

CDI Lawyers Update

Construction, Development & Infrastructure

A timely reminder from the NSW Court of Appeal: poorly drafted contracts threaten your right to liquidated damages

In dismissing an appeal to set aside an adjudication decision, the New South Wales Court of Appeal has confirmed our previous updates on the operation of a superintendent's discretionary power to grant an EOT and extend the date for practical completion, and the interaction between the 'prevention principle' and this type of discretionary EOT mechanism.

In *Probuild Constructions (Aust) Pty Ltd v DDI Group Pty Ltd* [2017] NSWCA 151, the Court of Appeal considered whether an adjudicator had denied Probuild procedural fairness by applying the prevention principle to reject Probuild's liquidated damages claim, in circumstances where Probuild alleged that neither party had raised the prevention principle before the adjudicator.

The rationale of the prevention principle is that 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.

In practice, the prevention principle would stop a principal from applying liquidated damages on the basis of late completion by the contractor, if completion was not achieved by the date for

practical completion because of principal caused delay.

Facts of the case

Probuild subcontracted DDI Group Pty Ltd (DDI) to carry out certain construction works. DDI achieved practical completion of the works 144 days after the date for practical completion.

DDI served a payment claim claiming approximately \$2.2 million, largely comprised of variations that were directed by Probuild after the date for practical completion. In response, Probuild served a payment schedule setting off approximately \$2.3 million for liquidated damages on the basis that DDI had not been granted any extensions of time (EOTs) under the contract.

In its subsequent adjudication application, DDI acknowledge that it failed to comply with the notice provisions in the contract, but argued that its adjudication material should be treated as both its notice of delay and claim for an EOT under the contract.

In rejecting Probuild's set-off for liquidated damages, the adjudicator, in effect, applied the prevention principle, finding that it appeared "totally inconsistent and unreasonable" for Probuild to be directing DDI to perform significant additional work after the date for practical completion and then making a claim for liquidated damages against DDI.

Probuild applied to overturn the adjudicator's determination, alleging that the adjudicator made his determination on a basis that neither party had contended for (because neither party expressly contended that the prevention principle should operate to deprive Probuild of its entitlement to liquidated damages) and, as a result, Probuild was denied natural justice.

The primary judge dismissed the application and Probuild appealed.

Analysis

In determining whether the prevention principle applied, the Court considered whether Probuild was entitled to its set-off for liquidated damages when the majority of the delay was caused by variations Probuild had directed DDI to complete.

Importantly, the extension of time provisions in the contract provided the superintendent with a discretionary power to grant EOTs in circumstances where it would be reasonable to do so, notwithstanding a failure by the contractor to comply with notice requirements; similar to the equivalent clause found in the Australian Standard contracts.

In dismissing the appeal, the Court of Appeal agreed with the adjudicator's reasoning in rejecting the liquidated damages set-off and held that Probuild was obliged to exercise its discretionary power either:

1. honestly and fairly, having regard to the underlying rationale of the prevention principle; or alternatively
2. based on an implied duty of good faith in exercising the discretion.

On that basis, the Court of Appeal held that Probuild should have granted discretionary EOTs. This had the result of extinguishing Probuild's liquidated damages set-off.

Importantly, the Court of Appeal again confirmed that the operation of the prevention principle can be modified or excluded in a contract. That is, where a contract includes a mechanism for the claiming and award of EOTs, and the contractor fails to exercise its contractual right to claim EOTs, the acts of prevention by the principal can no longer be said to be the cause of the delay. As DDI did not submit EOT claims in accordance with the terms of the contract, it would have ordinarily been precluded from an EOT or relief based on the prevention principle.

However, due to the fact that the contract contained an unfettered discretionary EOT clause (i.e. the drafting of the clause did not prevent it from being exercised in favour of DDI) the Court of Appeal held that DDI was nonetheless entitled to EOTs, and Probuild lost its entitlement to liquidated damages.

The result in Probuild v DDI can be contrasted with the result in *CMA Assets v John Holland*, which included similar issues, and was addressed in our update [No EOT – even though the Principal caused the delay.](#)

In *CMA Assets v John Holland*, the Supreme Court of Western Australia found that John Holland was entitled to apply liquidated damages, despite being the cause of CMA's delayed completion of the relevant works. The key difference in that case was:

1. the discretionary power to grant EOTs was drafted to only be exercisable in John Holland's absolute discretion (i.e. there was no requirement for the power to be exercised in favour of CMA); and
2. the contract was amended to expressly exclude the prevention principle.

The decision in Probuild and DDI is a timely reminder to principals that a failure to amend the discretionary EOT clause in your contracts could risk your entitlement to liquidated damages. Your contracts should also be amended to exclude the operation of the prevention principle.

For contractors, the decision emphasises the importance of complying with contractual requirements for claiming EOTs when entering into contracts with discretionary EOT clauses that can only be exercised in favour of the principal.

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