QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION:	*Contrast Constructions Pty Ltd v Allen & Anor* [2020] QCAT 194
PARTIES:	**CONTRAST CONSTRUCTIONS PTY LTD** (applicant) **v** **REECE ALLEN** (first respondent) **CHANTELL TAYLOR** (second respondent)
APPLICATION NO/S:	BDL219-19
MATTER TYPE:	Building matters
DELIVERED ON:	21 May 2020
HEARING DATE:	On the papers
HEARD AT:	Brisbane
DECISION OF:	Senior Member Brown
ORDERS:	**1. The application for miscellaneous matters is refused.** **2. Contrast Constructions Pty Ltd must file two (2) copies in the Tribunal and give one (1) copy to Reece Allen and Chantell Taylor of:** **(a) Contrast Constructions Pty Ltd's statement of evidence, which must be signed, dated and page numbered;** **(b) the signed, dated and page numbered statement from each witness to give evidence for Contrast Constructions Pty Ltd at the hearing including any experts; and** **(c) any documents referred to in a statement of evidence which must be identified, explained and attached to the appropriate witness statement, by:** **4:00pm on 18 June 2020.** **3. Reece Allen and Chantell Taylor must file two (2) copies in the Tribunal and give one (1) copy to Contrast Constructions Pty Ltd of:**

(a) Reece Allen's and Chantell Taylor's statement of evidence, which must be signed, dated and page numbered;

(b) the signed, dated and page numbered statement from each witness to give evidence for Reece Allen and Chantell Taylor at the hearing including any experts; and

(c) any documents referred to in a statement of evidence which must be identified, explained and attached to the appropriate witness statement, by:

4:00pm on 16 July 2020.

4. Reece Allen and Chantell Taylor must file in the Tribunal two (2) copies and give to Contrast Constructions Pty Ltd one (1) copy of a Schedule of defective and incomplete work (a Scott Schedule), by:

4:00pm on 16 July 2020.

5. Contrast Constructions Pty Ltd must file two (2) copies in the Tribunal and give one (1) copy to Reece Allen and Chantell Taylor of Contrast Constructions Pty Ltd's signed, dated and page numbered statements of evidence in reply, by:

4:00pm on 13 August 2020.

6. Contrast Constructions Pty Ltd must complete the Scott Schedule and file in the Tribunal two (2) copies and give to Reece Allen and Chantell Taylor one (1) copy of the completed Scott Schedule, by:

4:00pm on 13 August 2020.

7. Reece Allen and Chantell Taylor must file in the Tribunal two (2) copies and give to Contrast Constructions Pty Ltd one (1) copy of any statements of evidence in reply limited to the counter-application, by:

4:00pm on 27 August 2020.

8. The matter is listed for a Directions Hearing on a date and time to be advised.

CATCHWORDS: CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – THE CONTRACT – CONSTRUCTION OF PARTICULAR CONTRACTS AND IMPLIED CONDITIONS – SETTLEMENT OF DISPUTES – where respondents contend that the proceedings should be dismissed for non-compliance with dispute resolution processes provided for in contract –

whether dispute resolution clause survived termination of the contract – power of tribunal to stay proceedings – whether proceedings should be stayed pending compliance with dispute resolution provision – where not in the interests of justice for the proceedings to be stayed - where no utility in requiring the parties to comply with contractual dispute resolution process

CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – THE CONTRACT – where respondents contend that the proceedings should be dismissed for non-compliance with s 77(2) of QBCC Act – where compliance achieved before commencement of proceedings

Queensland Building and Construction Commission Act 1991 (Qld), s 77(2), sch 1B, s 32(1)
Queensland Civil and Administrative Tribunal Act 2009 (Qld), s 28(3)(b), s 47, s 69(b)

Allen & Taylor v Queensland Building and Construction Commission [2020] QCAT 63
Dobbs v National Bank of Australasia Ltd (1935) 53 CLR 643
Downer EDI Mining Pty Ltd v Wambo Coal Pty Ltd [2012] QSC 290
Electricity Generation Corporation v Woodside Energy Ltd; *Woodside Energy Ltd v Electricity Generation Corporation* (2014) 251 CLR 640
Elizabeth Bay Developments Pty Ltd v Boral Building Services Pty Ltd (1995) 36 NSWLR 709
Ferris v Plaister (1994) 34 NSWLR 474
Iezzi Constructions Pty Ltd v Watkins Pacific (Qld) Pty Ltd [1994] QCA 49
McDonald v Dennys Lascelles Ltd (1933) 48 CLR 457
Pipeline Services WA Pty Ltd v ATCO Gas Australia Pty Ltd [2014] WASC 10
Racecourse Betting Control Board v Secretary for Air [1944] Ch 114
Richmond v Moore Stephens Adelaide Pty Ltd [2015] SASCFC 147
Straits Exploration (Australia) Pty Ltd v Murchison United NL [2005] WASCA 241
WTE Co-Generation v RCR Energy Pty Ltd [2013] VSC 314
Zeke Services Pty Ltd v Traffic Technologies Ltd [2005] Qd R 563
4D Electrical Qld v Greyburn Pty Ltd [2020] QCAT 74

