our letter dated 08 May 2010, and ongoing apparent inability for the works to progress to completion with due diligence and in a competent manner (clause 24(a)(ii)), we the Proprietors/Owners and Customer hereby give notice that, unless Beare Homes provide notification in writing within 5 days of receipt of this letter (clause 28) detailing programmed progression of works to completion including guaranteed completion date, evidence of delays and other requested information contained within our previous correspondence, it is deemed and understood that Beare Homes is unable or unwilling to complete the works.

> Further, as Beare Homes has sought not to respond to our letter dated 08 May 2010, in accordance with the terms of notifications clause 8, as to programmed works and progression of works to completion it is understood that Beare Homes by omission acknowledge they are in default of terms of the contract.
>
> As an outcome, in accordance with clause 24(a), it is our intent to determine whether Beare Homes is capable of completion of these works. As part of this determination We shall consider actions necessary, in accordance with clause 24(b) of the contract, to ensure the works are completed in a professional, competent and diligent manner.
>
> As Beare Homes has failed to bring the works to practical completion or completion by the date identified in Item B and B.1 we hereby advise that the following costs are considered to be at Beare Homes expense and are a debt owed to the Proprietors/Owners and Customer:" [Certain costs were set out including for hire of demountable and electricity.]

[21] It is a great pity that the Wants did not seek legal advice at this stage (if not earlier before sending the letter of 8 May). The letter is difficult to understand and betrays a number of misunderstandings of the effect of terms of the contract. Mr Want appears to be asserting that Beare Homes is in breach of the contract by not responding with the information requested in the letter of 8 May within 5 days. That assertion is simply not correct. As explained, clause 9 did not oblige the Builder to provide the information requested on 8 May and clause 28 did not oblige the Builder to respond to that letter within 5 days; nor did any other clause of the contract. The letter also assumes that it is a matter for the Proprietor to determine whether the Builder was capable of completing the contract. That is not the case.

[22] On the other hand, Mr Want was correct in pointing out, as he did in the letter of 8 May 2010, that the works had not been completed by the due date for practical completion, and Beare Homes had not obtained (or even claimed) an extension of time by complying with the provisions of clause 9. It was therefore in breach of its obligations under clause 8 of the contract to "regularly and diligently proceed and complete the works by the Date for Practical Completion".

[23] The only response that Mr Want received to his letter of 21 June was an invoice. On 1 July 2010, Beare Homes sent an invoice to the Wants for $81,583.85, said to be for "Progress Payment number 4, for house …. As per progress payment schedule." Under the schedule, the fourth progress payment is due when work described as "kitchen cupboards installed gyprock ceiling, painting and wall tiles 2nd fix plumbing 2nd fix electrician" has been completed. At this point, according to the progress payment schedule, the work is meant to be 99.5% complete. The only work left to be covered by the fifth (and final) progress payment of $1,989.85 is "paint touch up, house and site cleaned".

[24] The work was not 99.5% complete when the invoice for the fourth progress claim was sent, and Beare Homes knew it. On 2 July 2010, Mr Want sent a brief email formally disputing the fourth progress claim, and again wrote to Beare Homes, complaining once more of the lack of progress, and of the lack of communication. The letter went on:

"In accordance with the Contract, Clause 18, Beare Homes are required to provide a correctly rendered accurate and complete invoice to the "Proprietor" before approval could be considered. As was requested at Progress payment 3, we again request you provide correctly detailed and accurate account of the invoice in accordance with Clause 18 of the contract and any other document that is to be provided in accordance with the financial progression of payments and accounts.

In accordance with Clause 9 we, as the Proprietor, demand Beare homes provide.

- **Copies of all building permit applications and approvals;**
- **Copies of all Building Inspection reports and approvals;**
- **Details as to all delays claimed in reaching completion (currently in breach of contract);**
- **Date Expected for Completion and programmed works to meet this deadline;**

It is our opinion that Beare Homes has still considerable works outstanding which require completion before consideration of any further progress payments will be approved.

Beare Homes has until COB 08 July 2010 to provide the required information and correctly rendered documents via certified mail. If this is not received by the due date it will be deemed Beare Homes is unable to complete the works and further considerations in accordance with the contract will be actioned."

[25] In response to the letter of 2 July, the Admin/Accounts officer from Beare Homes sent an email to Mr Want dated 7 July 2010, as follows.

"Beare Homes would like to apologise for the issue of the fourth Progress Payment and that I will send through another one when all works are definitely completed.

> Also, Richard has advised that the house will be ready for handover next Friday, 16th July 2010. Could you please inform me of a time on that date that will be convenient for you?
>
> Please note that all outstanding Extras and the fourth progress payment will need to be paid in full prior to then."

