SUPREME COURT OF QUEENSLAND

CITATION:	*Veesaunt Property Syndicate 1 Pty Ltd v Alliance Building and Construction Pty Ltd* [2023] QSC 129
PARTIES:	**VEESAUNT PROPERTY SYNDICATE 1 PTY LTD ABN 22 639 391 665** (applicant) **v** **ALLIANCE BUILDING AND CONSTRUCTION PTY LTD ABN 88 645 500 938** (respondent)
FILE NO/S:	BS 14468 of 2022
DIVISION:	Trial Division
PROCEEDING:	Originating Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	14 June 2023
DELIVERED AT:	Brisbane
HEARING DATE:	30 January 2023
JUDGE:	Brown J
ORDER:	**1. The Contract between the applicant and the respondent remains on foot and is binding on the parties.** **2. Within seven days, the parties are to file and serve submissions of no more than two pages as to costs, which the Court will determine on the papers unless otherwise ordered.**
CATCHWORDS:	CONTRACT – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – INTERPRETATION OF MISCELLANEOUS CONTRACTS AND OTHER MATTERS – where parties entered into a contract for the construction of residential townhouses – where the rights and obligations of the parties under the contract were subject to the satisfaction or waiver of conditions precedent by a nominated date – where the conditions precedent were not all satisfied by the nominated date – where the applicant contends that it waived the requirement for satisfaction of any outstanding conditions precedent through a notice given to the respondent by the superintendent or at general law – where the respondent contends that no such waiver occurred – whether the superintendent's notice effectively waived any

outstanding conditions precedent under the contract or at general law

CONTRACT – PARTICULAR PARTIES – PRINCIPAL AND AGENT – IN GENERAL – where the applicant contends that the superintendent gave the notice to the respondent as the applicant's agent and at the applicant's direction – whether the notice given by the superintendent constituted notice by the principal

CONTRACT – GENERAL CONTRACTUAL PRINCIPLES – DISCHARGE, BREACH AND DEFENCES TO ACTION FOR BREACH – CONDITIONS – CONDITIONS PRECEDENT AND SUBSEQUENT – where the conditions precedent were not waived or satisfied by the nominated date – whether, on a proper construction of the contract, a failure to satisfy or waive the conditions precedent by the nominated date resulted in the automatic termination of the contract or the contract being voidable

CONTRACT – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – INTERPRETATION OF MISCELLANEOUS CONTRACTS AND OTHER MATTERS – where the applicant contends that even if the contract provided for automatic termination, the respondent was in default and could not take advantage of its default – whether the contract could only be terminated at the applicant's election – whether the respondent was in default such that it was prevented from relying on the non-satisfaction of the conditions precedent

Australia and New Zealand Banking Group Ltd v Pan Foods Company Importers and Distributors Pty Ltd [1999] 1 VR 29
Agricultural and Rural Finance Pty Ltd v Gardiner (2008) 283 CLR 570
Bluepoint Properties Pty Ltd v Zuri Properties Pty Ltd [2022] QSC 26
Canberra Advance Bank Ltd v Benny (1992) 115 ALR 207
Cheall v Association of Professional, Executive, Clerical and Computer Staff (1983) 2 AC 180
Commonwealth v Verwayen (1990) 170 CLR 394
Donaldson v Bexton [2007] 1 Qd R 525
Electricity Generation Corporation v Woodside Energy Ltd (2014) 251 CLR 640
Gange v Sullivan (1966) 116 CLR 418
GPN Ltd v O2 (UK) Ltd [2004] EWHC 2494
MK & JA Roche Pty Ltd v Metro Edgley Pty Ltd [2005] NSWCA 39
Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd (2015) 256 CLR 104

New Zealand Shipping Co Ltd v Société des Ateliers et Chantiers de France [1919] AC 1
Perovich v Whitton (No 2) (2016) 250 FCR 272
Perri v Coolangatta Investments Pty Ltd (1982) 149 CLR 537
Principal Properties Pty Ltd v Brisbane Broncos Leagues Club Limited (2014) 2 Qd R 132
Prospect Resources Ltd v Molyneux [2015] NSWCA 171
Rudi's Enterprises Pty Ltd v Jay (1987) 10 NSWLR 568
Sandra Investments Pty Ltd v Booth (1983) 153 CLR 153
Suttor v Gundowda Pty Ltd (1950) 81 CLR 418
Quinn Villages Pty Ltd v Mulherin [2006] QCA 433
V601 Developments Pty Ltd v Probuild Constructions (Aust) Pty Ltd [2021] VSC 849

COUNSEL: J Hastie for the applicant
B Whitten for the respondent

SOLICITORS: Shand Taylor Lawyers for the applicant
CDI Lawyers for the respondent

[1] The applicant and the respondent entered into a written agreement dated 31 March 2022 for the construction of residential townhouses on the Gold Coast (the **Contract**). Under the Contract, the respondent, as contractor, was to carry out and complete the design and construction of works for the applicant, as principal. Under cl 6.1 of the Contract, the parties' rights and obligations were subject to the satisfaction or waiver of conditions outlined in cl 6.2 (the **Conditions Precedent**). All those Conditions Precedent were not satisfied by the date provided under the Contract, but the applicant contends that those conditions that were not satisfied were waived. The respondent contends that there was no such waiver. The principal issue is whether the Contract was terminated under cl 6.1(c) because the Conditions Precedent were not satisfied or waived or remains on foot.

[2] To determine the principal issue, the following questions call for determination:

(a) whether a notice provided by the superintendent on 29 July 2022 (the **29 July Notice**) effectively waived those Conditions Precedent in cl 6.2 of the Contract which had not been satisfied by the due date on behalf of the applicant and in particular:

(i) whether the terms of the 29 July Notice were sufficient to constitute a waiver under cl 6.1(b) of the Contract;

(ii) whether there could be waiver at general law and whether the 29 July Notice was sufficient to constitute waiver at general law; and

(iii) whether the notice given by the superintendent constituted notice by the principal.

(b) if the Conditions Precedent were not waived or satisfied by the nominated date agreed between the parties under cl 6.1(c), namely 31 July 2022 (the **Nominated Date**):

(i) did the Contract terminate under the terms of cl 6.1(c) on the Nominated Date;

(ii) on its proper construction, did cl 6.1(c) provide that the Contract was automatically terminated or was it to be construed as resulting in the Contract being voidable;

(iii) if the Contract was voidable, was the respondent in default such that the Contract could only be terminated at the election of the applicant; and

(iv) even if cl 6.1(c) provided for automatic termination of the Contract, was the respondent prevented from relying on the non-satisfaction of the Conditions Precedent which it was obliged to meet to assert that the Contract had to come to an end under cl 6.1(c).

(c) whether the applicant subsequently affirmed the Contract and it remains on foot.

Contractual provisions

[3] Clause 6 of the Contract provided as follows:

> "**6.1 General**
>
> (a) The rights and obligations of the parties under the Contract, other than the Day 1 Clauses which commence on and from the Contract Date, are subject to the satisfaction or waiver of the conditions precedent in clause 6.2.
>
> (b) The satisfaction of each of the conditions precedent identified in clause 6.2 can only be waived by written

notice from the Principal (on such conditions (if any) as the Principal may stipulate).

(c) Unless each of the conditions precedent identified in clause 6.2 have been satisfied, or waived under clause 6.1(b), within 3 months of the date of the Contract Date (or such later date as the Principal and the Contractor may agree in writing):

(i) the parties will no longer be bound by the terms of the Contract or other obligations connected with the WUC or the Works other than the Day 1 Clauses;

(ii) the Contract will be taken to have been terminated on that date (or such later date as the parties may agree) and the Contract will be of no further force or effect; and

(iii) the Contractor will have no entitlement under or in respect of the Contract or in respect of or otherwise in connection with the WUC, other than any claim in relation to a breach of any Day 1 Clause.

(d) The Contractor must not commence carrying out work on the Site unless and until each of the conditions precedent identified in clause 6.2 have been satisfied or waived under clause 6.1(b).