REPRESENTATION:

Applicant:	Self represented
Respondent:	Self represented

APPEARANCES:

This matter was heard and determined on the papers pursuant to s 32 of the *Queensland Civil and Administrative Tribunal Act* 2009 (Qld).

REASONS FOR DECISION

[1] Contrast contracted with the respondents to build a house. The parties fell into dispute. Each party purported to terminate the contract. Contrast commenced proceedings in the tribunal claiming damages for breach of contract.[1] The respondents have filed a response on a 'conditional basis without accepting the jurisdiction of (the) tribunal to entertain (Contrast's) claim'.[2]

[2] Before filing the response, the respondents filed an application for miscellaneous matters[3] seeking a number of orders including that the matter be listed for a directions hearing on the basis of the respondents' assertion that 'they have (the) right to be heard in relation to whether or not the tribunal has jurisdiction … and in particular whether the applicant has complied with s 77(2) of the QBCC Act'.[4]

[3] The respondents say that Contrast failed to comply with the dispute resolution provisions in the contract and failed to comply with s 77(2) of the *Queensland Building and Construction Commission Act* 1991 (Qld) ('QBCC Act') before commencing the proceedings.

[4] Although the respondents have not applied to amend the orders sought in the application for miscellaneous matters, the parties have clearly proceeded on the basis that the respondents seek an order dismissing the proceedings pursuant to s 47 of the *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) ('QCAT Act') or alternatively staying the proceedings until Contrast has complied with the dispute resolution provisions of the contract.

Contractual requirements – alternative dispute resolution

[5] Clauses 42.1 and 41.2 of the contract, as varied by special condition 13, provide:

> **42.1 Notice of Dispute**
>
> If a difference or dispute (together called a '*dispute*') between the parties arises in connection with the subject matter of the *Contract*, including a *dispute* concerning:
>
> a) a *Superintendent's direction*; or
>
> b) a claim:

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1 Application for domestic building disputes filed 19 August 2019.
2 Response filed 9 October 2019.
3 Application for miscellaneous matters filed 25 September 2019.
4 Ibid.

i) in tort;

ii) under statute;

iii) for restitution based on unjust enrichment or other quantum meruit; or

iv) for rectification or frustration,

or like claim available under the law governing the *Contract*,

then either party shall, by hand or by certified mail, give the other and the *Superintendent* a written notice of *dispute* adequately identifying and providing details of the *dispute*.

Notwithstanding the existence of a *dispute*, the parties shall, subject to clauses 39 and 40 and subclause 42.4, continue to perform the *Contract*.

42.2 Conference

Within 14 days after receiving a notice of *dispute*, the parties shall confer at least once to resolve the *dispute* or to agree on methods of doing so. At every such conference each party shall be represented by a person having authority to agree to such resolution or methods. All aspects of every such conference except the fact of occurrence shall be privileged.

If the dispute has not been resolved within twenty eight 28 days of service of the notice of dispute, either party may refer the dispute to:

(a) the dispute resolution processes administered by the *QBCC*;

(b) *QCAT*; or

(c) a court.

Any reference of the dispute to the *QBCC* is without prejudice to either party's right to refer any dispute to *QCAT* where entitled under *Legislative requirements* or otherwise to a court.

[6] As can be readily observed the obligation upon the parties to engage in dispute resolution was not an onerous one, there being no requirement for a structured dispute resolution process such as mediation. Clause 42 might be said to reflect no more than a common sense approach to attempting to resolve disputes arising between parties to a contract.

[7] While there has been no determination in these proceedings of the issue whether the contract has in fact been properly terminated by either party, the first issue to address is whether clause 42 survived a (assumed) valid termination.