[26] Unfortunately, Mr Want did not wait until 16 July. On 8 July 2010 he sent an email to Beare Homes which contained the following paragraph:

> "Notice is hereby given that in accordance with the terms as set out within the Contract, Beare Homes has been deemed unable in our determination to carry out and bring to completion, as identified for date of completion identified in Attachment Item B.1 the works prescribed under the contract in a diligent and competent manner and as such the contract is terminated effective immediately."

[27] After 8 July the Wants refused to allow Beare Homes access to the site to complete the works. Beare Homes disputed the Wants' right to terminate the contract; correspondence ensued and by a letter dated 3 August 2010 from its solicitors, Beare Homes purported to accept the repudiation of the contract by the Wants and terminate the contract.

[28] On 28 July 2010 Beare Homes sent the Wants a number of invoices setting out amounts it claimed were owing (and credits to be allowed for items not installed) as follows:

i) Tax Invoice 001 giving a credit of $9,282.00 as adjustment for items not installed;[4]

[4] Mr Beare deposed in his affidavit that this ought to have been issued as an adjustment note, rather than an invoice.

ii) Tax Invoice 002 for the amount of $12,488.25 identified as extra variation works performed;

iii) Adjustment Note 003 giving a credit of $5,534.40 for deleted items;

iv) Tax Invoice 004 for the amount of $81,245.55 identified as a consolidation of the amounts owing and the adjustment notes.

[29] The Wants did not pay these amounts.

[30] Beare Homes has brought this proceeding against the Wants claiming the balance it says is owing under the contract plus interest at 20% per annum on that amount from the time the final payment was due under the contract.

[31] The Wants took possession of the property on 8 July 2010. If Beare Homes is correct and the Wants were not entitled to terminate the contract on that date, then the provisions of clause 19(e) of the contract will apply and the deemed date of practical completion will be 8 July 2010. Under clause 20(a), when the works are practically complete the Builder is entitled to receive all money due and payable under the contract, and under clause 20(b) payment is due within 10 days of a written request. Under clause 18(e) and Item J of the appendix if any progress payment or final payment is

not paid within the prescribed period, interest is payable on the unpaid amount at the rate of 20% per annum.[5]

[32] The Wants have disputed all claims to payment by Beare Homes and claim that they validly terminated the contract on 8 July 2010.

[33] The first question is whether the Wants validly terminated the contract. The reason given by Mr Want in his letter of 8 July 2010 (set out in paragraph [26] above) was not a valid reason for terminating the contract. The Proprietor's rights to terminate the contract are set out in clause 24(a) of the Contract. They do not include a determination by the Proprietor that the Builder is unable to bring the works to completion. However, that does not necessarily mean that the termination by the Wants was invalid. They are entitled to rely on any valid ground for termination of the contract which existed at the time, even if that was not the ground relied on in the notice of termination.[6]

[34] Therefore the question is whether, as at 8 July 2010, a valid ground for termination of the contract existed. Under clause 24(a) of the contract, if the Builder defaults by failing to proceed with the works with due diligence and in a competent manner, then (provided the requirements of clause 24 are met) the Proprietor is entitled to terminate the Builder's employment, and the provisions of clause 24(b) will apply.

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5 Item J of the Schedule specifies the rate as 20% per month but the parties agreed that this was a mistake and should read 20% per annum.

6 *Shepherd v Felt and Textiles of Australia Ltd* [1931] 45 CLR 359 per Dixon J at 377-378

[35] As at 8 July 2010, Beare Homes was in breach of clause 8 of the contract: it had not brought the building to practical completion by the due date and was not entitled to an extension of time in accordance with the provisions of clause 9. However, that alone would not suffice.[7] Clause 24 gives the Proprietor the right to terminate if the default by the Builder consists of the Builder "failing to proceed with the works with due diligence and in a competent manner". No issue has been raised about the Builder's competence. Did the Builder's lengthy, largely unexplained delay in completing the works amount to "failing to proceed with the works with due diligence"? In my view it did.

[36] Failure to proceed with due diligence has been held to mean "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."[8] The phrase refers not only to personal industriousness, but also to reasonable efficiency in management and organisation of the works.[9] If, without any reasonable

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[7] Although failure to complete the works by the due date for completion may be accepted as evidence of delay (in the sense of default) on the part of the Builder, whether that amounts to a lack of diligence on the part of the Builder depends on the circumstances: *Westminster Corporation v Jarvis & Sons Ltd* [1970] 1 WLR 637 at 643 and 645; *Hometeam Constructions Pty Ltd v McCauley* [2005] NSWCA 303 at para [169]

