CMA Assets Pty Ltd v John Holland Pty Ltd [2015] WASC 217

Resolution Institute Presentation
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Outline

* Factual Background
* CMA’s Variation Claim – Variation 79
* Court’s Comments on Extension of Time Provisions
* CMA’s Delay Claims
* John Holland’s Claims
* Contracting out of the Prevention Principle
* Application of the Reserve Power
* Implications

Factual Background

* John Holland Pty Ltd ('JH') entered into a contract with BHP Billiton Iron Ore Pty Ltd ('BHP'), acting on behalf of a joint venture, to upgrade and extend a wharf at Finucane Island in Port Headland harbour – 2005 ('Head Contract')
* Two existing wharfs – Berth D to the north and Berth C to the south
* JH's scope of work
  * Reconstruct Berth C for larger vessels
  * Upgrade the iron ore shiploader
  * Excavate and dredge the seafloor to provide a *'berthing pocket'* alongside Berth C for larger vessels
* JH entered into a subcontract with CMA Assets Pty Ltd ('CMA') to demolish Berth C – including 7 berthing dolphins ('BD') and 5 mooring dolphins ('MD') - $10.4m (early August 2006)

Factual Background

* BDs and MDs substantial reinforced concrete structures
  * BDs 10m x 10m x 3m headstocks
  * BD 1, 2 and 6 – added top sections – 14m x 10m x 1.2m
  * MD s 7m x 7m x 2m
* Construction Plan
  * Shiploader to remain on northern part of Berth C
  * CMA to demolish existing structures from the south
  * JH to follow from south constructing new wharf
  * JH to move Shiploader to new wharf
  * CMA to demolish remainder of Berth C
  * Subcontract Date for Completion – 14 March 2007

Factual Background

* Problems -
  * BD commenced work in about August 2006
  * Completion in March 2008
  * Delay caused by CMA's obligation to remove quantities of reinforced concrete from harbour
  * January 2008 – parties in dispute
  * 27 March 2008 – CMA commenced proceedings

Claims and Counterclaims

* CMA's Claims – variation and delay costs - $8.1m
  * Variation 79 – additional work to demolish BD 1, 2 and 6
  * JH prevented CMA from commencing phase 4 works between 29 January 2007 and 10 May 2007 - JHs failure to move shiploader ('Shiploader Delay Claim')
  * Additional work for Variation 79 - delay from 25 October 2006 to 13 December 2006, and additional works in January 2007 ('Variation 79 Delay Claim')
  * JH delay in providing CMA access to the transfer station – delay from 13 February 2007 to 10 April 2007 ('Transfer Station Delay Claim')
  * JH delay in providing CMA access to MD4A from 21 March 2007 to 2 June 2007 ('MD4A Delay Claim')
* JH's Counterclaim - $11.7m
  * Additional work to dredge and convey demolition material – barges *Hippopotes, Westsea 9, and Westsea 10*
  * Disruption to pile driving works and additional supervision – removing debris
  * Liquidated damages for delay

Decision

* CMA
  * Successful in Variation 79 – awarded agreed amount of $639,568.21
  * Unsuccessful in all four delay claims
* JH
  * Successful in its claim for removing debris - $5,386,612
  * Successful in its liquidated damages claim - $1,182,700 (10% of Subcontract Sum)
  * Unsuccessful in its claim for disruption of piling works

Variation 79

* BD 1, 2 and 6
* Scope of work – MDs and BDs – to be broken into small sections to be handled away from site, and no debris shall be allowed to fall or remain on the seabed (Clause 9.3)
* CMA planned to use an hydraulic hammer to reduce the size of reinforced concrete sections, and to remove spoil by rock bucket onto barges
* CMA's subcontractor - Alterrain – used penetrating cone fracture ('PCF') explosive for the demolition
* PCF unsuitable to blast to destruction – produced both fine material and very large material – up to 10m^3
* Drawing in scope of work showed BD 1, 2, and 6 – R36 at 100mm centres – in fact no spacing

Variation 79

* JH submitted Variation 79 is part of scope of work
* JH relied on a disclaimer – clause 7.1 of Subcontract:

  'John Holland does not warrant, guarantee or make any representation about the accuracy or adequacy of any information or data made available to the subcontractor as to the existing conditions at the site and that information or data does not form part of the Subcontract.'

