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Reining in the Superintendent's (Adjudicator's) Discretion

Since *Peninsula Balmain v Abigroup contractors Pty Ltd* (***Peninsula Balmain***), it is clear that, from a principal's perspective, standard form construction contracts require amendment.

This case established that a superintendent, who is given an unqualified power to extend time, may do so for the contractor's benefit even where the contractor has not made a claim. This is the case even though such power has historically existed to protect the principal against the "peak principle"ⁱⁱⁱ.

The need to consider amending the discretion has been magnified due to the ability of an adjudicator to "*step into the shoes*" of the superintendent and exercise this discretion under rapid adjudication regimes.ⁱⁱⁱ

The recent case of *Hervey Bay (JV) Pty Ltd v Civil Mining and Construction Pty Ltd & Ors*^{iv} (***Hervey Bay (JV)***) has shown us that with appropriate amendments, drafted with *Peninsula Balmain* in mind, the superintendent's discretion (and therefore any adjudicator's discretion) to grant extensions of time can be fettered.

What does this decision mean for contract drafters? The answers require a more detailed consideration of this judgment.

Peninsula Balmain and the "reserve power"

The contract in *Peninsula Balmain* was based on AS2124-1992 with amendments by special conditions. However there was no amendment made to clause 35.5.

Clause 35.5 of AS2124-1992 deals with extensions of time for practical completion and relevantly provides that:

“When it becomes evident to the Contractor that anything including an act or omission of the Principal, the Superintendent or the Principal’s employees, consultants, other contractors or agents, may delay the work under the Contract, the Contractor shall promptly notify the Superintendent in writing with details of the possible delay and the cause.

...

“If the Contractor is or will be delayed in reaching Practical Completion by a cause described in the next paragraph and within 28 days after the delay occurs the Contractor gives the Superintendent a written claim for an extension of time for Practical Completion setting out the facts on which the claim is based, the Contractor shall be entitled to an extension of time for Practical Completion.

...

“Notwithstanding that the Contractor is not entitled to or has not claimed an extension of time, the Superintendent may at any time and from time to time before the issue of the Final Certificate by notice in writing to the Contractor extend the time for Practical Completion for any reason.”

Similar provisions have been commonplace in other standard form construction contracts for many years.^v

It was generally accepted, until *Peninsula Balmain*, that the “reserve power”^{vi} to unilaterally extend time was intended to be for the principal’s benefit only. The reserve power was intended to:

- 1 allow the date for practical completion to be extended in respect of any delays caused by the principal; and
- 2 preserve the principal’s entitlement to liquidated damages for the contractor’s failure to reach practical completion by the extended date for practical completion.^{vii}

However, the New South Wales Court of Appeal in *Peninsula Balmain* took a different view in its interpretation of the power:

“In my opinion, no error is shown regarding the primary judge’s acceptance of the referee’s conclusion based on the superintendent’s power. In my opinion, this power is one capable of being exercised in the interest both of the owner and the builder, and in my opinion the superintendent is obliged to act honestly and impartially in deciding whether to exercise this power.”^{viii}

It is also important to note that the *Peninsula Balmain* contract contained an unamended clause 23 of AS2124. Clause 23 requires the principal ensure the superintendent acts honestly and fairly in the exercise of its functions.

The *Peninsula Balmain* interpretation of clause 35.5 was later followed in *Kane Constructions Pty Ltd v Sopov*^{ix} and *620 Collins Street Pty Ltd and Ors v Abigroup contractors Pty Ltd and Anor (No 2)*.^x

The consequence of these decisions is to bring tension in balancing the importance of time bars with a wide discretion to grant extensions of time despite the absence of a complying claim. The difficulty with *Peninsula Balmain* for principals is, quite rightly, that the time bar in clause 35.5 exists for a very good reason. It provides a mechanism for timely notice and assessment of claims.

Peninsula Balmain appears to have given insufficient weight to time bars and the importance to principals that contractors be required to adhere to them. From a principal's perspective, this is not acceptable:

"The contract administrator should not be used as a vehicle to rescue the contractor from liquidated damages by reason of its own failure."^{xi}

Since *Peninsula Balmain*, lawyers for a principal have started amending standard form contracts to limit this outcome. However, the effectiveness of such amendments had not been judicially considered until *Hervey Bay (JV)*.

Hervey Bay (JV)

The dispute in *Hervey Bay (JV)* concerned an adjudicator's decision under the *Building and Construction Industry Payments Act 2004* (Qld) to allow delay costs to the contractor. The contract was, as was the case with *Peninsula Balmain*, based on AS2124. However, unlike *Peninsula Balmain*, the amendments did change clauses 23 and 35.5.