[8] *Re Stewardson Stubbs & Collett v Bankstown Municipal Council* [1965] NSWR 1671 per Moffitt J at 1675-1676; see also *Brenmar Building Company Pty Ltd v University of Newcastle* (1999) 15 BCL 467 at 469

[9] *Hooper Constructions Pty Ltd v Chris's Engineering Contracting Co* [1970] ALR 821 per Blackburn J at 823 (ALR in this instance refers to the Argus Law Reports. The Argus Law Reports preceded the Australian Law Reports. The original decision is titled *Hooper Constructions* however has been incorrectly reported in the ALR and elsewhere as *Hooker Constructions*)

explanation, the work falls seriously behind what could reasonably be expected, that is evidence of lack of due diligence.[10]

[37] In this case the due date for practical completion was approximately 24 weeks after laying the slab (ie by about 8 May 2010), and the work was still not complete by 8 July (2 months later). The only excuse for this put forward by Beare Homes was rain in the period November 2009 to February 2010. By submitting the third progress claim on 11 March 2010, Beare Homes represented that the works were 79% compete by that time.[11] No reason has been put forward for the failure to progress the works in the period from 11 March to 8 July 2010. Further, there is evidence of failure to properly organise the works. On 14 May 2010, after the works were meant to be complete, Mr Want wrote complaining that virtually no work had been done since the beginning of May and the response was, "…. we are trying to organise a tiler". This, it seems to me, fell well short of the degree of organisation that would be required to perform the works with due diligence.

[38] The next question is whether the Wants were entitled to terminate the contract without giving written notice to Beare Homes requiring it to proceed with the works with due diligence from the date of the notice. If the default relied on by the Proprietor is a default which is capable of being remedied, then clause 24(a) requires the Proprietor to give a written notice

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[10] *Hooper Constructions* at 823

[11] This is set out in the Progress Payments Schedule in the contract. The percentage of work which should be completed by the time of the third progress claim is 79% or 80% depending on the column one looks at.

to the Builder specifying the default, and the default must continue for 5 days after the giving of the notice, before the Proprietor has the right to terminate the Builder's employment. The question is whether Beare Homes' "failure to proceed with the works with due diligence" is a default capable of being remedied.

[39] In my view the default was capable of being remedied; a notice under clause 24(a) was required; and the Wants were not entitled to terminate the contract without giving such a notice.

[40] In *Batson v De Carvalho* Sugerman J said:

> "To 'remedy' a breach is not to perform the impossible task of wiping it out - of producing the same condition of affairs as if the breach had never occurred. It is to set things right for the future, and that may be done even though they have for some period not been right, and even though that may have caused some damage to the lessor. ... A breach may be remedied ... even though the time for doing the thing under the covenant may have passed ..."[12]

[41] Sugerman J refers to "a lease" but the same principle has been applied to other contracts.[13] In *Stewardson Stubbs & Collett v Bankstown Municipal Council* Moffitt J considered an equivalent clause which entitled the proprietor to terminate the contract if the builder had made default in certain specified respects and "if he shall continue such default for 14 days after

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[12] (1948) 48 SR (NSW) 417 at 427

[13] *Tricontinental Corporation Ltd v HJFI Ltd* (1990) 21 NSWLR 689 per Samuels JA at 702; *Burger King Corporation v Hungry Jack's Pty Limited* [2001] NSWCA 187 (21 June 2001) [118] to [124]; *Clint Australasis Pty Ltd v Cosmoluce Pty Ltd* [2008] NSWSC 635 at [34] to [36]

notice …. specifying the default has been given to him". His Honour held that a notice was required to be given before the right to terminate arose where the allegation was that a builder had "failed to proceed with the works with reasonable diligence or in a competent manner".[14] The clause in that case did not draw a distinction between breaches that were capable of remedy and breaches that were not, but Moffitt J discussed the construction of the clause in terms of what would be required to remedy such a default.[15]

[42] The next question is whether the Wants did give notice under s 24(a) specifying the default and giving notice of their intention to determine the Builder's employment. Mr Want certainly tried to do so. He wrote again and again to Beare Homes trying to spur them into action to complete the construction of the house within a reasonable time. The substance of that correspondence is set out above.

[43] However, I have rather reluctantly come to the view that none of this correspondence amounted to effective notice to Beare Homes under clause 24(a) specifying that it was in default by failing to proceed with due diligence in completing the work and giving notice of the Proprietor's intention to determine the contract. In none of the correspondence before 8 July 2010 did Mr Want specify the nature of the default, namely that Beare Homes had failed to proceed with the works with due diligence, or state his intention to determine the builder's employment if the default was not

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14 *Stewardson Stubbs & Collett v Bankstown Municipal Council* p 1673 – 1674

15 *ibid* p 1674

remedied within 5 days. Rather, Mr Wants' efforts were misdirected towards demanding information about the reasons for past delays, demanding copies of permit applications and approvals and Building Inspection reports and details of the "date expected for completion and programmed works to meet this deadline", as well as references to irrelevant clauses of the contract. The closest Mr Want came to giving a notice under clause 24 was in the underlined portion of the following extract from the letter of 21 June.