6.2 Specific conditions precedent

(a) The following conditions precedent are required to be satisfied before the Contract will commence:

(i) finance being approved by the financier (at the Principal's discretion);

(ii) receipt by the Principal of evidence of all insurance required to be effected by the Contractor under the Contract;

(iii) a single director of the Contractor executing a deed of guarantee and indemnity, set out in Annexure Part O, in accordance with clause 5.6A.

(iv) the Contractor providing security in the amount stated in Item 14 in accordance with clause 5 of the General Conditions of Contract; and

(v) the Contractor executing any financiers' deed in accordance with clause 47 (if required to do so by the Principal)."

[4] It is uncontentious that cls 6.2(a)(i) and (iii) were satisfied by the Nominated Date. Security was not, however, provided under cl 6.2(a)(iv) by the Nominated Date. As to cl 6.2(a)(ii), the state of the evidence is rather unsatisfactory as to what evidence

was provided to the applicant of the insurances, but it appears common ground that some insurance policies required to be obtained by the contractor did not comply with the Contract. In particular, those clauses which required insurance policies to be provided in joint names were not satisfied.

Background facts

[5] The parties resolved objections between themselves and no cross-examination in relation to the evidence took place. The factually contentious issues were not pursued by the respondent for the purposes of this application. To the extent there was any factual dispute, it was to be determined by reference to the documents.

[6] The time by which the Conditions Precedent were to be satisfied or waived under cl 6.1 of the Contract was extended from three months to four months by a deed of variation executed by the parties on 28 June 2022. The date became 31 July 2022, the Nominated Date. That extension of time was foreshadowed by the superintendent, Mr Dean Weintrop, in a letter dated 3 June 2022 when he provided a Notice to Proceed with the early works packages which relevantly stated (the **3 June Notice to Proceed**):

> "Please note the closing approval to proceed with the works under the contract has not been given. The parties further agree to extend the conditions precedent required satisfaction date outlined in clause 6.1(c) of the contract from three months to four months."

[7] The applicant seeks to rely on the 3 June Notice to Proceed as evidence that Mr Weintrop was not only acting as superintendent under the Contract but as the principal's agent, and that the respondent was aware of that fact. Given that an agreement varying the date for satisfaction was subsequently formalised by the parties through a deed of variation, and the parties did not rely on the 3 June Notice to Proceed, that argument carries little weight.

[8] On 29 July 2022, following an exchange of emails between Mr Wesley Hough, the applicant's managing director, Mr Weintrop, and Mr Jeremy McGrath, the financier's representative, Mr Weintrop sent a notice to the respondent (the **29 July Notice**). The 29 July Notice had been sent to Mr McGrath and Mr Hough for approval and stated:

> "RE: Lakeside Robina – Notice to proceed with contract works
>
> I write in my capacity as Superintendent in relation to the Lakeside Robina (34-38 Glenferrie Drive, Robina, QLD) AS4902-2000 contract between Veesaunt Property Syndicate 1 Pty Ltd and Alliance Building and Construction Pty Ltd dated 31 March 2022 ("the Contract"). This is a notice to proceed with contract works as clause 6.2 under the contract has been satisfied as per the below:
>
> - Formal financial approval from ANZ has been received and therefore preconditions per clause 6.2 have been satisfied.
> - The building contract tie in deed will be submitting within 14 days in accordance with clause 47."

[9] Mr Kane Keefe, the respondent's managing director, responded:

> "Thanks mate … I reckon you just made Wes's year with that news".

[10] According to the applicant, that 29 July Notice was sufficient to satisfy cl 6.1(b) of the Contract.

[11] After the 29 July Notice was sent, the parties continued to negotiate in relation to certain aspects of the Contract. In particular:

(a) between 4 and 10 August 2022, Mr Hough sent correspondence in relation to insurances which stated, amongst other things, "[l]ooking to close out the CPs for construction funding with ANZ. Wanted to get your thoughts on below..." and requested that the property and public liability insurance be moved to the contractor's insurance and Boulder Capital and ANZ be listed as interested parties. This appeared to follow requests from ANZ to shift property and public liability insurances and list Boulder Capital and ANZ as interested parties. It also requested a tripartite deed be entered into with the project financiers. There were also requests for the respondent's contract works insurance to be updated and for a current work cover policy. Mr Keefe responded that he would "flick" the insurances to the brokers to add the interested parties and that he had "printed the tripartite" which he would aim to review. That was followed up by Mr Hough on 8 August 2022;

(b) between 5 and 10 August 2022, there was an exchange between Mr Keefe and Mr Hough regarding the commencement of works. Mr Hough asked

whether they could put the respondent's "civil guys on standby pending the frame and truss pricing next week". Mr Keefe stated that they could probably get fences, sheds, and trees down by the end of the month if they were met with favourable feedback from the market on frames and trusses. In response, Mr Hough stated that "end of month tree clearing would be great". There was a further exchange in relation to the tripartite agreement, with Mr Keefe raising concerns regarding the entire agreement provision and seeking some other amendments. In his response, Mr Hough raised whether the parties should "book pre-start and get performance bond paid?";

(c) between 10 August and 2 September 2022, there were several email exchanges between Mr Hough and Mr Alex Johnson, the respondent's project manager, in relation to costs. Mr Johnson informed the applicant of cost overruns in the provisional amount of some $1.277 million and an extra $420,000 for trade and supplier escalation. Mr Johnson also stated that they could not proceed any further without some surety around the contract value and how the additional costs would be covered. Mr Hough stated in response that he would have a chat with the financier. That appears to have led to the email of 6 September 2022;

(d) on 6 September 2022, Mr Hough informed Mr Keefe:

> "I have now had a chance to speak with my financier and review the construction contract. We are going to proceed with the contract. As I understand it you are obligated (under the contract) to sign the tripartite deed so we can proceed with the works."

Mr Hough also requested the return of the tripartite at the earliest convenience;

(e) between 8 and 14 September 2022, a further email exchange took place in relation to the question of costs overruns, which included Mr Keefe stating to Mr Hough:

> "Now with respect to your assertion that the Contract is afoot, we refute this point as the FIA Conditions Precedent (Clause 6) have not been satisfied/waived and the time has now elapsed. You are likely referring to the notice from the Superintendent dated the 29th of July 2022, which is clearly issued in their capacity as Superintendent. Which highlight

> only the Principal can waive the Conditions Precedent, and therefore in accordance with Subclause 6.1.c the parties are no longer bound by the terms of the Contract …"

(f) on 29 September 2022, a notice to show cause was sent by Mr Hough to Mr Keefe giving notice pursuant to cl 39.2 of the Contract. The notice to show cause alleged that the contractor had wrongfully suspended work and, amongst other things, wrongfully asserted that the Contract had come to an end. Specifically, Mr Hough refuted that the Contract had come to an end on 31 July 2022 because the 29 July Notice satisfied the requirements of cl 6.1(b), or alternatively, the respondent had waived any right to take issue with the 29 July Notice;

(g) on 11 October 2022, the respondent again asserted that there was no contract; and

(h) on 21 November 2022, the applicant sent a further notice affirming its position that the Contract remained on foot but stated: "To the extent it is necessary to do so and without admission that these conditions have not been satisfied or waived, the Principal hereby waives each and every one of the requirements of clause 6.2 of the FIA".

[12] The respondent did work pursuant to an early works package. It was accepted for the purposes of the application that those works were the result of an agreement separate from the Contract and are not relevant to the present dispute.

Issue 1 – did the 29 July Notice result in the Contract becoming unconditional?

[13] The issue in relation to the 29 July Notice is whether it was sufficient to satisfy cl 6.1(b) of the Contract to waive any Conditions Precedent which had not been satisfied, such that the Contract became unconditional.