[8] In *Pipeline Services WA Pty Ltd v ATCO Gas Australia Pty Ltd*[5] Martin CJ in the Supreme Court of Western Australia held that a dispute resolution clause survived termination of the relevant contract. The relevant provision considered by Martin CJ was an arbitration clause. His Honour stated:

> An arbitration agreement is generally considered to be a contract independent of the underlying contract in which it is contained, and for that reason in the absence of evidence of a contrary intention of the parties, evident in the language that they have used, survives termination of the underlying contract:

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5 [2014] WASC 10.

see *Ferris v Plaister* (1994) 34 NSWLR 474, 484 (Kirby P), 496 - 497 (Mahoney JA), 500 - 501, 503 - 504 (Clarke JA); *Harbour Assurance Co (UK) Ltd v Kansa General International Insurance Co Ltd* [1993] QB 701, 723 - 724 (Hoffman LJ); *Heyman v Darwins Ltd* [1942] AC 356, 374 - 375 (Macmillan LJ); *Bremer Vulkan Schiffbau & Maschinenfabrik v South India Shipping Corp Ltd* [1981] AC 909, 998 (Scarman LJ); *Rizhao Steel Holding Group v Koolan Iron Ore* [165] (Martin CJ). In *Heyman v Darwins* , Lord Macmillan said:

> "[A]n arbitration clause in a contract … is quite distinct from the other clauses. The other clauses set out the obligations which the parties undertake towards each other … but the arbitration clause does not impose on one of the parties an obligation in favour of the other. It embodies the agreement of both parties that, if any dispute arises with regard to the obligations which the one party has undertaken to the other, such dispute shall be settled by a tribunal of their own constitution. …
>
> [W]hat is commonly called repudiation or total breach of a contract, whether acquiesced in by the other party or not, does not abrogate the contract, though it may relieve the injured party of the duty of further fulfilling the obligations which he has by the contract undertaken to the repudiating party. The contract is not put out of existence, though all further performance of the obligations undertaken by each party in favour of the other may cease. It survives for the purpose of measuring the claims arising out of the breach, and the arbitration clause survives for determining the mode of their settlement. The purposes of the contract have failed, but the arbitration clause is not one of the purposes of the contract (373 - 374)."[6]

[9] Martin CJ observed:

> Construction of a commercial agreement to the effect that provisions for the resolution of disputes, such as by arbitration, do not survive termination of the agreement would be inconsistent with the approach indicated in the authorities to which I have referred. That is because it will commonly be the case that parties will disagree as to whether their contract has been terminated and if so, as to the consequences of termination. In such a circumstance, the conclusion that the dispute resolution provisions of the contract depend upon the determination of the question of whether the contract has been terminated is manifestly inconvenient. For example, the parties might wish to refer such a dispute to arbitration, or may be required by their contract to refer such matters to arbitration as a condition of the exercise of any right to commence legal proceedings. But a decision of the arbitral tribunal to the effect that the contract has been terminated would deprive the arbitral tribunal of jurisdiction and prevent any award being made to give effect either to the termination or its consequences. This would in turn create an incentive for the parties to first determine, in a court, whether the contract remained on foot before then invoking its provisions relating to the resolution of disputes in the event of an affirmative answer to that question. However, that course would itself be inconsistent with their expressed desire to utilise particular mechanisms for the resolution of their disputes, *and with the assumption that the parties intended that their disputes could be resolved in a single forum*.[7] (emphasis added)

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6 *Pipeline Services WA Pty Ltd v ATCO Gas Australia Pty Ltd* [2014] WASC 10, 42.

7 Ibid 47.

[10] Martin CJ relied upon, inter alia, *Ferris v Plaister*[8] where the New South Wales Court of Appeal considered whether an arbitration clause survived termination of a contract based upon an allegation of fraud where it was asserted that such a contract was *void ab initio*. In *Ferris* the court found that an arbitration clause is a 'self-contained contract'.[9] This 'separability principle'[10] was central to Martin CJ's decision in *Pipeline Services*.

[11] In *Elizabeth Bay Developments Pty Ltd v Boral Building Services Pty Ltd*[11] Giles J in the New South Wales Supreme Court considered the enforceability of a contractual provision requiring the parties to refer a dispute to mediation. Giles J stated:

> Although the construction management contract and the building contract had come to an end, one way or another, in the middle of 1994, it was common ground that the provisions for mediation survived in the same manner as the provisions for arbitration.[12]

[12] The mediation provision under consideration in *Elizabeth Bay Developments* was in quite different terms to clause 42 of the contract between Contrast and the respondents. The provision considered by Giles J required the parties to first engage in mediation and, if the dispute could not be resolved, the dispute would then be referred for arbitration.