> "As an ongoing failure of Beare Homes to complete the works in accordance with the terms of the contract (clause 8 and items A, B and B.1), lack of response to notification (Clause 28) and provision information requested in our letter dated 08 May 2010, and ongoing apparent inability for the works to progress to completion with due diligence and in a competent manner (clause 24(a)(ii)), we the Proprietors/Owners and Customer hereby give notice that, unless Beare Homes provide notification in writing within 5 days of receipt of this letter (clause 28) detailing programmed progression of works to completion including guaranteed completion date, evidence of delays and other requested information contained within our previous correspondence, it is deemed and understood that Beare Homes is unable or unwilling to complete the works.
>
> .....
>
> As an outcome, in accordance with clause 24(a), it is our intent to determine whether Beare Homes is capable of completion of these works. As part of this determination We shall consider actions necessary, in accordance with clause 24(b) of the contract, to ensure the works are completed in a professional, competent and diligent manner."

[44] Clause 24(a) entitles the Proprietor to determine (meaning put an end to or terminate) the Builder's employment if the Builder is in default in one of the specified ways and that default continues for 5 days after notice in writing

specifying the default and stating the Proprietor's intention of determining the Builder's employment has been given to the Builder. Perhaps Mr Want did not understand this usage of the word "determine". It is impossible to tell from the letter. In any case, I do not think that Beare Homes could be expected to have understood from the letter of 21 June 2010 (and certainly not from any of the other correspondence) that it was being put on notice that if it did not begin to proceed with the works with due diligence within 5 days, the Wants would exercise their rights under clause 24(a) to terminate their employment as Builders on the project.

[45] Accordingly, I hold that the Wants had no right to terminate the contract as they purported to do by the letter of 8 July 2010.[16]

[46] The next step is to determine the amount owing to the Beare Homes under the contract. That consists of the fourth and fifth progress payments (a total of $83,573.70) plus amounts owing for extra work performed under the contract ($12,488.25) less adjustments for work which was not performed, or materials not supplied ($14,816.40) a total of $81,245.55.

[47] In their defence, the Wants alleged that there were defects in the work and that it would cost them more to rectify those defects than was owing to Beare Homes. However, they provided no particulars. Before this matter came to trial, the parties very sensibly engaged a joint expert, Mr John

[16] Even if the Wants had given a proper notice under Clause 24, their action in purporting to terminate the contract on 8 July was surely precipitate. Beare Homes may not have begun to carry out the work with due diligence by 26 June – there is no evidence about that – but it appears to have done so by 7 July when it wrote to the Wants saying that their home would be ready to be handed over by the following Friday. It was an unfortunate decision to terminate the contract the next day.

Brears, to inspect the work and to prepare a report setting out any defects and any unfinished work and the cost to rectify those defects or complete the work. Mr Brears identified 23 items of unfinished work which he said would cost $2,125.00 to complete, and 32 defects which he said would cost $6,040.00 to rectify.[17] Mr Brears also commented on 41 other alleged issues that he identified as neither defects nor unfinished work.

[48] The uncontradicted evidence of Mr Beare was that as at 8 July 2010, when Beare Homes was denied access to the site, the work was almost complete and that he would have finished the unfinished work within the final week. This is supported by the relatively minor nature of the unfinished work set out in Mr Brears' report. Mr Beare also gave uncontradicted evidence that he would have required subcontractors to rectify the defects at no cost to himself if he had been given the opportunity to complete the work. In light of this evidence, I do not think there should be any deductions from the amount owing under the contract as detailed in the final invoices referred to above.[18]

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[17] This does not include the sum of $10,000 for bi-fold doors which were not installed as these were included by the Builder on the credit note issued to the Wants with the final progress claim.

[18] The Wants' decision to totally deny that any money was owing to Beare Homes was also a curious one, especially after they had received the report of Mr Brears which indicated that there was a maximum of only $8,1665.00 to be deducted from the contract price for unfinished work and defects if they were successful in showing they had validly terminated the contract.

[49] Beare Homes is also entitled to simple interest at 20% per annum on the amount due from the due date for payment (7 August 2010) to the date of judgment, a total of $49,818.70.[19]

[19] Had the Wants been successful in showing they had validly terminated the contract, Beare Homes would not have been entitled to interest at the rate specified in the contract, but it would still have been entitled to interest at a commercial rate on the money owing.