Summary of the parties' contentions

[14] According to the applicant, the 29 July Notice was effective notice under cl 6.1(b) of the Contract because:

(a) by 29 July 2022, the only Conditions Precedent which remained to be satisfied were:

(i) the provision, by the respondent, of the bank guarantee; and

(ii) the execution, by the respondent, of the tie-in deed with the financier;

(b) the 29 July Notice waived those and any other outstanding Conditions Precedent; and

(c) the validity of the 29 July Notice was not affected by the fact that it was sent by the superintendent rather than the principal, as the superintendent sent the notice as the applicant's agent for and on behalf of and at the direction of the principal.

[15] In essence, the applicant says that while the 29 July Notice did not expressly refer to waiver, it could not be interpreted as doing otherwise. This is because the 29 July Notice gave notice to proceed with works in circumstances where, pursuant to cl 6.1(d) of the Contract, works could only proceed if the Conditions Precedent had been satisfied or waived.

[16] The applicant contends that even if the 29 July Notice was not effective notice within the terms of cl 6.1(b) of the Contract, the principal waived any unsatisfied Conditions Precedent under general law because each of the Conditions Precedent were solely for the benefit of the principal and waiver could occur under general law without the principal giving notice under cl 6.1(b). That waiver is said to have been effected by the 29 July Notice directing the respondent to proceed with works, which was consistent only with the satisfaction or waiver of the Conditions Precedent.

[17] The respondent contends that it was not sufficient for the 29 July Notice to be given by the superintendent. While it does not cavil with the fact that the superintendent can be the principal's agent, the respondent's position is that on the proper construction of the Contract, the notice had to be given by the principal and did not state that the superintendent provided the notice on behalf of the principal. Further, there was no evidence that the respondent had been made aware that the financier's instructions through Mr McGrath to the superintendent were accepted by the applicant prior to the sending of the 29 July Notice.

[18] The respondent further contends that the 29 July Notice was not sufficient to constitute a waiver as it was not deliberate, clear and unequivocal.[1] The respondent submits that, properly construed, a reasonable businessperson would observe that the 29 July Notice purported to communicate the fact that the finance pre-condition had been satisfied and was otherwise inadequate to effect a waiver of the unsatisfied conditions in cl 6.2 of the Contract.

[19] Further features relied upon by the respondent are that:

(a) the 29 July Notice did not explicitly refer to any waiver of conditions;

(b) the 29 July Notice refers to "notice to proceed with contract works as clause 6.2 under the contract has been satisfied as per below" and only refers to finance approval having been given and to a tie-in deed being submitted within 14 days as provided under cl 47 of the Contract; and

(c) reference to the tie-in deed, which was to be submitted within 14 days, demonstrated that there was no waiver because it had not been submitted to be signed as contemplated under cl 6.2 of the Contract.

[20] The respondent contends that the reference to the 29 July Notice being a "notice to proceed with works" was inconsequential as while they are interlinked, they are distinct. The provision for the commencement of works in cl 6.1(d) of the Contract is a constraint upon the contractor not to commence works unless and until each of the Conditions Precedent identified in cl 6.2 have been satisfied or waived under cl 6.1(b). Clause 6.1(b), however, provides that satisfaction of each of the Conditions Precedent can only be waived by written notice from the principal.

[21] The respondent contends that there could be no waiver under general law as, on the proper construction of cl 6.1 of the Contract given the word "only", it was only open for the applicant to waive any condition in accordance with that clause.

[22] The respondent further contends that the applicant's conduct after 29 July 2022 was inconsistent with it having waived conditions in cl 6.2 of the Contract, given it was seeking that the respondent comply with the conditions in cl 6.2 which had not been

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[1] *Commonwealth v Verwayen* (1990) 170 CLR 394; *Agricultural and Rural Finance Pty Ltd v Gardiner* (2008) 283 CLR 570, 588 [56] where the Court also noted the many different uses of the term "waiver".

satisfied, at least by the provision of security and potentially in requesting changes to insurance. The applicant also required the execution of the tie-in deed referred to in cl 6.2(a)(v) of the Contract which was not executed by the respondent by 31 July 2022 (nor did it appear to have been provided by the applicant prior to that date with a request for execution).

[23] The applicant contends that the conduct after the 29 July Notice in respect of the Conditions Precedent was consistent with the applicant having waived compliance with the conditions in question as conditions precedent but not otherwise. It contends that the conditions as to the provision of the bank guarantee, insurance and financier's deed were still contractual promises that the respondent was obliged to satisfy once performance of the contract was required.

Condition precedent to contract or performance?

[24] Although little turns on it for the purposes of the present application, there is a threshold question of whether, on its proper construction, cl 6 of the Contract is a condition to the performance of the Contract rather than to the formation of a binding contract.[2] Mason J in *Perri v Coolangatta Investments Pty Ltd* stated that "[g]enerally speaking, the court will tend to favour that construction which leads to the conclusion that a particular stipulation is a condition precedent to performance as against that which leads to a conclusion that the stipulation is a condition precedent to the formation or existence of a contract".[3]

[25] In this case it is fairly clear from the terms of both cls 6.1 and 6.2 that there is a contract in existence and that cl 6.2 provided for conditions precedent to performance. Clause 6.1(a) refers to the "rights and obligations of the party under the Contract" being "subject to the satisfaction or waiver of the conditions precedent in clause 6.2". Similarly, cl 6.1(c) is premised on a contract being in existence given it provides for its termination and for the parties to be released from being bound by the terms of the contract. Clause 6.2 similarly refers to conditions which must be satisfied before "the Contract will commence". These features demonstrate that the parties' intention was that there be a contract in existence with

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2 *Perri v Coolangatta Investments Pty Ltd* (1982) 149 CLR 537, 552. See also the discussion by Gibbs CJ at 541–543.

3 Ibid 552.

conditions precedent to be satisfied or waived before performance of the Contract was required.

Did the 29 July Notice comply with cl 6.1(b)?

[26] The 29 July Notice only refers to satisfaction of conditions and not to waiver. In considering the effectiveness of the 29 July Notice, the absence of an explicit reference to waiver is not necessarily fatal.[4]

[27] In *Prospect Resources Ltd v Molyneux* (***Molyneux***),[5] Ward JA (with whom Beazley P and Leeming JA agreed) considered whether a letter of 28 October 2013 amounted to a waiver and stated:[6]

> "What was necessary was for the letter to communicate unequivocally that compliance with relevant conditions was no longer required or was taken as having been satisfied".

[28] The clause in *Molyneux* was in similar terms to the present insofar as it drew a distinction between the "satisfaction" and "waiver" of the conditions precedent.[7] In that case, under the contract concerned the appellant had to reasonably satisfy the respondents that various conditions precedent had been satisfied or waived by a nominated time. If the conditions precedent were not satisfied or waived by the nominated time, either party had the right to terminate the agreement. In the event the court did not consider all the conditions precedents were satisfied, an alternative argument was raised by the appellant that the letter of 28 October 2013 was sufficient to waive any unsatisfied conditions precedent.

[29] The letter, which was sent by the nominated time, referred to the appellant being "pleased to confirm that clauses 5.2, 5.3 and 5.4 … have been satisfied as of the date of this document", requested the other party to confirm its understanding was the same, and was signed by the respondents. Ward J considered that the respondents did not by their signatures "express an agreement to treat the conditions as having been satisfied or not to insist upon further performance of the conditions", but rather confirmed their current belief as to the satisfaction of the conditions.[8]

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4 *Prospect Resources Ltd v Molyneux* [2015] NSWCA 171, [27], [58].
5 [2015] NSWCA 171.
6 Ibid [68].
7 Ibid [64].
8 Ibid [68].

Ward J rejected the argument that by signing the letter the respondents expressed an agreement to treat the conditions as satisfied or to waive any conditions not satisfied.[9]

[30] Her Honour stated that what was unclear was whether the respondents were doing more than expressing a current belief as to satisfaction of the conditions. The letter did not, for example, "unequivocally communicate a decision to abandon a right to insist on satisfaction of the conditions or an election not to insist on their satisfaction or treat them as being fulfilled."[10] The letter was therefore found not to have objectively communicated or constituted a waiver of the conditions.