[13] In *Downer EDI Mining Pty Ltd v Wambo Coal Pty Ltd*[13] Martin J considered that there was no relevant difference, in principle, between expert determination clauses and dispute resolution clauses.[14] In *Downer* the contract required the parties to comply with the dispute resolution procedure set out in the contract and provided that 'a party may not commence court proceedings concerning a (d)ispute' unless, inter alia, the party complied with the dispute resolution clause.[15] The clause required the parties to engage in a process, commenced by the delivery of a dispute notice, to attempt to resolve the dispute by negotiation. If the negotiations were unsuccessful, and depending upon the quantum of the dispute, the contract required the referral of the dispute for expert determination.

[14] It should be noted however that in *Downer EDI* the contract had not been terminated and the question of whether the dispute resolution provision survived termination did not arise for consideration. Martin J's statement that there was no relevant difference in principle between expert determination clauses and dispute resolution clauses was a reference to the consideration of the principles relevant to granting a stay of proceedings while the parties complied with their contractual obligations to engage in a dispute resolution process.

[15] In *McDonald v Dennys Lascelles Ltd*,[16] Dixon J stated:

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8 (1994) 34 NSWLR 474.
9 Ibid 501.
10 Ibid.
11 (1995) 36 NSWLR 709.
12 Ibid 715.
13 [2012] QSC 290.
14 Ibid [8].
15 Ibid [6].
16 (1933) 48 CLR 457.

> When a party to a simple contract, upon a breach by the other contracting party of a condition of the contract, elects to treat the contract as no longer binding upon him, the contract is not rescinded as from the beginning. Both parties are discharged from the further performance of the contract, but rights are not divested or discharged which have already been unconditionally acquired.

[16] Contractual provisions may survive termination however it must be apparent from the terms of the agreement and of the particular provision that it is intended to continue governing the relations of the parties even after the rest of the contract is gone.[17] Contractual rights and obligations that may survive termination include those arising when there is a breach of contract (eg clauses obliging a party to pay compensation or damages for breach); obligations ancillary to the main purpose of the contract (eg arbitration clauses, choice of forum clauses); and clauses regulating the secondary obligations of parties (eg liquidated damages clauses).

[17] As has been outlined, arbitration clauses are an example of a contractual provision that survive termination. Clause 42 is not however an arbitration clause.

[18] Whether clause 42 survives termination is a question of construction of the contract. There is no express provision in the contract providing for the survival of specific clauses in the event of the contract being terminated. In *Richmond v Moore Stephens Adelaide Pty Ltd* [18] the Full Court of the Supreme Court of South Australia stated:

> The general rule … can be expressed as a single rule: termination of a contract discharges those obligations of a party that are not contingent upon its subsistence or future events dependent on its subsistence or future obligations discharged by its termination. Whether an obligation is or is not contingent in this sense is to be determined as a matter of construction of the contract.

[19] The nature of a contractual provision may lead to a construction that the obligation is not contingent and survives termination of the contract.

[20] Clause 42 provides for a notice to be given by a party in the event of a 'dispute'. The contract defines a 'dispute' as 'a difference or dispute (together called a 'dispute') between the parties … in connection with the subject matter of the Contract.' The definition is a broad one and potentially captures disputes across a wide spectrum including disputes of a relatively minor nature through to disputes that may result in termination of the contract. Upon giving a notice of dispute the parties are obliged to engage in what may be best described as an informal dispute resolution process. After 28 days, a party may, inter alia, commence proceedings in the tribunal.

[21] Clause 42 does not provide for a well defined, structured dispute resolution process in which the parties are required to participate and from which agreement might come. Aside the requirement for the delivery of the dispute notice and the stipulated time periods, clause 42 leaves dispute resolution entirely in the hands of the parties in an informal and unstructured way. Unlike the various authorities to which I have referred, clause 42 does not require the parties to proceed to a formal mediation or other dispute resolution process. It should be noted that any requirement for parties

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17 *Iezzi Constructions Pty Ltd v Watkins Pacific (Qld) Pty Ltd* [1994] QCA 49.

18 [2015] SASCFC 147, [197].

to engage in arbitration would fall foul of the prohibition on arbitration clauses found in the QBCC Act. [19]

[22] Clause 42 required that the parties confer to resolve the dispute or to agree on methods of doing so. The parties were only required to meet once and without the assistance of a third party. If the dispute was not resolved the parties were at liberty to proceed to litigation. Such a process was not one through which a dispute about whether termination by one of the parties was valid was likely to achieve any meaningful outcome.

[23] On a proper construction of the contract, clause 42 provided for an informal dispute resolution process to enable the parties to attempt to resolve issues relating to the build as and when those issues arose. There is nothing in clause 42 that leads to the conclusion that, on a proper construction of the contract, the clause was intended to survive termination. To construe clause 42 so as to require the parties to engage in what could be described as a potentially very brief and very informal alternative dispute resolution process before proceeding to formal litigation, in the context of a purported termination of the contract, would be to give the clause a significance it was not intended to have. Such a construction would be commercially nonsensical for the reasons I have outlined.[20] It follows that compliance or otherwise by Contrast with clause 42 is irrelevant to Contrast's entitlement to commence these proceedings.

