

CDI Lawyers Update

Construction & Infrastructure

No EOT – even though Principal caused the delay

“There is no doubt that the provisions of the contract are heavily in favour of John Holland. They are, however, the terms in which the parties chose to contract. There is no doubt that the strict application of the terms are harsh. But I am not satisfied that it is without purpose”.

BHP Billiton engaged John Holland to carry out an upgrade and extend a wharf at Finucane Island on the western side of the Port Hedland Harbour. John Holland performed some of the work itself and subcontracted some of it to CMA Contracting Pty Ltd.

John Holland both denied a number of CMA's claims, and asserted a set off in an amount that exceeded those claims and also converted two bank guarantees that had been given by CMA pursuant to the contract.

The Contract

Under the contract CMA was entitled to claim an EOT to the date for PC if it was, or would be delayed “in a manner which will prevent it from achieving completion of the works”.

The contract then provided that:

- Ñ CMA must submit a written claim every 5 days after the first occurrence of the delay until the effects of the delay cease;
- Ñ CMA must within 14 days after the commencement of the delay, give a written claim for an EOT for PC; and
- Ñ If CMA fails to comply with the notice requirements then there was no entitlement to an EOT.

Discretion to approve

Importantly the Australian Standard clause had been amended to read:

*“John Holland at any time in its absolute discretion, by written notice to the Subcontractor, **unilaterally extend** the date for completion...(emphasis added)”.*

CMA claimed an EOT and John Holland rejected the claim on the basis it was time barred. CMA issued proceedings on the basis that:

- Ñ *as a matter of construction the strict time bar should not be enforced;*
- Ñ *the conduct of John Holland meant it was*

“estopped” from enforcing the time bar; and

- Ñ *liquidated damages did not apply because John Holland had caused the delay.*

Time Bar

The Court strictly construed the contract and held the EOT claim was time barred. Allanson J said:

“There is no doubt that the provisions of cl 10 are weighed heavily in favour of John Holland.”

...
“They are, however, the terms in which the parties chose to contract.”

...
“There is no doubt that the strict application of cl 10.12 and cl 10.13 is harsh. But I am not satisfied that it is without purpose and absurd, so that an alternative construction must be given, notwithstanding apparently clear words. In approaching cl 10, I believe it is appropriate to have regard to the fact that it is part of a Subcontract, designed to mirror obligations in the Head Contract. The nature of the information required to be given by the Subcontractor may be relevant to John Holland meeting its own obligations to its principal.”

Prevention Principle

CMA claimed that it was delayed or prevented by the conduct of John Holland. This is commonly referred to as the 'prevention principle'. In short, a party cannot insist on the performance of a contractual obligation by the other party if it itself is the cause of the other party's non-performance.

Allanson J held that the application of the prevention principle must be considered in the context of the particular contract. The contract between John Holland and CMA directly addressed this question by providing that if CMA failed to comply with the notice procedures it shall have no entitlement to an EOT and any principle of law or equity which might render the date for PC unenforceable shall not apply.

Her Honour said:

“CMA is precluded from the benefit of an extension of time and is liable for liquidated damages, even where the relevant delay has been caused by John Holland”.

Estoppel

CMA also claimed that, by a course of conduct, the parties adopted a convention by which they did not comply with the strict notice provisions in the contract and that it would be unconscionable for John Holland to rely on CMA's failure to comply. The Court held that the evidence did not support the claim that there was any common assumption between the parties.

What this means for you?

1. *Principals need to amend the discretion (to extend time) clause in standard contracts to avoid adjudicators and courts reversing a superintendent's decision;*
2. *Where such a clause is amended -contractors need to claim in time; and*
3. *If claims made out of time are to be approved-then the Principal needs to confirm in writing that the time bar is not waived.*

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