[31] In the present case, no notice was expressly required to be given notifying of the satisfaction of the Conditions Precedent. However, as the applicant was the only party who could waive a condition, cl 6.1(b) of the Contract required it do so expressly. The 29 July Notice, however, only speaks in terms of satisfaction of the "preconditions per clause 6.2" and refers to the tie-in deed being submitted within 14 days in accordance with cl 47 of the Contract.

[32] The applicant contends that unlike the position in *Molyneux*, the respondent would have been aware of which conditions had not been satisfied and, given the Conditions Precedent not complied with were ones for which the respondent was responsible, would have known that those conditions were being waived. In relation to the financiers' deed, the applicant contends that cl 6.2 only provided for it to be executed if required by the principal and the principal had not required that it be done by the Nominated Date.

[33] There is, in my view, merit in the argument that at least in relation to the financiers' deed the 29 July Notice constitutes a waiver of compliance with cl 6.2(a)(v) of the Contract by the Nominated Date on conditions, given the 29 July Notice made clear that execution of the deed was still required but not until after the Nominated date, namely 14 days after provision of the deed. Clause 6.1(b) allowed a waiver to be on conditions. Given the timing of the notice two days prior to the Nominated Date and the reference to the financer's deed being required to be executed 14 days after that

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9 Ibid.
10 Ibid.

date, the terms were adequately clear and deliberate to constitute a waiver of the satisfaction of cl 6.2(a)(v) by the Nominated Date.

[34] The same cannot be said in relation to the other Conditions Precedent which were not complied with at the time of the 29 July Notice and to which no reference was made at all. The applicant is not assisted by the reference to "conditions" in the first dot point of the 29 July Notice. Firstly, the conditions are referred to in connection with financial approval. That is supported by the fact that the 29 July Notice stated that "clause 6.2 under the contract has been satisfied as per the below" then identified the formal finance approval clause and referred to the building contract tie-in deed albeit indicating how it was to be satisfied after the Nominated Date. Secondly, the 29 July Notice referred to the conditions that were satisfied, not that those conditions that had not been satisfied were either being treated as satisfied or otherwise as having been waived. Even if the reference to "conditions" in the 29 July Notice was construed more broadly given cl 6.2(a)(iii) had been complied with and cl 6.2(a)(ii) had at least been partially complied with, the notice could only, on its broadest construction, be referring to those conditions and implicitly treating the compliance with cl 6.2(a)(ii) as sufficient. On no reading of the 29 July Notice could the reference to conditions being satisfied constitute a waiver of the condition not met at all, namely the provision of security required by cl 6.2(a)(iv) of the Contract. In that regard, cl 6.1(b) required that any notice of waiver had to be given in respect of each of the Conditions Precedent to be waived. A reasonable businessperson would read that as requiring the condition to be waived be specified.

[35] The applicant contends, however, that there is a clear implicit waiver by the 29 July Notice stating that the contracts works were to proceed. I am not persuaded that argument is correct. In my view, the argument conflates the notion of the notice to proceed with the question of waiver where cl 6.1(d) clearly requires that a condition be waived under cl 6.1(b), rather than a notice to proceed being a substitute for it. While cl 6.1(d) of the Contract acts as a constraint upon the respondent from proceeding with the construction works unless the Conditions Precedent are satisfied or waived, it expressly provides that the condition is waived under cl 6.1(b). By giving the notice to proceed and omitting any reference to the condition or conditions not satisfied, the question of whether the condition has been waived or not is silent. It is not a clear, unequivocal notice that cl 6.2(a)(iv) was waived.

[36] In my view, the proper construction of the 29 July Notice is that it gave notice that the applicant had met the conditions for which it was responsible or, in the case of the financiers' deed, required it to be provided but waived the time for compliance with that condition by the Nominated Date and that from the applicant's point of view it had satisfied or waived on condition the conditions in cl 6.2 it was required to meet to allow the works to proceed. However, the 29 July Notice leaves silent the position in relation to the conditions not complied with by the contractor and was insufficient to waive the Conditions Precedent not satisfied.

[37] There is an additional reason why the 29 July Notice does not constitute a waiver of the unsatisfied conditions in cl 6.2 of the Contract under cl 6.1(b), namely that it was given by Mr Weintrop in his capacity as superintendent.

[38] There is no prohibition on a superintendent being the principal's agent under a construction contract notwithstanding his or her contractual role, as was recognised by Digby J in *V601 Developments Pty Ltd v Probuild Constructions (Aust) Pty Ltd*.[11] That was not disputed by the respondent. The respondent, however, relies on the fact that the principal did not hold Mr Weintrop out as being able to act with the principal's authority. That argument may be shortly disposed of given this is not a case of ostensible authority but rather one in which the superintendent is said to have acted as the principal's undisclosed agent. I find that the emails between the superintendent, financier's representative, and the principal's representative provided the superintendent with actual authority to send the 29 July Notice but that that had not been communicated to the respondent. As such, the cases which the respondent relied upon to contend that a superintendent does not have authority to waive the operation of a contract do not apply in the present case.[12]

[39] As set out above, I do not consider the 3 June Notice to Proceed sent by the superintendent to the respondent gave notice that the superintendent had some general authority to act on behalf of the principal. If anything, the fact that a deed of variation followed would have suggested that a follow up notice would be sent by the principal. However, while the superintendent could have been authorised by the principal to waive the Conditions Precedent, the email exchange between the

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11 [2021] VSC 849, [239]–[240].

12 See paras [72]–[73] of the Respondent's Outline of Submissions. See also *GPN Ltd v O2 (UK) Ltd* [2004] EWHC 2494.

superintendent, Mr Hough and the financier only made reference to the satisfaction of the finance approval and the position with respect to the financiers' deed. On the face of the emails the superintendent's authority did not expressly make any reference to waiver any of the conditions, nor was he provided any authority separate from the authorisation to give the 29 July Notice itself.

[40] In any event, the 29 July Notice was insufficient to waive those Conditions Precedent which had not been complied with because it was stated to have been sent by Mr Weintrop in his capacity as superintendent not as agent of the principal.[13]

[41] The 29 July Notice did not merely omit to state that it was provided by the superintendent on behalf of the principal but expressly stated it was given in Mr Weintrop's capacity as superintendent, which was a designated role under the Contract with specified powers[14]. Those powers arguably extended to giving notice to proceed with works under the Contract but did not extend to being able to waive the Conditions Precedent.

[42] Given the superintendent had the power to direct the commencement of works under the Contract, by giving the 29 July Notice explicitly in his capacity as the superintendent, the reference to satisfaction of the conditions could not reasonably be construed as being a notice given by the principal under cl 6.1(b), if the 29 July Notice was sufficient to otherwise constitute a waiver.

Waiver under the general law

[43] In the absence of notice as contemplated by cl 6.1(b) of the Contract, the applicant contends that there still could be a general waiver of the Conditions Precedent. For the reasons stated above, I do not consider the 29 July Notice by stating the contractor should proceed with the works[15] or the conduct in sending such a notice, provided in clear, deliberate and unequivocal terms that further performance of the conditions was not required. The 29 July Notice therefore was not sufficient to constitute a waiver of any of the conditions in cl 6.2 whether it be under the Contract or general law. Even if I am wrong in that regard, I do not consider that

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13 The case of *Australia and New Zealand Banking Group Ltd v Pan Foods Company Importers and Distributors Pty Ltd* [1999] 1 VR 29 referred to by the applicant does not lend any assistance with a clause in different terms from the present.

14 See cl 19 of the Contract.

15 Cf *Canberra Advance Bank Ltd v Benny* (1992) 115 ALR 207, 220.

waiver was permitted under the general law as it is excluded on the proper construction of the clause. Clause 6.1 is explicit that the waiver must comply with cl 6.1(b) for the following reasons:

(a) cl 6.1(a) states that the rights and obligations that the parties under the Contract "are subject to the satisfaction or waiver of the conditions precedent in clause 6.2";

(b) cl 6.1(b) states that the satisfaction of the conditions precedent identified in cl 6.2 can only be waived by written notice from the principal;

(c) cl 6.1(c) states "[u]nless each of the conditions precedent in clause 6.2 have been satisfied, or waived under clause 6.1(b)"; and

(d) cl 6.1(d) refers to the contractor being prohibited from commencing works "unless and until each of the conditions precedent have been satisfied or waived under clause 6.1(b).