[24] The tribunal has a power to stay proceedings if it is in the interests of justice to do so.[21] Even if I am wrong however about the effect of termination of the contract on clause 42, for the reasons that follow I would nevertheless conclude that it is not in the interests of justice for the proceedings to be stayed pending compliance by the parties with the contractual dispute resolution process.

[25] The parties' contractual entitlements and obligations regarding termination are to be found in clause 39 of the contract. Where the contractor is said to be in substantial breach of the contract, the principal is obliged to give a notice to show cause as to why, inter alia, the contract should not be terminated.

[26] The respondents relied upon various grounds in the notice given to Contrast: failure by Contrast to use materials or standards of work required by the contract; failure by Contrast to proceed with due expedition and with delay and failing to carry out the work with reasonable diligence and ensure that the works reached practical completion by the agreed practical completion date; overclaiming/claiming payment to which Contrast was not entitled.

[27] As I have observed, after purporting to terminate the contract, the respondents made a claim under the Home Warranty Scheme for non-completion of the contract works. A further claim was subsequently made by the respondents following acts of vandalism at the building site. The QBCC rejected the respondents' claim. The respondents commenced the review proceedings. The tribunal confirmed the

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19 *Queensland Building and Construction Commission Act* 1991 (Qld) sch 1B, s 32(1).

20 *Electricity Generation Corporation v Woodside Energy Ltd*; *Woodside Energy Ltd v Electricity Generation Corporation* (2014) 251 CLR 640.

21 *4D Electrical Qld v Greyburn Pty Ltd* [2020] QCAT 74.

decision of the QBCC, finding that the respondents had not lawfully terminated the contract.[22]

[28] It is well established that courts and tribunals will, generally speaking, hold the parties to a contract to the terms of the bargain they have struck, including contractual mechanisms for dispute resolution. In *Racecourse Betting Control Board v Secretary for Air*[23] it was held:

> … the court makes people abide by their contracts and … will restrain a plaintiff from bringing an action which he is doing in breach of his agreement with the defendant that any dispute between them shall be otherwise determined.

[29] Clause 42 of the contract as modified by special condition 13 is a product of the parties' agreement and the law does not discourage parties from resolving their differences through alternative dispute resolution.[24] Accepting for present purposes that clause 42 survives termination, the failure by Contrast to comply with the dispute resolution provisions of the contract does not render the proceedings liable to be struck out but rather to be stayed until such compliance has been achieved.[25]

[30] The authorities dealing with adjudication clauses in contracts are relevant in considering the effect of clause 42 and whether the proceedings should be stayed.

[31] In *Zeke Services Pty Ltd v Traffic Technologies Ltd*,[26] Chesterman J, referring to the power of the court to stay proceedings where the parties had agreed to a means for dispute resolution, stated:

> The discretion whether or not to grant the stay is obviously wide. The starting point for a consideration of its exercise is that the parties should be held to their bargain to resolve their dispute in the agreed manner. This factor was emphasised by the House of Lords in *Channel Tunnel*, by the High Court in *Dobbs* and *Huddart Parker Ltd v The Ship Mill Hill and Her Cargo* (1950) 81 CLR 502 (an arbitration case) and by Gillard J in *Badgin*. However, a stay will not be granted if it would be unjust to deprive the plaintiff of the right to have his claim determined judicially or, to put it slightly differently, if the justice of the case is against staying the proceeding. The party opposing the stay must persuade the court that there is good ground for the exercise of the discretion to allow the action to proceed and so preclude the contractual mode of dispute resolution. The onus is a heavy one. The court should not lightly conclude that the agreed mechanism is inappropriate.

[32] In *Downer EDI Mining Pty Ltd v Wambo Coal Pty Ltd*[27] Martin J stated:

> In *Straits Exploration (Australia) Pty Ltd v Murchison United NL* the Western Australian Court of Appeal was concerned with the operation of an expert determination clause but, in doing so, also considered the effect of a dispute resolution procedure. Wheeler JA, in giving the judgment of the court, said:

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22 *Allen & Taylor v Queensland Building and Construction Commission* [2020] QCAT 63.
23 [1944] Ch 114, 126.
24 *Downer EDI Mining Pty Ltd v Wambo Coal Pty Ltd* [2012] QSC 290, [9] citing *Dobbs v National Bank of Australasia Ltd* (1935) 53 CLR 643, 652.
25 *Straits Exploration (Australia) Pty Ltd v Murchison United NL* [2005] WASCA 241.
26 [2005] Qd R 563, [21].
27 [2012] QSC 290, [10], [14]-[15].

