SUPREME COURT OF QUEENSLAND

CITATION:	*O'Brien & Anor v Hillcrown Pty Ltd & Anor* [2010] QSC 458
PARTIES:	**JOHN CHARLES JOSEPH O'BRIEN AND STANLEY WILLIAM O'BRIEN** (plaintiffs) **v** **HILLCROWN PTY LTD (ACN 092 155 701)** (first defendant) AND **GRAEME ANGUS INGLES** (second defendant)
FILE NO/S:	BS113 of 2004
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	13 December 2010
DELIVERED AT:	Brisbane
HEARING DATE:	15 November 2010
JUDGE:	Martin J
ORDER:	**THE PLAINTIFFS ARE TO BRING IN MINUTES OF ORDER**
CATCHWORDS:	CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – DISCHARGE, BREACH AND DEFENCES TO ACTION FOR BREACH – IMPOSSIBILITY OF PERFORMANCE – IN WHAT CASES PERFORMANCE EXCUSED – FRUSTRATION – where the defendants were contracted to build a golf course on identified land by a particular date – where the development did not occur – where the defendants pleaded that failure to obtain development approval from the Gold Coast City Council frustrated the contract – whether this pleading should be stuck out under r 171 *Uniform Civil Procedure Rules* 1999 (Qld) *Uniform Civil Procedure Rules* 1999 (Qld), r 5, r 171 *Brisbane City Council v Group Projects Pty Ltd* (1979) 145 CLR 143

Codelfa Construction Pty Ltd v State Rail Authority of New South Wales (1982) 149 CLR 337
Davis Contractors Ltd v Fareham Urban District Council [1956] AC 696
Horlock v Beal [1916] AC 486

COUNSEL: D A Savage SC, with him M R Bland, for the plaintiffs
R P S Jackson for the defendants

SOLICITORS: QBM Lawyers for the plaintiffs
Brian Bartley & Associates for the defendants

[1] The plaintiffs ("the O'Briens") seek to have paragraph 5 of the amended defence struck out.

[2] The O'Briens seek damages in the sum of $2,205,000 for an alleged breach of contract by the defendants. In their amended statement of claim, the O'Briens plead:

> "5. By a deed made between the plaintiffs, the first defendant and the second defendant at the same time as the contract, it was agreed that:-
>
> (a) the first defendant would construct a golf course to a certain standard on Area B on or before 30 June 2002;
>
> (b) the second defendant would guarantee the due and punctual performance by the first defendant of its obligations under the deed.
>
> 6. In breach of its obligations under the deed, the first defendant failed to construct a golf course on area B by 30 June 2002 or by any later time."

[3] In their amended defence the defendants plead to those paragraphs:

> "4. As to paragraph 5 of the statement of claim, the defendants:
>
> (a) admit that a deed was entered into between the plaintiff, the first defendant and the second defendant on 30 June 2000 ("the deed");
>
> (b) deny the facts alleged in subparagraph (a) thereof because the effect of clauses 1 and 2 of the deed are not accurately set out;
>
> (c) say that clause 2 of the deed provided:
>
> 'The Purchaser (first defendant) will complete the construction of the golf course on or before 30 June 2002, provided that if the Purchaser has entered into a construction contract with a bona fide third party on constructions terms in time to ensure completion of the golf course in terms of this clause by 30 June 2002 but construction is delayed for reasons beyond the control of the Purchaser and through no fault on the part of the Purchaser then the time for completion of the golf course shall be extended by a

period equal to the aggregate periods of delay but not exceeding six (6) calendar months.'

(d) rely on a letter from the first defendant's former solicitors, Clayton Utz, to the plaintiffs' former solicitors, Primrose Couper Cronin Rudkin, dated 5 August 2002 which relevantly stated:

'... I am instructed that my client has engaged a contractor to undertake the construction of the golf course. However, for reasons beyond my client's control and through no fault of my client, the works were not finalised by 30 June 2002.

Accordingly, pursuant to clause 2 of the Deed you referred to the time for completion of the golf course is now extended to 31 December 2002.'