[44] Therefore, it is not necessary for me to consider whether the Conditions Precedent were for the benefit of the applicant only.

Issue 2 – Did the applicant have a right to give notice of the termination of the Contract, or was the Contract automatically terminated?

[45] Even if the court finds that there has been no waiver within the terms of cl 6.1(b) or under general law, the applicant contends that it has affirmed the Contract such that the respondent could not terminate the Contract under cl 6.1(c). In particular, the applicant contends that given the responsibility for non-compliance with cls 6.2(a)(ii) and (iv) lay with the respondent, the respondent was precluded from taking advantage of its failure to provide the insurances and bank guarantee as provided for under the Contract. Given the applicant elected to continue with the Contract notwithstanding the non-satisfaction of the Conditions Precedent by its notice on 6 September or 21 November 2022, the Contract remained on foot.

[46] The respondent contends that on its proper construction, cl 6.1(c) had the effect that the Contract was terminated automatically and that the parties were no longer bound by it. The respondent contends that the Conditions Precedent in cl 6.2(a)(v) was not satisfied as a result of the applicant's failure to provide it with the tie-in deed in

sufficient time to permit its execution by the Nominated Date. Further, the respondent contends there is no evidence that it took advantage of its default given it did not interfere with the applicant deciding whether the Conditions Precedent were satisfied or waived, nor is there any evidence of the applicant prior to 31 July 2022 seeking out the amendment of the insurances or the provision of a bank guarantee. The respondent contends that the applicant sought to defer those matters and pursue them after the time when the Conditions Precedent should have been waived or satisfied. It does not, however, raise any case of estoppel.

[47] There has been some tension in the authorities as to how provisions providing for a contract to be void or to come to an end when a condition precedent or a contingent condition has not been satisfied or waived should be construed. In particular, should such a clause be construed as only providing for the contract to be voidable at the election of a party not responsible for its fulfilment, if the satisfaction of the relevant condition is within the party's control, to avoid that party taking advantage of its own default to assert the contract is rendered void. Alternatively, should the clause be construed on its own terms and the question of a party seeking to take advantage of its own breach of duty where the duty is owed to the other party[16] or advantage of its own default to bring about a stipulation that a contract is void[17] is dealt with by the application of legal principle. In recent times, at least in this Court, the latter approach has been favoured.

[48] As was stated by Keane JA in *Donaldson v Bexton* (***Donaldson***):[18]

> "In the end, however, it is the intention of the parties which is sovereign."

[49] The High Court has reiterated that the proper approach to the interpretation of commercial contracts is to look at the terms in their context and construe them according to what a reasonable businessperson would understand those terms to mean.[19]

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16 *Cheall v Association of Professional, Executive, Clerical and Computer Staff* (1983) 2 AC 180, 189 per Lord Diplock (with whom the remainder of the court agreed).

17 Drawing from the High Court in *Suttor v Gundowda* (1950) 81 CLR 418, 441. See also Keane JA in *Donaldson v Bexton* [2007] 1 Qd R 525, 536 [28].

18 [2007] 1 Qd R 525, 532 [21].

19 *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640, 656–657 [35]; *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104, 116 [47].

[50] The blurring of the lines between construction and principle appears to stem from *New Zealand Shipping Co Ltd v Société des Ateliers et Chantiers de France*, where Lord Atkinson stated:[20]

> "It is undoubtedly competent for the two parties to a contract to stipulate by a clause in it that the contract shall be void upon the happening of an event over which neither of the parties shall have any control, cannot bring about, prevent or retard. For instance, they may stipulate that if rain should fall on the thirtieth day after the date of the contract, the contract should be void. Then if rain did fall on that day the contract would be put an end to by this event, whether the parties so desire or not. … But if the stipulation be that the contract shall be void on the happening of an event which one or either of them can by his own act or omission bring about, then the party, who by his own act or omission brings that event about, cannot be permitted either to insist upon the stipulation himself or to compel the other party, who is blameless, to insist upon it, because to permit the blameable party to do either would be to permit him to take advantage of his own wrong, in the one case directly, and in the other case indirectly in a roundabout way, but in either way putting an end to the contract."

[51] That passage was cited by the High Court in *Suttor v Gundowda Pty Ltd* (***Suttor***)[21] in stating the second reason that the contract was still on foot notwithstanding the lack of the treasurer's consent even if the court had not found the time for compliance with the clause in question had been extended (as it did), that clause being relevantly:[22]

> "in the event of the consent of the Treasurer not being obtained within two months from the date hereof or within such further period as may be mutually agreed upon by the parties hereto, this contract shall be deemed to be cancelled …" (emphasis added)

[52] The second answer of the High Court as to why the contract remained on foot was in the following terms:[23]

> "Where the event in question is one which cannot occur without default on the part of one party to the contract, the position is clear. The provision is then construed as making the contract not void but voidable: only the party who is not in default can avoid it, and he may please himself whether he

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20 [1919] AC 1, 9.
21 (1950) 81 CLR 418.
22 Ibid 421.
23 Ibid 441.

> does so or not. In the present case the happening of the event (not obtaining the Treasurer's consent) may be brought about by failure on the part of either party to take certain necessary steps … or it may be brought about without any default on the part of either party. In fact, although there was some argument to the contrary, it was, we think, brought about without any default on the part of either party. Such a case is perhaps not quite so clear as the simpler case where the event cannot occur without default on one side or the other. But we are of the opinion that the *New Zealand Shipping Case* requires the same construction to be given to the contract in both classes of case. The provision in question is to be construed as making the contract not void but voidable. The question of who may avoid it depends upon what happens. If one party has by his default brought about the happening of the event, the other party alone has the option of avoiding the contract. If the event has happened without default on either side, then either side may avoid the contract. But neither need do so, and, if one party having a right to avoid it does not clearly exercise that right the other party may enforce the contract against him …" (footnotes omitted)

[53] *Suttor* was followed by the majority in *Gange v Sullivan* (***Gange***),[24] where the relevant clause in relation to the non-fulfilment of a condition to which the performance of the contract was subject provided that:[25]

> "… in the event of the said Council not granting such approval for the purpose aforesaid by the 31st day of May, 1965, then this Contract shall be deemed to be at an end and all moneys paid by the Purchaser to the Vendor shall be refunded but in the event of Council granting the approval aforesaid then the Purchaser will complete the Contract within twenty days of the granting of such consent." (emphasis added)

[54] In *Gange*, the majority stated that:[26]

> "As a first step to deciding this decisive question, it is necessary to understand the condition and its significance to the parties. Without doubt, it was intended to safeguard the purchaser by making the continuance of the contract depend upon his obtaining the council's approval for using the land for the three purposes therein set out. Yet, although the condition was for the protection of the purchaser, it nevertheless affected the vendor, for it obliged the purchaser to make his application for the council's approval within seven days; it provided for the contract coming, or being brought, to an end if the

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24 (1966) 116 CLR 418.
25 Ibid 425.
26 Ibid 441–2. Barwick CJ and Windeyer J however adopted different reasoning to the majority.