> "[14] There is increasingly, as a matter of commercial practice, a tendency of parties to provide for the determination of some or all disputes by reference to an expert. There are a number of reasons for that course, including informality and speed; suitability of some types of disputes for determination by persons with particular expertise; privacy; and a desire to resolve disputes in a way which may be seen as reasonably consistent with the maintenance of ongoing commercial relationships. The law has long recognised that those are proper considerations to which the Court should give appropriate weight, and that it is desirable therefore that parties who make such a bargain should be kept to it. **The tendency of recent authority is clearly in favour of construing such contracts, where possible, in a way that will enable expert determination clauses to work as the parties appear to have intended, and to be relatively slow to declare such provisions void either for uncertainty or as an attempt to oust the jurisdiction of the court**. A considerable number of cases demonstrating this trend are collected in the reasons for decision of Einstein J in *Heart Research Institute Ltd v Psiron Ltd* [2002] NSWSC 646 at [16] - [33]. (See also *Australian Pacific Airports (Melbourne) Pty Ltd v Nuance Group (Australia) Pty Ltd* [2005] VSCA 133 at [50] and *Zeke Services Pty Ltd v Traffic Technologies Ltd* [2005] QSC 135 at [21].)
>
> [15] The effect of a valid expert determination clause, however, is not to oust the jurisdiction of the court, but to limit, in some circumstances, the matters which the court can consider. **Prior to the conclusion of the expert determination procedure - that is, prior to the making of a determination - any party to a contract containing such a clause remains free to sue upon the contract, unless the contract itself makes compliance with some form of dispute resolution procedure a condition precedent to the enforcement of rights under the contract. In relation to the latter type of contract, the effect of the clause is not to invalidate an action brought in breach of it, but to provide a defence and to "postpone" but "not annihilate the right of access to the court"** (*Freshwater v Western Australian Assurance Co Ltd* [1933] 1 KB 515 at 523 per Lord Hanworth MR). The latter type of clause is not in issue here, however. **Where a contract contains a dispute resolution clause, and a party who has not first proceeded in accordance with that clause sues on the contract, the court has, however, a jurisdiction to stay the proceeding so as, in a practical sense, to force the party to fall back upon the contractual procedure.** The circumstances in which a stay will be granted are considered in Jacobs, *Commercial Arbitration: Law and Procedure* (2001), at [12.49/5] - [12.49/8]. There are no proceedings on the agreement in the present case, and it is therefore not necessary to consider those principles." (emphasis added)

…

In this case, there is no provision for arbitration – the parties are to attempt to solve their problems through discussion at increasing levels of responsibility. In the absence of resolution, the matter may be referred to an expert or the parties can litigate.

The burden on the parties to an application to stay proceedings was considered by Chesterman J. He said:

> "[21] ... However, a stay will not be granted if it would be unjust to deprive the plaintiff of the right to have his claim determined judicially

> or, to put it slightly differently, if the justice of the case is against staying the proceeding. The party opposing the stay must persuade the court that there is good ground for the exercise of the discretion to allow the action to proceed and so preclude the contractual mode of dispute resolution. The onus is a heavy one. The court should not lightly conclude that the agreed mechanism is inappropriate.
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> [22] Ordinarily I would think that that onus can be discharged only by showing that, in the particular case, the dispute is not amenable to resolution by the mechanism the parties have chosen. This consideration includes the procedure, if any, for which the parties have contracted, and the qualification of the expert or referee to embark upon the determination of the dispute. ..." (footnotes omitted, emphasis added)

[33] In *WTE Co-Generation v RCR Energy Pty Ltd*,[28] Vickery J of the Supreme Court of Victoria summarised the relevant principles in relation to contractual dispute resolution provisions expressed to be a pre-condition to litigation:

> 1. The general rule is that equity will not order specific performance of a dispute resolution clause, notwithstanding that it may satisfy the legal requirements necessary for the court to determine that the clause is enforceable. This is because supervision of performance pursuant to the clause would be untenable.
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> 2. The Court may, however, effectively achieve enforcement of a dispute resolution clause by default, by ordering that a proceeding commenced in respect of a dispute subject to the clause, be stayed or adjourned until such time as the process referred to in the clause, is completed. **What is enforced by this means is not co-operation and consent of the parties but participation in a process from which consent might come**.
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> 3. A circumstance which will operate to preclude the ordering of a stay on this ground arises where the particular dispute resolution clause is determined to be unenforceable, as where for example, the clause is found to be uncertain.
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> 4. Dispute resolution clauses in contracts should be construed robustly to give them commercial effect. The modern approach to the construction of commercial agreements is generally to endeavour to uphold the bargain by eschewing a narrow or pedantic approach in favour of a commercially sensible construction, unless irremediable obscurity or a like fundamental flaw indicates that there is, in fact, no agreement.
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> 5. **Honest business people who approach a dispute about an existing contract will often be able to settle it.** If business people are prepared in the exercise of their commercial judgment to constrain themselves by reference to express words that are broad and general, but which nevertheless have sensible and ascribable meaning, the task of the court is to give effect to and not to impede such solemn express contractual provisions. Uncertainty of proof does not detract from there being a real obligation with real content.
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> 6. A dispute resolution clause in a contract, consistently with public policy in promoting efficient dispute resolution, especially commercial dispute resolution, requires that, where possible, enforceable content be given to contractual dispute resolution clauses.

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28 [2013] VSC 314, [39].

> 7. The trend of recent authority is in favour of construing dispute resolution clauses where possible, **in a way that will enable those clauses to work as the parties appear to have intended**, and to be relatively slow to declare such provisions void either for uncertainty or as an attempt to oust the jurisdiction of the court.
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> 8. The court does not need to see a set of rules set out in advance by which the agreement, if any, between the parties may in fact be achieved. The process need not be overly structured. **However, the process from which consent might come must be sufficiently certain to be enforceable**. A contract which leaves the process or model to be utilized for the dispute resolution ill defined, or the subject of further negotiation and agreement, will be uncertain and unenforceable.
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> 9. An agreement to agree to another agreement may be incomplete if it lacks the essential terms of the future bargain.
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> 10. An agreement to negotiate, if viewed as an agreement to behave in a particular way, may be uncertain, but is not incomplete. The relevant question is whether the clause has certain content.
>
> 11. An obligation to undertake discussions about a subject in an honest and genuine attempt to reach an identified result is not incomplete. (footnotes omitted) (emphasis added)

[34] In opposing a stay, Contrast must persuade the tribunal that there are good grounds for the exercise of the discretion to allow the action to proceed and so preclude the contractual mode of dispute resolution. In exercising the discretion to order a stay of the proceedings, a relevant consideration is whether a stay the effect of which would be to require the parties to engage in the contractual dispute resolution process, would be of any utility. It is relevant also to consider whether the process outlined in clause 42 is one from which a resolution of the dispute might come, whether the conduct of the parties has been such that they will approach the process with the necessary goodwill to attempt to resolve the dispute, and whether the process is sufficiently structured to provide a framework within which the parties may resolve the dispute.

[35] By the time the present proceedings had been commenced a number of events had transpired: the respondents had purported to terminate the contract and lodge a claim with the QBCC under the Home Warranty Scheme; the respondents had made a complaint to the QBCC about defective building work; the QBCC had dismissed the defective building work complaint on the basis that the respondents had denied Contrast access to the works; the review proceedings had been listed for a hearing in the tribunal. During the course of these events the parties had every opportunity to engage in discussions with a view to attempting to resolve the issues in dispute between them. That they did not, speaks to the utility of requiring them to engage in a further, informal, dispute resolution process.

[36] The respondents say, inter alia, that they 'intend to hold (Contrast) to their bargain, including the dispute resolution provisions'.[29] The respondents' submissions convey no apparent willingness to negotiate in a meaningful way to achieve a resolution of the dispute. Rather, the submission reinforces a perception that the respondents are focussed less upon resolving the dispute than creating obstacles to the continuation

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[29] Respondents' submissions filed 29 October 2019, [87].

of the present proceedings. It is evident that the respondents have actively taken various points in pursuing their entitlements. The respondents' conduct, before and during the review proceedings, supports this view:

(a) The respondents contended that, while Contrast responded to the respondents' Show Cause Notice delivered under the contract on the due date, the response was not delivered by 5:00pm. The tribunal found to the contrary in the review proceedings;[30]

(b) The respondents made no apparent attempt to negotiate with Contrast after terminating the contract and before making the claim under the Home Warranty Scheme. The respondents purported to terminate the contract on 21 November 2017. They made a claim under the Home Warranty Scheme on 5 December 2017. At no stage did the respondents give to Contrast a notice under clause 42 of the contract;

(c) The respondents vigorously contested the review proceedings with the tribunal finding:

> The applicants have filed a significant volume of evidence in this proceeding, much of which was repetitive. They also filed lengthy submissions after the three day hearing and again, they contain evidence as well. The final submissions in reply in particular go far beyond a response to the Commission's submissions. It has been an onerous task to sift through the material to try and discern the substantive issues going to whether the contract was properly terminated.[31]

(d) The respondents' have appealed the decision of the tribunal in the review proceedings.[32]

[37] Finally, and perhaps most relevantly, there is the fact that the parties participated in a compulsory conference in the tribunal on 19 November 2019. The purposes of a compulsory conference include promoting a settlement of the dispute the subject of the proceeding.[33] The dispute was not resolved at the compulsory conference.