The important amendments to AS2124 were:

The Superintendent's functions

A new clause 23A was added following an amended clause 23:

"23 Superintendent

The Principal shall:

(a) ensure that at all times there is a Superintendent; and

(b) endeavour to ensure that in the exercise of the functions of the Superintendent under clause 35.5 (assessment of extensions of time), clause 35 (assessment of delay or disruption costs), clause 42.5 (issue of the Certificate of Practical Completion), clause 40.5 (valuation of variations), clause 42.1 (issue of payment certificates), clause 42.8 (issue of the Final Certificate), the Superintendent —

(i) acts honestly and fairly;

(ii) acts within the time prescribed under the Contract or where no time is prescribed, within a reasonable time; and

(iii) arrives at a reasonable measure or value of work, quantities or time.

The Superintendent may carry out its functions under the Contract (other than those referred to in para (b) above):

(c) as agent and representative of the Principal;

(d) in accordance with instructions given to it by the Principal (acting in its absolute discretion unless the Contract expressly requires otherwise) and in a manner consistent with the interests of the Principal.”

“23A Principal’s and Superintendent’s discretion

The Contractor agrees that except to the extent expressly provided in the Contract:

(a) the Principal and Superintendent may exercise those discretions and rights given to them under the Contract in whatever way the Principal or Superintendent decide in their absolute discretion; and

(b) the Principal or Superintendent may grant, refuse or grant subject to reasonable conditions any consent required from the Principal or Superintendent in their absolute discretion.”

Discretion to grant extensions of time

Clause 35.5, was also amended, by removing:

“Notwithstanding that the Contractor is not entitled to or has not claimed an extension of time, the Superintendent may at any time and from time to time before the issue of the Final Certificate by notice in writing to the Contractor extend the time for Practical Completion for any reason.”

New clauses 35.5A and 35.5B were added:

“35.5A Other Extension by Superintendent

*Notwithstanding that the Contractor is not entitled to or has not claimed an extension of time, the Superintendent may at any time and from time to time before the issue of the Final Certificate by notice in writing to the Contractor extend the time for Practical Completion for any reason **in the Superintendent’s absolute discretion and without being under any obligation to do so.**” [emphasis added]*

“35.5B Conditions Precedent to Extension of Time Claims

Despite clause 35.5 the Contractor shall not be entitled to an extension of time to the Date for Practical Completion or any other Claim unless it has:

(a) *complied strictly with clause 35.5 (including without limitation) given all the notices required by clause 35.5 in the forms and within the time periods specified in clause 35.5; and*

(b) *demonstrated to the satisfaction of the Superintendent that the delay has affected the Contractor's critical path for work under the Contract (including without limitation demonstrating that the critical path of the latest approved construction program is affected).*"

Right to Delay Damages

Under clause 36, delay damages were payable only where the contractor had been granted an extension of time under clause 35.5. Although the superintendent did not grant the extensions of time, the adjudicator, "*standing in the shoes*" of the superintendent, held the contractor was entitled to those extensions, and therefore delay damages.

The principal's main argument was that the adjudicator erred in law by misinterpreting the contract.^{xii}

The differences between clause 35.5A and the deletion of the sentence from clause 35.5 was described by McMurdo J as "significant". His Honour held:

"Accepting the correctness of Peninsula Balmain and the cases which have followed it, in this contract however the parties have substituted different terms and the expressed intention was to confer a power on the superintendent without imposing any obligation as to the exercise of that power. Indeed the deletion of the relevant paragraph in cl 35.5 and the addition of cl 35.5A and cl 35.5B appear to have been drafted with Peninsula Balmain in mind. In my view there is no tenable construction of cl 35.5A by which the superintendent could be said to be under any obligation and in particular an obligation to extend time if it would be fair to do so. Absent such an obligation there was no entitlement in any sense to an extension of time, if there had not been compliance with cl 35.5."^{xiii}

In this judgment the adjudicator was held to have been wrong to have included delay costs for which extensions of time were not granted and for which there was no entitlement.

Do the amendments go far enough?

The natural question following *Hervey Bay (JV)* is whether the amendments drafted in that contract serve as an example in future for those planning to draft clauses where there is a discretion but it is intended to operate solely for the benefit of one party.

It is arguable that the amendments to clause 35 alone in the *Hervey Bay (JV)* contract may not go far enough to confer sufficient protection to the principal in instances where:

- 1 the superintendent's obligation to act "*honestly and fairly*" relates to the exercise of all of its functions; or
- 2 the superintendent is obliged to act "*reasonably and in good faith*"^{xiv}.

“Honestly and fairly”

The amendments to clauses 23 and 35.5 in *Hervey Bay (JV)*, read together, essentially provided that the superintendent’s discretion under clause 35.5A was not only absolute but was also not tempered by any duty to act honestly or fairly.