> council's approval was not granted by 31 May; and it fixed the date for the completion of the contract by reference to the only event which could give rise to any obligation to complete — that is, the council's approval.
>
> It was argued for the appellant that the condition did not mean that the contract was brought to an end automatically when the council had not granted approval by 31 May. *Suttor v Gundowda Pty Ltd* (1950) 81 CLR 418, together with other cases, was relied upon to support the conclusion that non-fulfilment of the condition did not of itself bring the contract to an end but did no more than render the contract voidable at the instance of a party not responsible for the non-fulfilment of the condition. Whilst the effect of a condition must in every case depend upon the language in which it is expressed and a decision upon the meaning of one condition cannot determine the meaning of a different condition, the authorities cited do show a disposition on the part of courts to treat non-fulfilment of a condition such as that here under consideration as rendering a contract voidable rather than void in order to forestall a party to a contract from gaining some advantage from his own conduct in securing, or contributing to, the non-fulfilment of a condition bringing the contract to an end. Accordingly, notwithstanding that the language of the condition here is susceptible of meaning that the contract came to an end if 31 May passed without the council's approval, we are prepared to treat non-fulfilment of the condition as rendering the contract voidable rather than void. So understood, non-fulfilment of the condition could, in the absence of default contributing thereto, be relied upon by either party as a ground for determining the contract …" (emphasis added)

[55] The above cases were considered by Keane JA in *Donaldson* (with whom Jerrard J agreed). In that case, the respondents had purported to terminate the contract, asserting that it had come to an end automatically under the special condition which relevantly provided that:[27]

> "This contract is subject to and conditional upon the Buyer's entering into a binding and enforceable contract of sale on terms satisfactory to them for the sale of their property … within thirty (30) days from the date of this contract herein, failing which this contract will be at an end, the deposit refunded to the buyer and neither party will have any claim against the other apart from any rights either of the parties will have against the other as a result of any breach of this contract."

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27 *Donaldson v Bexton* [2007] 1 Qd R 525, 531 [12].

[56] Both parties accepted that by virtue of the decisions of the High Court in *Suttor* and *Gange*, the special condition should be construed as rendering the contract voidable by either party.[28] It was accepted that neither party contributed to the non-fulfilment of the special condition.[29] The purchasers purported to waive the benefit of the condition after the 30-day period had passed. The vendors subsequently asserted that the contract was at an end due to the failure of the condition. The purchasers contended that they had effectively waived the special condition after its time for fulfilment and stated their intention to complete before the vendors had exercised their right to terminate. The question was whether the vendors' right to terminate was lost because the purchasers indicated their wish to complete the contract before the respondent terminated it, so was different from the present case.

[57] Given the arguments raised by the parties, his Honour analysed a number of authorities dealing with non-fulfilment of contingent conditions where the contract provided for the contract to come to an end in order to see whether they supported a broader right contended for by the purchaser. While the case was not on all fours with the present case, some of the comments by his Honour are relevant in considering the question of construction. His Honour considered that even though the condition was for the exclusive benefit and could be waived by one party, as a matter of construction, the terms of the contract did not entitle that party to enforce the contract contrary to the wishes of the other party if the special condition was not fulfilled.[30] His Honour stated:[31]

> "The special condition speaks of the contract being 'at an end' in the event of nonfulfilment. While it is appropriate to regard that provision, illuminated by *Suttor v Gundowda* and *Gange v Sullivan*, as rendering the contract voidable rather than void, the express terms of the special condition are hardly consistent with the contract being able to be kept on foot by the choice of the purchaser in denial of the conceded right of the vendor to bring the contract to an end. The language of the special condition simply does not suggest that the contract may be kept on foot at the option of the buyers."

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28 Ibid 531 [17].
29 Ibid.
30 Ibid 544 [58].
31 Ibid 544 [60].

[58] In *Donaldson*, the vendors' right of termination was not defeated by the purchasers' expressed desire after termination of the contract to complete the contract. His Honour further commented that:[32]

> "… It may be the case that the appellants alone could have waived the benefit of the special condition before it failed. It is not necessary to resolve that issue in this case. That is because the appellants cannot deny to the respondents the right of avoidance which arose upon its non-fulfilment. In the events which happened, on the true construction of the special condition, the respondents were entitled to terminate the contract.
>
> To interpret the contract as the appellants contend would do more violence to the language in which the parties have cast their bargain than is warranted by the authorities. That violence would be done for reasons not connected with the principle that a party should be denied the opportunity to take advantage of that party's own default being the principle which informs the decisions in *Suttor v Gundowda* and *Gange v Sullivan*. Indeed, such an interpretation would defeat the evident intention of the parties in a way not required by the authorities. The principles of contractual interpretation established by *Suttor v Gundowda* and *Gange v Sullivan* do not invite, or encourage, a process of judicial adjustment of the parties' rights of termination in accordance with a judicial assessment of whether a vendor has a sufficient interest in the fulfilment of a particular condition to resist a unilateral waiver of that condition by the buyer before it is fulfilled. To sanction such a process is to introduce a further layer of uncertainty into the enforcement of contracts."

[59] Two New South Wales decisions which considered *Suttor*, and were referred to by the parties, are *Rudi's Enterprises Pty Ltd v Jay* (***Rudi's Enterprises***)[33] and *MK & JA Roche Pty Ltd v Metro Edgley Pty Ltd* (***MK & JA Roche***)[34]. In the former case, Samuels JA (with whom Priestley and McHugh JJA agreed) found that a clause providing that a deed was "null and void" on a contemplated event, namely the failure of a third party to give consent in a reasonable time, differed from the clause considered in *Suttor* because, unlike *Suttor*, the deed made express provision by which it could be avoided in providing that one of the parties had contractual obligations to apply for consent while the other party was obliged to support the application and that the grant or refusal of consent was regarded as beyond their

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32 Ibid 550 [63]–[64].
33 (1987) 10 NSWLR 568.
34 [2005] NSWCA 39.

control.[35] The deed therefore, in his Honour's view, exhausted the parties' intervention in the process and strongly suggested that the parties intended that the refusal of consent was to result in automatic termination.[36] In contrast to elsewhere in the deed, the clause stated that the deed "shall be null and void and of no effect" upon the contemplated event occurring. The clause also provided for what was to occur in terms of the parties' respective positions to restore them to the position they were in prior to entry into the deed. Samuels JA considered that the parties' intention was that the agreement should terminate automatically upon the happening of the stated event, with his Honour observing that:[37]

> "I cannot think that the Court in *Suttor* intended to lay down the proposition that parties could not stipulate for automatic termination of a contract save upon the occurrence of an event which, objectively, lay beyond their control. Effect must be given to the parties' intention."

[60] Samuels JA considered that provided the principle preventing a blameworthy party from taking advantage of his default is observed, he could see no difficulty in giving effect to the parties' "deliberately manifested intention".[38] His Honour held that the agreement terminated by its own force upon the expiration of a reasonable time for obtaining consent.[39]

[61] In *MK & JA Roche*, Hodgson JA (with whom Beazley and Ipp JJA agreed) considered that the use of the term "automatically" in a clause which provided for automatic recission if the conditions were not satisfied by the nominated date clearly showed the parties' clear intention that automatic recission was to be effected with no notice required.[40] The contract concerned was a development contract for construction of a bar and brasserie. Relevant to the development was a lease agreement where the brasserie was to be located. The parties' obligations were conditional on the satisfaction of several conditions precedent.

[62] Hodgson JA rejected the proposition that *Suttor* established a principle of law to be applied irrespective of the parties' inherent intention reflected in the terms of the

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35 *Rudi's Enterprises Pty Ltd v Jay* (1987) 10 NSWLR 568, 579.
36 Ibid.
37 Ibid.
38 Ibid 580.
39 *MK & JA Roche Pty Ltd v Metro Edgley Pty Ltd* [2005] NSWCA 39, [44].
40 Ibid [45].

contract.[41] In his Honour's view, *Suttor* established a principle to guide the construction of the contract which gave way to sufficiently clear expressions of intention to the contrary.[42] His Honour considered that if the position were otherwise, it would be contrary to well-established principles of construction where the words used in a contract are unambiguous.[43] His Honour agreed with Samuels JA's view of *Suttor* in *Rudi's Enterprises* as set out above. His Honour stated:[44]

> "Thus, as asserted in *Rudi's Enterprises*, where the parties have clearly stipulated for automatic termination upon the occurrence of an event which could occur either without the default of either party or with the default of one or other party, and if the event occurs through the default of one party, then, although in general terms this would mean automatic termination, the party whose default caused the event can be prevented from taking advantage of this by direct application of the principle that a party cannot take advantage of its own wrong, rather than through construing the contract contrary to its clear meaning."