[38] Whilst the respondents were entitled to pursue the review proceedings, in my view their position in relation to the termination of the contract and what flows therefrom is clearly so entrenched as to make any prospect of a negotiated resolution of matters with Contrast unlikely, at least through the mechanism provided for in clause 42. Having been unable to resolve the dispute in a compulsory conference, it seems almost inevitable that any informal dispute resolution process will produce no result other than to prolong the present proceedings.

[39] There is, in my view, no reasonable prospect of the dispute resolution process pursuant to clause 42 of the contract achieving any useful outcome. I am therefore satisfied that, had clause 42 survived termination of the contract, Contrast has met the 'heavy onus' of establishing why a stay of the proceedings should be refused.

Section 77(2) of the QBCC Act

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30 *Allen & Taylor v Queensland Building and Construction Commission* [2020] QCAT 63, [51].

31 *Allen & Taylor v Queensland Building and Construction Commission* [2020] QCAT 63, [147].

32 *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) ('QCAT Act') s 28(3)(b) – the tribunal may inform itself in any way it considers appropriate. The filing of the appeal is a matter of public record.

33 Ibid s 69(b).

[40] The respondents contend that Contrast failed to comply with s 77(2) of the QBCC Act before commencing the proceedings.

[41] Section 77(2) provides that a person involved in a building dispute may not apply to the tribunal to have the tribunal decide the dispute unless the person has complied with a process established by the commission to attempt to resolve the dispute.

[42] It is reasonably clear on the material before the tribunal that:

(a) A building contract dated 17 February 2016 was entered into between the parties;

(b) The respondents purported to terminate the contract on 21 November 2017;

(c) Contrast purported to terminate the contract on 1 December 2017;

(d) The respondents subsequently made a claim under the Home Warranty Scheme in respect of incomplete building works;

(e) On 20 March 2018 the QBCC wrote to Contrast and advised it had decided the respondents had not properly terminated the contract and they had no entitlement to pursue a claim under the Home Warranty Scheme;

(f) The respondents commenced proceedings in the tribunal seeking a review of the QBCC decision (the review proceedings);

(g) On 12 April 2018 the QBCC wrote to Contrast referring to 'the defective building dispute' at the respondents' property, noting that as the respondents had not provided Contrast with reasonable access to the site to rectify the defects the 'current case' was closed. The letter also advised Contrast that it had 'participated in the QBCC's dispute resolution process as prescribed by legislation …';

(h) On 28 June 2019 the QBCC wrote to Contrast advising that:

(i) the dispute between the parties related to a building contract had been terminated;

(ii) the dispute was outside the scope of the QBCC's Early Dispute Resolution process;

(iii) Contrast had participated in the QBCC's dispute resolution process as prescribed by legislation;

(i) On 19 August 2019 the present proceedings were commenced;

(j) On 4 November 2019 the QBCC wrote to Contrast advising that it had 'reached the end of (the QBCC's) dispute process';

(k) On 27 February 2020 the tribunal decided the review proceedings and confirmed the original decision by the QBCC;

(l) On 2 March 2020 the QBCC wrote to Contrast advising that their letter of 28 June 2019 contained a typographical error (that error being the reference to the male respondent as the builder) and enclosing a further letter dated 20 March 2020 (in the same terms as the letter of 28 June 2019) correcting the error.

[43] I am satisfied that the 'dispute resolution process as prescribed by legislation' referred to in the letters from the QBCC to Contrast dated 12 April 2018 and 28 June 2019 (noting the subsequent clarification by the QBCC regarding the contents of the latter correspondence referred to above) is a reference to 'a process established by the commission' as referred to in s 77(2) of the QBCC Act.

[44] In circumstances where the QBCC is satisfied that a party to a building dispute has complied with a process established by the commission for the purposes of s 77(2), what form that process might take, and whether parties to a building dispute have complied with such a process, is a matter for the QBCC.

[45] I am satisfied that Contrast complied with s 77(2) of the QBCC Act before commencing the proceedings.

Conclusion

[46] The respondents' application for miscellaneous matters is refused. I will make directions for the matter to proceed in the usual manner.