(e) further and/or alternatively, if there was such an agreement as alleged, or as pleaded in subparagraph 4(b) above, the defendants say that:

(i) on its true construction, clause 1 of the deed reserved to the first defendant an unfettered discretion as to the essential terms of such agreement regarding the design, layout and specification of the golf course;

(ii) in the premises, clause 1 of the deed does not constitute a binding agreement between the plaintiffs and the first defendant;

(f) further and/or alternatively, if any agreement was concluded with the first defendant, which is denied, the terms agreed were so uncertain as to preclude the plaintiffs from enforcing the agreement alleged in these proceedings.

Particulars

Clause 1 of the deed is uncertain as the words 'of a standard no less than the Gold Coast Country Club Course' are obscure and incapable of any precise or definite meaning.

(g) admit, as to subparagraph (b) thereof, that the second defendant, pursuant to the deed, guaranteed the due and punctual performance by the first defendant of its obligations under the deed.

5. The defendants deny the facts alleged in paragraph 6 of the statement of claim because:

(a) on the proper construction of the deed, the time for performance of the first defendant's obligations pursuant to clause 2 of the deed was of the essence;

(b) at all material times:

(i) it was necessary for a development approval from the Gold Coast City Council ("GCCC") to be obtained for the development on the golf course land;

(ii) the parties were aware that such approval would be required:

Particulars

(A) the golf course land was located within the jurisdiction of the GCCC;

(B) the town plan administered by the GCCC required development approvals to be obtained for the development of the golf course on the golf course land;

(C) the knowledge, for the first defendant is that of Mr Ingles. The knowledge for the plaintiffs is of each of the plaintiffs;

(D) the fact of knowledge for the plaintiffs is to be inferred from their having owned the golf course land prior to the deed and the notorious nature of the need to obtain development approvals from the local authority for the conduct of development on land;

(c) the first defendant did not receive the GCCC's approval to commence construction of the golf course prior to 30 June 2002 or 31 December 2002;

(d) the GCCC's failure to approve construction of the golf course by 30 June 2002 or 31 December 2002 made the first defendant's obligation to construct the golf course by 31 December 2002 (or alternatively, by 30 June 2002) pursuant to the deed incapable of performance;

(e) by reason of the matters alleged in subparagraphs (a)-(d) above, the deed was frustrated and the defendants were discharged from further performance of that agreement.

6 The first defendant denies the facts alleged in paragraph 7 of the statement of claim because the obligations the performance of which the second defendant guaranteed pursuant to the deed have discharged by operation of law in the premises referred to in paragraph 5."

[4] The plaintiffs' response to paragraph 5(e) of the amended defence is contained in paragraph 4 of the plaintiffs' reply. It reads:

"As to paragraph 5(3) of the defence:

(a) the plaintiffs deny that the matters alleged in paragraphs 5(a) to 5(d) have the result that the deed was frustrated;

(b) further, without derogation from (a):

(i) it was an implied term of the deed that the first defendant would do all things necessary to ensure completion of the golf course by 31 December 2002;

(ii) in breach of that term, the first defendant failed to do all things necessary to obtain the Council's approval within sufficient time to ensure such completion;

(iii) in the premises of (i) and (ii), the first defendant may not rely on the Council's not having given its approval within such time as would have allowed the first defendant to have constructed the golf course by 31 December 2002 to discharge the first defendant from further performance of the deed."

[5] The plaintiffs submit that paragraph 5 of the amended defence does not disclose a reasonable ground of defence and should be struck out under r 171(1)(a) of the *Uniform Civil Procedure Rules.*

[6] Rule 171 relevantly provides:

"(1) This rule applies if a pleading or part of a pleading—

(a) discloses no reasonable cause of action or defence; or

…

(2) The court, at any stage of the proceeding, may strike out all or part of the pleading and order the costs of the application to be paid by a party calculated on the indemnity basis.

(3) On the hearing of an application under subrule (2), the court is not limited to receiving evidence about the pleading."

[7] The plaintiffs argue that paragraph 5 of the amended defence does not disclose a reasonable ground of defence for three reasons:

(a) Frustration only occurs where without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. The plaintiffs submit that an obligation to construct a golf course by some time after 31 December 2002 is a radically different thing from an obligation to construct a golf course by 31 December 2002.

(b) An event will not be taken to have frustrated a contract if it was foreseen by the parties but not made the subject of a special provision in the contract. The defendant alleges, in paragraph 5(b)(ii) of the defence, that the parties were aware that the local authority's approval of the golf course would be required. Further, the defendant refers in its particulars to "the notorious nature of the need to obtain development approvals from the local authority for the conduct of development on land".