[63] While Hodgson JA acknowledged that such a construction can give rise to uncertainty if an invalidating event occurred through the default of one party, insofar as the defaulting party will be in doubt as to whether or not it is required to perform the contract unless some notice is given by the party not in default, his Honour did not consider that did more than generally support the *Suttor* approach to construction.[45] His Honour found there were many matters outside the parties' control that could cause the non-fulfilment of the conditions precedent and concluded that the parties' clear intention reflected in the clause that the contract would be automatically rescinded and that no notice was required should prevail in the construction of the contract.[46]

[64] More recently, in *Principal Properties Pty Ltd v Brisbane Broncos Leagues Club Limited* (***Principal Properties***), Jackson J considered that the approach of Hodgson JA in *MK & JA Roche* stated the relevant principle where there is failure

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41 Ibid [42].
42 Ibid.
43 Ibid [44].
44 Ibid [45].
45 Ibid [46]. His Honour's suggestion at para [47] that the *Suttor* construction applied most strongly where an invalidating event could only occur through a breach of contract by one party or another was criticised by Cullinane J in *Quinn Villages Pty Ltd v Mulherin* [2006] QCA 433 (with whom McMurdo P and Holmes JA agreed).
46 *MK & JA Roche Pty Ltd v Metro Edgley Pty Ltd* [2005] NSWCA 39, [47].

of contingent conditions,[47] noting that a similar view was expressed by the Full Federal Court in *Perovich v Whitton (No 2)* (***Perovich***).[48]

[65] In *Bluepoint Properties Pty Ltd v Zuri Properties Pty Ltd* (***Bluepoint Properties***),[49] Bradley J adopted the analysis of Jackson J in *Principal Properties* and the Full Court in *Perovich*. In *Bluepoint Properties*, the clause was comprehensive in providing what would occur in relation to a condition in respect of the buyer undertaking due diligence if the buyer was not satisfied by a nominated date, had waived the benefit of the clause, or gave no notice at all. If the buyer did not provide a notice that it had satisfied or waived the benefit of the due diligence condition by a particular date, the deed provided that "clause 2.1 will be deemed to be not satisfied and this deed will be deemed to be terminated from 5pm on the earlier of [two nominated dates]".[50] Clause 2.2 then provided for what would occur if the deed was terminated. Clause 2.1 expressly stated that it was for the benefit of the buyer and could only be waived by the buyer. In that case his Honour found that the clear intention of the parties was requiring strict adherence to giving notice of a particular kind and that failure to do so resulted in termination of the agreement without the parties having to elect the result. His Honour considered the "second answer" outlined in *Suttor*, if it were to be applied in that case, "would produce a result contrary to the clear intention of the parties and the settled principles of contractual interpretation".[51] Adopting the approach of Jackson J in *Principal Properties*, Bradley J considered that *Suttor* should not be considered an exception to the settled approach of contractual interpretation and provided no principle that governed the proper interpretation of commercial agreements such as the clause in question, particularly in light of recent decisions of the High Court in relation to contractual interpretation whereby the terms are to be construed to accord with what a reasonable businessperson would have taken them to mean.[52] Any matter of party seeking to take advantage of its own wrong was to be dealt with according to principle.[53] His Honour's approach in relation to *Suttor* and *Gange* is consistent

47 (2014) 2 Qd R 132, 146 (which was not overturned on appeal in this respect).
48 (2016) 250 FCR 272, [62]–[63].
49 [2022] QSC 26.
50 *Bluepoint Properties Pty Ltd v Zuri Properties Pty Ltd* [2022] QSC 26, [53].
51 Ibid [88].
52 Such as *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640, 656–657 [35]; *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104, 116 [47].
53 *Bluepoint Properties Pty Ltd v Zuri Properties Pty Ltd* [2022] QSC 26, [92].

with *MK Roche*, *Rudi Enterprises* and *Perovich*. While the clause in the clause in the present case bears similarities to that considered by the Court of Appeal in *Donaldson*, *Donaldson* proceeded on the basis that the contract was voidable if the contingent condition was not satisfied or waived by the specified date, that was a matter conceded by the parties.

[66] Given the above authorities:

(a) the question of whether the Contract "automatically terminated" upon the Conditions Precedent not being satisfied or waived is a question of construction of the relevant clause having regard to the principles of contractual interpretation in relation to commercial contracts as stated by the High Court;

(b) the fact that satisfaction of conditions precedent may depend on action being taken by the parties and the conditions precedent may not be satisfied due to the default of a party, may indicate that the parties intend that the contract is voidable rather than void or, in the present case, that it will terminate upon the election of a party rather than automatically, but this remains a question of construction; and

(c) even if construction would generally favour automatic termination upon the occurrence of an event, the party in default will be prevented from taking advantage of its own default giving rise to the event by application of the principle a party cannot take advantage of its own wrong.

[67] Under the Contract:

(a) the rights and obligations of the parties, other than the Day 1 Clauses, were subject to the satisfaction or waiver of the Conditions Precedent in cl 6.2;

(b) the Conditions Precedent in cl 6.2 required the applicant or respondent to undertake steps to satisfy those conditions or at least in relation to the obtaining of finance approval steps by the applicant, make the application including by providing any material required;

(c) only the applicant, not the respondent, determined whether or not the conditions in cl 6.2 were satisfied or waived;

(d) the applicant could waive conditions in cl 6.2, and such waiver did not have to be absolute but could be on conditions as the applicant may stipulate; and

[68] While cl 6.1(b) evinces a clear intention of the parties that it is only the applicant who may determine to waive the satisfaction of any of the Conditions Precedent.

[69] In the context of a construction contract where work is being delayed pending the satisfaction of the Conditions precedent, the parties' clear intention evinced by cl 6.1(c) is that it is for the benefit of both parties in providing certainty as to whether the performance of the Contract will be required or not and the consequences of the non-satisfaction or waiver of the Conditions Precedent on the parties' rights and obligations under the Contract.

[70] The contractor could not commence works on the site until the conditions in cl 6.2 had been satisfied or waived under cl 6.1(b). The satisfaction of the Conditions Precedent were generally within the control of either the respondent or applicant, save that in respect of finance the applicant could only make the relevant application to the financier but whether the finance was approved remained at the principal's discretion. Considerable time was provided under cl 6.1 for the Conditions precedent to be satisfied. While the respondent could control those Conditions Precedent for which it was responsible, it was otherwise in a state of limbo until the satisfaction or waiver of the Conditions Precedent by the applicant by the Nominated Date. Consistent with giving the respondent certainty as to whether it was to have work pursuant to the Contract or be released from it, and relieving the applicant from any contractual responsibility under the Contract, the parties' intention of the effect on the Contract of the lack of satisfaction or waiver of the Conditions Precedent is made clear by cl 6.1(c), which is stated in unequivocal terms. It is in the present tense and provides a certain date on which the Contract will come to an end – "the parties will no longer be bound by the terms of the contract …" – and provides for the Contract to have been terminated "on that date".[54] Further, it provided for the contractor to have no entitlement under or in respect of the Contract or otherwise in connection with the WUC save for a breach under the Day 1 Clauses. The evident purpose of cl 6.1(c) is that termination of the

[54] Namely the day upon which the conditions were to be satisfied or waived.

Contract would occur on the Nominated Date[55] unless the Conditions Precedent in cl 6.2 were satisfied or waived without a party having to elect to terminate the Contract. If the parties wished to provide for a longer period in which the Conditions Precedent could be satisfied or waived, provision was made in cl 6.1(c) for the Nominated Date to be extended by the parties in writing.