* JH also relied on clause 9.8:

  'The Subcontractor must inspect any work that has been carried out by any other person (Prior Work) as soon as is practicable and in any event within seven days after John Holland gives the Subcontractor access to the Site under clause 7.2. If the proper execution of the Works is dependent upon or appreciably affected by the quality or completeness of the Prior Work, the subcontractor must:

  (a) promptly notify John Holland in writing providing full particulars of the defects or matters identified in the reasons for its opinion; and

  (b) not commence or continue with the execution of any part of the Works dependent upon or appreciably affected by that Prior Work until it receives a Direction from John Holland as to whether John Holland considers the Prior Work defective and, if so, how to proceed'

Prospective or Retrospective Analysis?

* Prospective analysis – Allanson J agreed with CMA's delay expert
* Factors from Subcontract provisions:
  * CMA's obligation to perform Works in accordance with Approved Construction Programme
  * Approved Construction Programme – both a current and future focus
  * Clause 10.10 prospective – *'is or will be delayed'*
  * Clause 10.14 *'[has] been or [will] be delayed in reaching Practical Completion'*

Prospective or Retrospective Analysis?

* Allanson J, on the significance of prospective analysis: [326]

'But on a prospective construction, whether CMA had in fact completed all tasks at the extended date for practical completion does not affect the analysis which is concerned with what was the extent of the delay at the time of the cause of delay. That some other activity proved to take longer than expected, so that practical completion is further delayed, does not retrospectively change what was the critical path at the time of a delaying event.

…

Where a subsequent delay event begins to operate concurrently, it is only taken to affect the critical path from when the event earlier in time ceases to be effective. It is the delay which first becomes critical which causes a delay in reaching practical completion'

Prospective or Retrospective Analysis?

- Compare Akenhead J in *Walter Lilly & Company v DMV Developments Ltd* [2012] EWHC 1773 [362]:

  'Whilst the Architect prior to the actual Practical Completion can grant a prospective extension of time, which is effectively a best assessment of what the likely future delay will be as a result of the Relevant Events in question, a court or arbitrator has the advantage when reviewing what extensions were due of knowing what actually happened. The Court or arbitrator must decide on a balance of probabilities what delay has actually been caused by such Relevant Events as have been found to exist;… How the court or arbitrator makes that decision must be based on the evidence, both actual and expert.'

Shiploader and Transfer Station Delay Claims

* Approved Construction Programme – submitted by CMA in May 2006 and updated 4 August 2006
* Shiploader – 29 January 2006 to 10 May 2007 – claimed 94 days extension to Date for Practical Completion
* Delayed CMA's Phase 4 works – demolition of Bents 3 to 11
* Decided on CMA's failure to comply with notice requirements
* JH – argued CMA's own delay in removing the demolition debris was the critical delay
* Allanson J
  * Removal of debris not a programmed activity – and was not behind schedule by reference to the Approved Construction Programme
  * Extension of time prospective – subsequent change to critical path does not affect entitlement
* JH – argued CMA did not have sufficient resources to demolish both the remainder of the wharf and the transfer station
* Allanson J
  * No evidence that CMA could not have demolished both with existing resources

Shiploader and Transfer Station Delay Claims

* CMA's Notices and Claims
  * 21 February 2007 – notice of delay commencing 29 January 2007
  * 26 February 2007 – 5 day notice pursuant to clause 10.11
  * 3 March 2007 – further 5 day notice
  * 5 day notices from 8 March to 9 May 2007
  * 27 March 2007 – CMA progress claim – delay claim for February and March 2007 of $3,226,518
  * 3 August 2007 – CMA's formal claim for extension of Date for Completion and delay costs – 101 days and $4,428,459
* JH – response on 27 March 2007
  * Rejected claim
  * Claim not in accordance with Clauses 10.11, 10.12(a)(i) and (ii), (b)(ii), (iii), and (v)
* CMA argued that condition precedent in clause 10.12 (reference to 10.12(b)(i)) is not the formal giving of notice but JH informed of the likelihood of the delay
* Allanson J
  * Clause 10.12 must be read with clause 10.11
  * Clause 10.12(b) requires – '*satisfied John Holland*' in accordance with Clause 10.12(a)
  * Clause 10.12(b) not limited to notifying JH of the likelihood of the delay, or even the cause of the delay

