



## CONSTRUCTION LAW UPDATE No. 1002

### Terminating Trouble

#### Introduction

In *Diploma Construction v Marula* [2009] WADC 1 the WA Court of Appeal examined whether a building contract had been legally terminated. This case highlights the precision required when terminating a building contract.

#### Background

Marula was a plastering subcontractor engaged by Diploma to carry out solid plastering on a three-storey multi unit development. The parties entered into a written lump sum contract for \$239,800. The contract included clause 8.1(a):-

8.1 If [Marula]:

(a) fails to carry out any of its obligations under this Subcontract and fails to rectify the default within 3 days of becoming aware of details of the default (by notice from [Diploma] or otherwise); ...

[Diploma] may, at any time and without prejudice to any other rights or remedies available to it under this Subcontract or otherwise, by notice to [Marula] terminate this Subcontract.

The contract also required Marula to follow Diploma's directions:

4.2 (a) [Marula] must perform the Works (the plastering works) in accordance with this Subcontract (including directions from Diploma to Marula given under this Subcontract) and to the entire satisfaction of Diploma.

#### The work and the problems commence

Soon after work commenced on 14 March 2003 the parties began complaining to each other. Diploma was frustrated about the lack of progress. Marula said other trades were impeding its work, the roof was leaking water on to the walls making it difficult to apply plaster and Diploma's ceiling fixers were working alongside Marula's plasterers creating safety issues. These complaints were the parties' theme song for the remainder of the dispute.

The complaints were initially verbal, but by 12 June, Diploma had started to complain in writing and by mid July, the dispute escalated with almost daily faxes and phone calls from both sides. This update contains only a selection of the correspondence.

On 11 July Diploma sent the following fax:

*Please be advised the plasterers schedule given to me for Friday 11-7-03 has not been carried out. ie no solid plasterers were on site today & the setting plasterers working in units 37, 38, 42 left site 11.00 am (reason given) they had to go to get their pay from you in Gosnells etc. Clearly a more suitable method should be found. The setters also advise me (Matt) they will be back Monday not Saturday.*

Marula responded in writing repeating its three complaints and saying that these issues were responsible for the lack of progress. Marula verbally promised weekend work on 12 and 13 July but little occurred.

On 14 July Diploma sent a fax saying:

*Further to your letter dated the 11/7/03, Diploma deny [sic] that all trades are working in and around one another. Diploma advice [sic] that Safety is of the Highest Standard, [sic] We therefore give you Notice that you are in breach of your Contract, pursuant to clause 8.1 Part A.*

*You are required to recommence work Tomorrow morning, Tuesday 15th July 2003, [sic] if you do not return to work your Contract will be Terminated. We reserve the right to deduct liquidated Damages and any other Costs that arise from your breach of contract.*

More faxes in a similar vein followed during that week with Marula continuing to maintain its three complaints. In addition, it had now sought an expert opinion as to defects in the plaster caused by the leaks.

On Saturday 19 July, Marula wrote to Diploma conceding that the leaking had been reduced but maintaining the other two complaints. Marula said that if unimpeded, it could finish the plastering within 5 to 7 days.

On the following day, Diploma terminated the contract by written notice. Another plastering subcontractor commenced Marula's unfinished work the following day. Marula said the termination notice was a repudiation of the contract and accepted that the contract was terminated.

Marula sued Diploma for approximately \$50,000 due under the contract for work completed up to the date of termination. Diploma cross claimed for \$209,000, the cost of having the works completed by others.

### **The Legal Principles**

The Court had to decide whether Diploma was entitled to terminate. It is accepted law that the party who terminates a contract has the onus of proving the other party's default and the effect of the default.

Diploma said it was entitled to terminate and it had complied with its procedural obligations under clause 8.1(a) when it sent the faxes of 14 and 15 July.

The Court had to decide whether Marula was in default of its contractual obligations at the time of termination and if it was, whether the faxes constituted sufficient written notice as required by clause 8.1(a).

### **Was Marula in default?**

Diploma relied on two defaults: the fax of 11 July from Marula saying it would stop work and a failure to follow directions given by Diploma in faxes it sent on 11 and 12 July.

#### *The stop work fax*

In its 11 July fax, Marula had complained at length about the job and had concluded by saying it would stop work until these matters were rectified. Diploma said that this was a notice refusing to perform the contract and therefore was a repudiatory breach of the contract. Accordingly, Diploma said it was entitled to terminate the contract on that ground alone.

However, the Court accepted that on 11 July the parties had verbal discussions in which Marula had promised to keep working and in fact worked on 14 July. Diploma could not rely on Marula's fax as a basis for terminating the contract because there had been no breach.

#### *The faxed directions*

Diploma relied on two faxes to establish that Marula was in default because it had failed to follow directions. In the first facsimile, Diploma complained about what had happened on site that day, in terms of plastering, and, in the second, it complained about the failure of

Marula to keep its promise to work on 12 and 13 July 2003.

The Court said that a "direction" bears its ordinary meaning of "an instruction what to do, how to proceed or where to go". There was no specific instruction on the faxes. Marula was not in default because the faxes had not asked it to do anything.

Therefore, Diploma was not entitled to terminate the contract.

In any event, the faxes of 14 and 15 July did not specify the default in sufficient detail. The Court said that the notice must "direct the contractor's mind to what is said to be amiss". It was not enough to say that Marula already knew the details of the default.

Diploma was required to pay to Marula the \$50,000 less retention being the amount due as at the date of termination, plus interest.

### **Conclusion**

The termination of a contract is a serious step with long term implications. Minor differences in the form and substance of the documents used in termination can lead to substantially different legal outcomes.

It may be that Diploma would have been entitled to terminate if it had better communicated its position to Marula in strict compliance with its contractual obligations.

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