[71] I consider, therefore, that the proper construction of cl 6.1(c) of the Contract is that a reasonable businessperson would construe the clause as providing that the Contract terminated on the Nominated Date without either party having to elect to terminate unless the Conditions Precedent in cl 6.2 had been waived or satisfied. However, as the court recognised in *MK & JA Roche*, which was adopted by Jackson J in *Principal Properties* and Bradley J in *Bluepoint Property*, notwithstanding the construction of a clause which is construed as automatically terminating upon an event, a party whose default caused the event can be prevented taking advantage of that automatic termination by application of the principle that a party cannot take advantage of its own wrong. In my view, notwithstanding the wording of cl 6.1(c), the clause does not exclude a party being prevented from taking advantage of its own default to contend that the Contract has been terminated.[56] That is supported by the fact that the conditions in cl 6.2(a) clearly impose obligations upon the respondent to satisfy a number of Conditions precedent. Although the applicant was the only party who could waive one of the Conditions Precedent, that does not support a construction that the applicant would have to waive a condition which the respondent was obliged to fulfil within its control and had no done so, in order to avoid the Contract being automatically terminated. If that were the case a party could determine it did not wish to proceed with the contract and therefore would take no steps to fulfil the Conditions Precedent, forcing the other party to forego the benefit of the conditions or to allow the contract to come to an end.

[72] It is therefore necessary to consider whether the respondent is prevented from relying on the Contract being automatically terminated due to non-compliance with conditions for which it was obliged to carry out and which were within its control.

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55 Unless the parties agreed an alternative date.

56 *Cheall v Association of Professional, Executive, Clerical and Computer Staff* (1983) 2 AC 180, 189.

[73] There is no evidence before me that cls 6.2(a)(ii) and 6.2(a)(iv) of the Contract were complied with by the contractor by the Nominated Date, nor as set out above did the applicant waive satisfaction of those conditions. It is clear from the terms of cl 6.2(a)(ii) and 6.2(a)(iv) that the contractor was to provide to the applicant evidence of all insurances required to be effected under the Contract and to provide the security required under Item 14 in accordance with cl 5 of the General Conditions. The contractual provisions in cls 15A–17A and cl 5 obliged the respondent to provide such insurances and security. Indeed, the respondent accepted that those conditions not having been complied with but relied on the applicant not having positively sought to have the respondent comply with them. Under the Contract, the contractor was to obtain insurance of the works and public liability insurance in joint names of the parties, evidence of which was required to be provided by the contractor to the principal. The evidence, such as it is, by an email from Mr Keefe to Mr Hough dated 21 April 2006 suggests that at least the insurance for works did not comply with cl 15A as it was not taken out in joint names. The fact that there was some non-compliance was not disputed by the respondent.[57] As to cl 6.2(a)(iv) of the Contract, the respondent was required to provide security under cl 5 in accordance with Item 14, which provided for a bank guarantee to be provided in an amount of 2.5% of the contract sum.[58]

[74] The respondent's contention that it was not responsible for the non-satisfaction of the Conditions Precedent which were not waived was two-fold:

(a) first, that there is no evidence that the non-satisfaction of the lack of execution of the tie-in deed was the fault of the respondent; and

(b) secondly, that the applicant could have required the respondent to take steps to meet the unsatisfied Conditions precent or waived the unsatisfied Conditions Precedent but chose not to do so.

[75] As to the first matter, for the reasons I have set out above, I consider that the applicant had effectively waived the execution of the tie-in deed by the Nominated Date. Clause 6.2(v) only provided that the contractor execute the financiers' deed if required. The 29 July Notice made clear that while execution of the deed was

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57 T1-8/25-32.

58 Although it was not requested until 9 August 2022. Affidavit of Mr Wesley Hough, Ex WH-1 at 259. No case of estoppel has been raised in this regard.

required it was not required to be executed by the Nominated Date. While I found that there was an additional reason why the 29 July Notice would have failed, namely that it was given by the superintendent and stated that it was given in his capacity as superintendent rather than on behalf of the principal, that would not result in the Condition Precedent in cl 6.2(a)(v) not being satisfied by the Nominated Date due to the conduct of the applicant. That is because cl 6.2(a)(v) only obliged the respondent to execute the financier's deed (or tie-in deed as it has been referred to by the parties) if required to do so by the applicant. Absent the 29 July Notice, there was no other notice by the principal requiring it to be executed and therefore it was not a Condition Precedent which was not left unsatisfied by the Nominated Date.

[76] As to the second matter, it is clear from cl 6.2 that the respondent was obliged to provide the evidence of the insurances and the bank guarantee in accordance with the Contract by the Nominated Date. It failed to do so, and those Conditions Precedent were not satisfied by the Nominated Date. By not satisfying those Conditions Precedent, can the respondent be said to be taking advantage of its default in asserting that the Contract was terminated pursuant to cl 6.1(c), or does the provision for the applicant to waive the satisfaction of the condition under cl 6.1(b) lead to a different conclusion. The fact that the applicant could have waived the conditions would have avoided the event giving rise to the Contract being terminated under the terms of cl 6.1(c). However, that event arose upon the Conditions Precedent not being satisfied or waived. To the extent the respondent was in default in not providing the insurances and bank guarantees by the Nominated Date, it seeks to rely on that non-satisfaction in asserting that the Contract was terminated under cl 6.1(c). In those circumstances it is seeking to take advantage of its own default by asserting the Contract came to an end on the Nominated date due to the Conditions precedent it was obliged to satisfy not having been satisfied. In those circumstances the Court prevents the respondent taking advantage of its own default.

[77] In the circumstances, I accept that the respondent cannot rely upon its own failure to provide a bank guarantee and evidence of insurances to assert that the Contract automatically terminated on the Nominated date.

[78] It therefore was a matter for the applicant whether it determined to treat the Contract as terminated under cl 6.1(c) or affirm the Contract, notwithstanding the Conditions Precedent had not been satisfied.[59]

[79] Given the applicant by its notice of 6 September 2022 stated it was going to proceed with the Contract and by its notice of 21 November 2022 made clear that it waived any condition in cl 6.2 that had not been satisfied or waived, it elected to proceed with the Contract and the Contract remained on foot and binding on all the parties.

[80] If I was wrong that in my construction as to clause 6.1(c) and the proper construction of cl 6 was that the Contract voidable upon the Conditions Precedent in cl 6 not having been waived or satisfied, the outcome would have been the same. Given that the respondent had been in default of compliance with the Conditions Precedent in cl 6.2, the applicant as the party not in breach would have been the only party who was entitled to elect to terminate the Contract. It did not do so, and the Contract remained on foot.

[81] The applicant is therefore entitled to the declarations sought.

Conclusion

[82] Given the above reasons, I have determined that:

(a) the 29 July notice was not a clear, unequivocal and deliberate waiver of the conditions in cl 6.2 (a)(ii) and (iv) and did not waive those conditions in accordance with cl 6.1(b) of the Contract;

(b) the applicant was the only party who could waive the conditions in cl 6.2 of the Contract which were largely for its benefit but given the express provision for waiver and the reference to "only" and having regard to cl 6.1 as a whole, any waiver had to be in accordance with cl 6.1(b) and not under general law;

(c) cl 6.1(c) by its terms demonstrates a clear intention of the parties that if the conditions in cl 6.2 are not satisfied or waived by the applicant, the Contract will terminate on the date nominated for such satisfaction or waiver to occur;

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[59] *Bluepoint Properties Pty Ltd v Zuri Properties Pty Ltd* [2022] QSC 26, [96] quoting Lord Atkinson at *New Zealand Shipping Co Ltd v Société des Ateliers et Chantiers de France* (1919) AC 1, 9.

(d) however, notwithstanding that construction, the prevention principle does not allow a party who is relevantly in default from taking advantage of that default. In the present case it was the respondent who had failed to comply with the conditions which it was obliged to meet under the cl 6.2 and the relevant terms of the contract. In those circumstances it could not take advantage of its default and rely on conditions it had not satisfied to contend that absent waiver the contract had terminated under cl 6.1(c); and

(e) the Contract remains on foot and a declaration should be made in the applicant's favour.

Orders

[83] The Court will order that:

1. The Contract between the applicant and the respondent remains on foot and is binding on the parties; and

2. Within seven days, the parties are to file and serve submissions of no more than two pages as to costs, which the Court will determine on the papers unless otherwise ordered.