(c) The doctrine of frustration does not apply if the contract imposes an absolute obligation to perform on a party, such that the party has taken the risk that the eventuality in question might occur. The deed relied upon contains a provision obliging the defendant to pay $1,500,000 if it failed to build a golf course by the required date. The

plaintiffs accept that this provision is void as a penalty but argue that it shows that the defendant assumed the risk that the golf course might not be completed in time.

[8] The defendants argue:

(a) It would have been unlawful to have built the golf course in the absence of approval and, therefore, it could not be said that the defendants' case of frustration was untenable.

(b) As the plaintiffs' case is that the impossibility arose from the first defendant's breach of an implied term to do all things necessary to obtain the relevant approval, it must be that there is now a requirement for a factual determination of that matter.

(c) As it is necessary to construe the deed and to have regard to the genesis of the transaction, there will need to be a trial in order to determine the purpose and the circumstances known to the parties at the time of entering into the deed.

(d) The allegation of frustration and the response that the impossibility was brought about as a result of the default of the defendants has been an issue between the parties since the litigation commenced and that it would be wrong to allow the plaintiffs to proceed in this manner having conducted the litigation in that way for over 5½ years.

(e) To allow the application after such a long period of time would deprive r 5 of the UCPR of its meaning because the defendants have conducted themselves on the basis that the case as pleaded was the case they were required to meet.

(f) For the plaintiffs to allege that it is necessary to strike out the paragraph because it would tend to delay the fair trial of the proceeding is inconsistent with the plaintiffs' delay in bringing the application.

(g) There is an outstanding request for particulars of paragraph 4(b) of the plaintiffs' reply and the plaintiffs have said that those particulars would be provided by way of a town planning report.

(h) It should be presumed that the first defendant had taken the risk that it might be lawfully prevented from constructing the golf course. Such a conclusion could not be properly drawn in the absence of consideration of the circumstances in which the deed was executed. There should be a consideration of those circumstances in order to arrive at a conclusion.

[9] The High Court in both *Brisbane City Council v Group Projects Pty Ltd* (1979) 145 CLR 143 and *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337 accepted the approach adopted by Lord Reid and Lord Radcliffe in *Davis Contractors Ltd v Fareham Urban District Council* [1956] AC 696. Lord Radcliffe said, at 729, that:

> "…frustration occurs whenever the law recognises that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that

> which was undertaken by the contract. *Non haec in foedera veni*. It was not this that I promised to do."

[10] His Lordship also went on to deal with the matters which need to be considered when assessing whether a contract has, in fact, been frustrated. He said (at 729):

> "There is, however, no uncertainty as to the materials upon which the court must proceed. 'The data for decision are, on the one hand, the terms and construction of the contract, read in the light of the then existing circumstances, and on the other hand the events which have occurred' (*Denny, Mott & Dickson Ltd. v. James B. Fraser & Co. Ltd*, *per* Lord Wright). In the nature of things there is often no room for any elaborate inquiry. The court must act upon a general impression of what its rule requires. It is for that reason that special importance is necessarily attached to the occurrence of any unexpected event that, as it were, changes the face of things. But, even so, it is not hardship or inconvenience or material loss itself which calls the principle of frustration into play. There must be as well such a change in the significance of the obligation that the thing undertaken would, if performed, be a different thing from that contracted for."

[11] His Lordship went on to say (at 730):

> "All that anyone, arbitrator or Court, can do is to study the contract in the light of the circumstances that prevailed at the time when it was made and, having done so, to relate it to the circumstances that are said to have brought about its frustration. It may be a finding of fact that at the time of making the contract both parties anticipated that adequate supplies of labour and material would be available to enable the contract to be completed in the stipulated time. I doubt whether it is, but, even if it is, it is no more than to say that when one party stipulated for completion in eight months, and the other party undertook it, each assumed that what was promised could be satisfactorily performed. That is a statement of the obvious that could be made with regard to most contracts. I think that a good deal more than that is needed to form a 'basis' for the principle of frustration."

