

Dispute resolution clause, mistaken interpretation and cancellation of contract: *Jade Residential Limited v Paul* [2020] NZCA 477

Jade Residential Ltd (Jade) entered into a contract to build a house for a couple, the Pauls. Progress payments were required when certain construction “milestones” were met. Two of the “milestones” were “closed-in” and “lined”. Jade was required to “maintain a continuous construction programme until completion”, but was allowed to suspend work in certain circumstances including the Pauls’ failure to pay monies due. The contract includes a dispute resolution clause (cl 27) which provided that if any dispute arises the parties shall meet promptly in good faith and use their best endeavours to resolve such dispute, if such dispute has not been resolved then any party may give a dispute notice, the parties shall refer the dispute to mediation once dispute notice is given, and neither party may issue any arbitration or legal proceedings unless that party has first taken all reasonable steps to comply with this clause.

Jade issued the “closed-in” and “lined” invoices when these milestones had not been achieved. The Pauls refused to pay. Jade suspended the works and notified the Pauls that the works would not proceed until the demanded payments had been made. The Pauls responded that the “closed-in” and “lined” milestones had not been met, that Jade was in breach of its contractual obligation to maintain a continuous construction programme, and that the Pauls had the right to cancel the contract if Jade refused to return to site and continue with the work by a time fixed by the Pauls.

Jade continued to demand the payments and reiterated that it would not recommence work until it had received the payments. The Pauls gave Jade a notice of cancellation on expiry of the fixed time. Jade did not accept cancellation but served a dispute notice under the contract.

Both the District Court and the High Court found that neither of the milestones had been achieved so Jade was not entitled to payments for those invoices. The Courts, however, differed in whether the Pauls should have gone through with the dispute resolution process before exercising their right to cancel the contract.

The District Court judge, relying on *Waihopai Valley Vineyard Ltd v Savvy Vineyards 3550 Ltd* [2015] NZHC 2089, held that the Pauls’ cancellation was ineffective because the parties were to require to complete the dispute process set out in cl 27 (including mediation) before the contract could be validly cancelled. Grice J of the High Court, however, found that cl 27 did not bar or delay the exercise of the right of cancellation. The dispute resolution clause in *Waihopai* specifically prohibited the termination of the contract before the mediation procedure had been followed, whereas cl 27 in the present “is clear and does not purport to bar anything other than the issue of court or arbitral proceedings”.

The Court of Appeal agreed with Grice J. Jade’s submission that cl 27 suspends the exercise of any rights of cancellation under ss36 & 37 of the Contract and Commercial Law Act 2017 was rejected, because “[e]xpress words or a very clear implication are needed to remove a remedy for breach of contract arising by operation of law” (Blanchard J in *Property Ventures Investments Ltd v Regalwood Holdings Ltd* [2010] 3 NZLR 231 (SC) at 231, citing *Grant v NZMC Ltd* [1989] 1 NZLR 8 (CA) at 13).

The Court of Appeal also agreed with the High Court that the Pauls were entitled to cancel the contract for Jade's repudiation, rejecting Jade's argument that it only suspended performance due to its honest belief that money was owed. "[A] party who *bonafide* [but mistakenly] relies on an express provision of the contract, ... to suspend performance, is not by that fact alone to be treated as having repudiated his contractual obligations" (*Mayhaven Healthcare Ltd v Bothma* [2009] EWHC 2634 (TCC) at [25], applied in *Woodar Investment Development Ltd v Wimpey Construction UK Ltd* [1980] 1 WLR 277 (HL), referred to with approval in *Kumar v Station Properties Ltd* [2016] 1 NZLR 99 (SC)). Merely (vigorously) espousing a bona fide mistaken interpretation of the contract may not in itself be a manifestation of an intention not to perform its contractual obligation. Jade, however, went significantly beyond merely espousing a *bona fide* mistaken interpretation of the contract (as to the effect of cl 27), but as a party who "persistently refuses to perform unless the other party accepts additional onerous terms inconsistent with the contract", it "may well be found to have repudiated the contract" (*Kumar* at [63]).

The Court of Appeal concluded that the Pauls were entitled to cancel the contract for Jade's repudiation, or alternatively, for Jade's serious breach of contract satisfying the s 37(2) criteria (substantially reduced the benefit of the contract to the Pauls). The dispute resolution clause (cl 27) had not removed such a remedy by express words or a very clear implication. The contract was effectively cancelled by the Pauls.