Although in *Hervey Bay (JV)* *McMurdo J* only refers to the amended clause 23 as “consistent” with clause 35.5A^{xv}, it is, in the authors’ view, the amended clause 23 which put the superintendent’s role as the principal’s agent for the purposes of clause 35.5A beyond doubt.

If there is a truly independent superintendent, it is arguable that the amendments made by clause 35.5A alone may not go far enough. This is because although the superintendent is not “*obligated*” to exercise its discretion, it may nevertheless decide to do so.

If the superintendent must fulfil its role “*honestly and fairly*”, then by extension it is reasonable to argue that this obligation will apply to the exercising of any “*absolute discretion*”. There are no words in the clause that suggest that the absolute discretion be only for the benefit of the principal.

Absolute Discretion

While clause 35.5A permits the superintendent to act in its absolute discretion, there is no guidance in that clause that the discretion is to be for the benefit of the principal.

It is possible for a superintendent to exercise that discretion for the contractor. If this occurred the principal would find itself in the same situation as the contractor in *Hervey Bay*, without the ability to challenge the superintendent’s assessment.

There is potential for instances where a superintendent would exercise the discretion for the contractor’s benefit, if it were fair to do so, even in the absence of a complying claim and even though the superintendent is not strictly obligated to do so.

“Reasonably and in good faith”

The authors’ views on the utility of the words used in clause 35.5A of *Hervey Bay (JV)*, in relation to an independent superintendent acting “*honestly and fairly*” in all functions, are perhaps even more pertinent to instances where an independent superintendent is obligated to act “*reasonably and in good faith*”.

While the law as to what constitutes acting in “*good faith*” is not settled, it presumably, or at least potentially, may constitute a higher standard of duty than acting “*honestly and fairly*”.

It seems that a superintendent exercising its functions under an explicit duty to act “*reasonably and in good faith*” must do what is proper having regard to the interests of both parties.

Hypothetically then, what if in future the courts settled on a definition that included, for example, preventing hardship? In those cases it may not be enough to simply say that the superintendent is “*not under an obligation to*” extend time for the benefit of the contractor, where a failure to do so may cause hardship. A “*good faith*” obligation in the exercise of a discretion arguably may include turning one’s mind to the contractor’s interests if such an extension were or were not granted.

Contracts need to take into account that possibility.

Put the issue beyond doubt

The above analysis may appear a somewhat semantic exercise into the meaning of terms such as “*fair*”, “*good faith*”, “*obligation*” and “*discretion*”. Lawyers, and indeed judges, may differ on these interpretations, however, the point is to demonstrate that it would be foolhardy to believe that interpretation of these issues has been settled by *Peninsula Balmain* or *Hervey Bay (JV)*.

A conscientious drafter should put the issue beyond doubt. For example, where it is intended that to the superintendent’s discretion in clause 35.5 of AS2124-1992 or clause 34.5 of AS4000-1997 be for the principal’s benefit, the following approaches need to be considered:

- 1 expressly stating that the obligation to act “*honestly and fairly*” or “*reasonably and in good faith*” does not apply to the superintendent’s discretion to unilaterally extend time; and/or
- 2 expressly stating that the discretion may only be exercised for the benefit of the principal (as opposed to using words such as “*not under any obligation to do so*”).

In some quarters, such drafting might be considered “*overkill*” or “*weasel words*”. However, such unambiguous drafting would clearly reflect the clause’s purpose and arguably remove the potential to dispute its intent.

ⁱ [2002] NSWCA 211

ⁱⁱ *Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd* [1970] 1 BLR 111

ⁱⁱⁱ *Building and Construction Industry Payments Act 2004* (Qld); *Building and Construction Industry Security of Payment Act 1999* (NSW); *Building and Construction Industry Security of Payment Act 2002* (Vic)

^{iv} [2008] QSC 58

^v For example, subclause 34.5 of AS4000-1997 and clause H6 of ABIC MW-1 2003

^{vi} The power was appropriately described as a “reserve power” in Ritchie J, “The superintendent’s power to extend time in the absence of the complying EOT claim – is the debate over?” (2007) 19 ACLB 1

^{vii} For background and a robust discussion on the historical purpose of this clause, see Baron A, “The superintendent’s Discretion to Extend Time: A long story must be told to satisfy the ‘earnest enquirer’” (2007) 23 BCL 410

^{viii} n 2 at [79] per Hodgson J

^{ix} [2005] VSC 237

^x [2006] VSC 491

^{xi} Baron A, “Role of the contract administrator: breathing new life into the ‘prevention principle’” (2003) BCL 334 at 342

^{xii} n 3, at [7]

^{xiii} n 5, at [40]

^{xiv} This obligation is contained in the unamended AS4000-1997 at clause 20.

^{xv} n 2, at [33]