Shiploader and Transfer Station Delay Claims

* Allanson J – identified six other matters:
  * Intention to apply for an extension of time (clause 10.12(b)(iv))
  * An estimate of the length of the delay (clause 10.12(b)(iv))
  * The steps it will take to minimise the delay (clauses 10.12(b)(iii) and (iv))
  * All the facts upon which the claim is based (clause 10.12(b)(v))
  * The number of days extension claimed (clause 10.12(b)(v))
  * The effect on the Approved Construction Programme (clause 10.12(a)(i), clause 10.12(b)(v))
* CMA argued that, on a proper construction of clause 10.12, late notice does not defeat the claim – only loss of entitlement before the period to which the notice applies
* Allanson J - CMA's construction inconsistent with the language of clause 10.11 and 10.12 which impose obligations:
  * upon the first occurrence of the delay (clause 10.11)
  * as soon as becoming aware of the likelihood of the delay (clause 10.12(b)(i)); and
  * within a specified time after the occurrence of the cause of any delay (clause 10.12(b)(iv))

Shiploader and Transfer Station Delay Claims

* CMA argued against a construction that would result in an absurdity (dicta of Barwick CJ inPort *Jackson Stevedoring Pty Ltd v Salmond & Spraggon (Australia) Pty Ltd* (1978) 139 CLR 231)
* Allanson J
  * Strict application of clauses 10.12 and 10.13 is '*harsh*'
  * Not satisfied that it is without purpose and absurd, so that an alternative construction must be given, notwithstanding apparently clear words
  * Have regard to the fact that it is part of Subcontract, designed to mirror obligations under Head Contract
* Allanson J – application to the facts
  * CMA's first notice of its intention to apply for an extension of time for Shiploader Delay on 21 February 2007 – well outside time prescribed by clauses 10.11 and 10.12
  * CMA's first notice of its intention to apply for an extension of time for Transfer Station Delay until October 2006 – did not comply with clause 10.12 either as to time or content
* CMA argued estoppel – parties adopted a convention by which they did not strictly comply with notice provisions in the Subcontract
* Allanson J – no estoppel on facts
  * Parties did not dispense with Approved Construction Programme
  * JH gave CMA several notices of unsatisfactory progress
  * Process followed by both parties inconsistent with the alleged shared assumption

MDA4 Delay Claim

* CMA's claim - JH directed CMA to delay demolition of MD4A from 21 March 2007 to 2 June 2007 (68 days)
* Allanson J accepted JH directed CMA to defer demolition of MD4A
* CMA's Notices and Claims
  * 12 December 2007 – notice of delay and a request for an extension of time for demolition of MD4
* Allanson J
  * CMA did not give written notice of a claim for an extension of time for demolition of MD4A
  * CMA's reliance on estoppel not established
  * CMA's failure to comply with the requirements of clause 10.12 entitled JH to reject its claim

Variation 79 Delay Claim

- CMA's claim – Variation 79 delayed the Works from 25 October 2006 to 13 December 2006 (46 days)
- CMA's Notices and Claims
  - 12 September 2006 – Alterrain first discovered the extent of rebar reinforcement on BD6
  - 12 September 2006 – Alterrain advised CMA
  - 29 September 2006 – CMA gave notice to JH – BD6 - referred to capping not conforming to drawings resulting in prolonged drilling programme – contemplating delay recovery
  - 29 September 2006 – CMA's notice of variation for BD 6 – referred to getting back on schedule
  - 16 November 2006 – CMA's notice of variation for BD2
  - 4 September 2007 – CMA's detailed claim for Variation 79 – BD1, 2, and 6 – no claim for an extension of time
- CMA also argued:
  - On each occasion, parties agreed to vary the Subcontract
  - Clause 10.12 applies only to an Approved Construction Programme
  - CMA complied with clause 10.12(b) to the extent it could be complied with
  - Clause 10.12 only operated in relation to tasks on the critical path
  - JH had abandoned the Approved Construction Programme / time requirements by December 2006
  - Prevention argument
- Allanson J
  - Satisfied, on the evidence of CMA's delay expert, Variation 79 would entitle to CMA to the claimed delay of 46 days
  - CMA's failure to comply with the requirements of clause 10.12 entitled JH to reject its claim
  - No evidence of any agreement to vary, detailed written contract, and JH repeatedly giving notices
  - The Construction Programme was approved