[12] With respect to the particular facts in *Davis Contractors*, Lord Radcliffe said (at 731):

> "Two things seem to me to prevent the application of the principle of frustration to this case. One is that the cause of the delay was not any new state of things which the parties could not reasonably be thought to have foreseen. On the contrary, the possibility of enough labour and materials not being available was before their eyes and could have been the subject of special contractual stipulation. It was not made so. The other thing is that, though timely completion was no doubt important to both sides, it is not right to treat the possibility of delay as having the same significance for each. The owner draws up his conditions in detail, specifies the time within which he requires completion, protects himself both by a penalty clause for time

> exceeded and by calling for the deposit of a guarantee bond and offers a certain measure of security to a contractor by his escalator clause with regard to wages and prices. In the light of these conditions the contractor makes his tender, and the tender must necessarily take into account the margin of profit that he hopes to obtain upon his adventure and in that any appropriate allowance for the obvious risks of delay. To my mind, it is useless to pretend that the contractor is not at risk if delay does occur, even serious delay. And I think it a misuse of legal terms to call in frustration to get him out of his unfortunate predicament."

[13] The obligation undertaken by the first defendant in this case was an absolute one. It contracted to build a golf course on identified land before a particular time. The deed contains a provision in which the parties expressly advert to the possibility of the golf course not being constructed. Clause 3 of the deed provides:

> "The purchaser, the guarantor and the O'Briens agree that if the golf course is not constructed on the G C land, the O'Briens will suffer damages as a result of the diminution in value of adjoining land of the O'Briens and the parties have agreed that the amount of such damages is the sum of $1,500,000. In the event of the failure of the purchaser to comply with its obligations under clause 2 hereof, the purchaser will forthwith pay to the O'Briens and the O'Briens will accept in full satisfaction and discharge of all claims they may have against the purchaser the sum of $1,500,000."

[14] A provision of that sort is the clearest evidence that the parties did contemplate the possibility that the golf course could not be constructed for some reason. The defendant pleads that the parties were aware of the need to obtain development approvals from the local authority for the construction of the golf course. It is clear that the parties were well aware that there was a risk that such approval might not be given and thus render the golf course unable to be built. This falls within the principle enunciated by Lord Wrenbury in *Horlock v Beal* [1916] AC 486 at 525:

> "Where a contract has been entered into, and by a supervening cause beyond the control of either party its performance has become impossible, I take the law to be as follows: If a party has expressly contracted to do a lawful act, come what will – if, in other words, he has taken upon himself the risk of such a supervening cause – he is liable if it occurs, because by the very hypothesis he has contracted to be liable."

[15] The contentions for the defendant essentially revolve around two major issues. First, that there is a factual issue to be tried and, secondly, that the delay in bringing the application should count against the plaintiffs.

[16] The factual issues which might be triable are those which are relevant to the question of whether or not a contract has been frustrated. The factual issues which arise then are whether or not there is a radical difference in performance, whether the parties foresaw the frustrating event, and whether the defendant took the risk that the eventuality in question might occur.

[17] As to the first, the contractual obligation was to build the golf course by 31 December 2002. It is now incapable of being built without permission from the local authority. It may be that it could be built at some time in the future. But the point is that should it ever be built then there is a radical difference between it possibly being built in the future and the obligation undertaken by the defendant.

[18] As to the second matter, it is clear that the parties, by the terms of the deed and by the pleading of the defendant, had foreseen the possibility of a refusal by the local authority to grant leave or that the defendant would simply not comply with the provision.

[19] As to the third factor, the obligation upon the defendants was absolute, that is, the building of the golf course was not conditional upon obtaining the appropriate permission. The risk taken by the defendants is evidenced by the clause in the deed referred to above. The fact that the amount agreed upon by the parties would most likely render it a penalty does not detract from the fact that the defendants clearly shouldered the risk.

[20] The other major issue is that of delay. The defendant argues that the plaintiff has allowed the matter to proceed for over five years on a certain footing. That is correct. But that is not a complete answer.

[21] The intention of the *Uniform Civil Procedure Rules* is made clear by r 5(1):

> "The purpose of these rules is to facilitate the just and expeditious resolution of **the real issues** in civil proceedings at a minimum of expense." (emphasis added)

To allow the pleading of frustration to remain in light of what I have set out above would mean that an issue which was not real in the proceedings would continue to trial and would, inevitably, result in the incurring of unnecessary expense. It is contrary to the intention of the Rules that a pleading (or a part of a pleading) which has no prospects should be allowed to create a false issue for a trial court notwithstanding that it has been ignored or unacknowledged for many years.

[22] I will make an order in terms of the application.