JH's Removal of Debris and Disruption Claims

- Removal of debris using barges *Hippoppotes, Westsea 9, and Westsea 10*
  - Engaged Van Ord to remove demolition debris
  - JH recovered costs as damages for CMA's breach of clause 9.3
  - And under clause 17.5 –

    'John Holland may… perform any obligation under the Subcontract which the Subcontractor was obliged to perform but failed to perform within the time required in accordance with the Subcontract.'
  - Agreement between the parties for use of *Westlea 10* and associated equipment
- Disruption claim – JH's piling activities
  - Allanson J – satisfied that there was some disruption to JH's piling
  - JH estimated additional supervision costs, and that it was required to undertake an additional 63 days of piling works

    'Activities which were originally planned to take 46 calendars took an additional 53 calendar days, plus a 10 further days caused by the late demolition of MD 4A.'
  - Allanson J [856]:
    - Not '*supported by evidence*', '*measure is crude*'
    - Particularly when JH itself claimed 116 days delay due to unexpected sub-sea conditions
    - *'I am not satisfied that John Holland has proved any resulting loss for which it has not otherwise been compensated*

JH's Liquidated Damages Claim

* CMA argued it achieved completion under the Subcontract by 25 June 2007 because by then debris which were necessary to be removed to achieved Completion were removed
* Allanson J – CMA's argument not consistent with twin limbs of definition of '*Completion*'
* New wharf was operational on 29 October 2007 – for larger vessels it was designed to accommodate from about that time
* Allanson J - findings
  * Much of the debris was removed between August and November 2007
  * Material still being removed in January and February 2008
  * Breaking up and removal of sizable blocks
  * Satisfied that CMA did not achieve Completion in 2007
  * Unnecessary to be more precise, even if claimed extensions of time allowed, the aggregate of liquidated damages was reached by October 2007
  * JH entitled to the liquidated damages claimed

CMA's Prevention Principle Submission

* CMA's claim – performance of the Subcontract in accordance with the Approved Construction Contract was prevented by JH
* Allanson J [863]:
  * *'… 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.'*
  * *Spiers Earthworks Pty Ltd v Landtec Projects Corporation Pty Ltd [No 2]* [2012] WASCA 53 – McLure P

    'as a particular manifestation of the obligation to cooperate as a matter of law in all contracts'
* Allanson J – summarised the application of the prevention principle [864]:

  'If, in the events that have occurred, CMA has been prevented by John Holland's breach or default from achieving the stipulated date, and there is no contractual mechanism for substituting a new date, then there is no date from which liquidated damages will run, and the right to liquidated damages will be lost. In the context of this case, CMA's obligation to achieve practical completion by 14 March 2007 is replaced by an obligation to reach practical completion within a reasonable time.'

CMA's Prevention Principle Submission

* Allanson J
  * Application of the prevention principle must be considered in the context of the particular contract
  * Clause 10.13 directly addressed this question [865]:

    'Expressly, cl 10.13 purports to exclude the prevention principle. In my opinion, it is effective in doing so. 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: see ***Peninsula Balmain Pty Ltd v Abigroup Contractors Pty Ltd*** *[2002] NSWCA 211 [78], referred to by McLure P in* ***Spiers*** *[57].'*

Contracting Out of the Prevention Principle

* Concept is not new
  * Salmond J - stated that the prevention principle applies unless the contract expresses a contrary intention (*Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd* [1970] 1 BLR 111, per Salmon LJ, at p123)
  * A principle recently cited by Prakash J in *Lin Chin San Contractors Pty Ltd v LW Infrastructure Pte Ltd* [2011] SGHC 162, [291]
* Allanson J cited McClure P's dicta in *Spiers Earthworks Pty Ltd v Landtec Projects Corporation Pty Ltd [No 2]* that the prevention principle is a manifestation of an implied obligation to cooperate
* McClure P in *Spiers* left open the question of whether the implied duty to cooperate could be excluded [61]:

  'In the result, cl 35.5 brings the prevention principle back into line with the general contractual principles relating to the implied duty to cooperate. Accordingly, it is unnecessary to determine whether contractual parties are free to exclude the implied duty to cooperate, which is a term implied by law.'

Contracting Out of the Prevention Principle

* Rationale for the prevention principle
  * Implied term or implied supplemental contract
  * Party cannot '*insist upon compliance with a condition if it is partly his own fault it cannot be fulfilled*' (*Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd* [1970] 1 BLR 111, per Salmon LJ, at p123)
  * Waiver or estoppel (*Temloc Ltd v Errill Properties Ltd* (1987) 39 BLR 30)
  * Fundamental considerations of fairness and reasonableness (*SMK Cabinets v Hili Modern Electrics Pty Ltd* [184] VR 391)
* Brooking J – '*a positive rule of law*' *SMK Cabinets*
* On going debate – but likely parties are free to contract out of the prevention principle

Submissions on the Reserve Power

- CMA argued:
  - Clause 14 and 15 could only be exercised for the purpose conferred – to fix a reasonable period for performance of the Works
  - Subject to an implied term of the Subcontract that JH would act '*fairly, reasonably and in good faith*'
- Allanson J: [431-432]

'I am not satisfied that cl 10.14 imposed any obligation upon John Holland to exercise its discretion at all. The discretion in cl 10.14 is not fettered. It may be exercised for the benefit of John Holland or the Subcontractor….

It is also not necessary to consider generally the question of implied obligations to act reasonably and in good faith. The question must be considered in the context of the particular contract, and the particular contractual power which is being exercised. In the context of the detailed provisions in cl 10, and in particular cl 10.13 under which compliance with the notice requirements of cl 10.12 is a condition precedent to any entitlement to an extension of time, I can see no basis within the terms of the contract to limit John Holland's discretion in the manner sought.'

JH's Settlement with BHP

- JH Settled Claims with BHP
- CMA argued:
  - If JH has suffered loss, it has been compensated by BHP
  - Denied JH's settlement with BHP was reasonable
- Settlement and Release Deed dated 13 April 2008
  - Settled on a without admission of liability basis
  - '*John Holland Claims*' – set out in Schedule 1
  - Contract sum of $190m, plus additional amount of $23.5m
- Allanson J [899-901]
  - Onus on CMA to show that JH obtained money from another source that must be taken into account
  - On face of Deed, and book of claims, no settlement of any claim relating to the claims it makes in this action, with the possible exception of the disruption claim for piles
  - Liquidated Damages – agreed sum, JH does not have to prove loss
  - Reasonableness - No part of JH's claim that it has settled with BHP at a loss, which it is seeking to recover from CMA

Implications

* Commercial implication for failure to comply with notice / claim requirements
  * Loss of delay costs, plus payment of liquidated damages
* Drafting of notice / provisions:
  * Identify objectives eg early notice of all delays, early estimates of extension of time and costs
  * Draft clauses to achieve objectives
  * Drafting in a consistent manner
* Trigger criteria?
  * *'every 5 days after the first occurrence of the delay'* (clause 10.11)
  * *'as soon as becoming aware of the likelihood of the delay'* (clause 10.12(b)(i))
  * *'within 7 days after the occurrence of the cause of any delay'* (clause 10.12(b)(iv))
  * *'within 14 days after the commencement of the delay'* (clause 1012(b)(v)
* Content of Notice / Claim?
* Criteria for extending time?
  * Critical path?
  * Against planned programme?
  * Updated progress?
  * Prospective analysis?

Implications

* Contracting out of Prevention Principle can be effective
* Exclusion of the *contra proferentem* rule effective, Allanson J [272]
  'I take into account that the contract was prepared by John Holland, and few deviations from the standard form were permitted. The implications of that fact, however, must be considered against cl 1.2(g) if the application of a construction contra proferentem would disadvantage John Holland.'
* Obligation wrt reserve power only applicable to Superintendent / Independent Contract Administrator
* Interface clauses such as clause 9.8 – option to specify the implications of breach?
* Specific contractual regime for dealing with existing structures?
* Administration of Contract
  * Strict compliance
  * Administrative burden on both contracting parties
* Records essential
* Waiver of provisions difficult to establish

Many thanks
Questions?