



CONSTRUCTION LAW UPDATE No. 804

Does the Superintendent have to be fair?

Introduction

A recent Queensland Supreme Court Decision examines the role of the Superintendent where the building contract has been amended to give the Superintendent an absolute discretion and does not require the Superintendent to act fairly and honestly. (*Hervey Bay (JV) Pty Ltd v Civil Mining and Construction Pty Ltd* [2008] QSC 58)

The role of the Superintendent

In most commercial and some larger value residential building contracts the parties agree to appoint a Superintendent. Traditionally, the Superintendent has been required to act impartially when making assessments under the contract. The assessments to be made include assessing claims for payment by the builder, claims for extensions of time, the quality of materials and workmanship and claims for extra payments, whether for variations or for other site related issues.

Invariably, the Superintendent is chosen by the owner and paid by the owner. Builders have often been heard to comment that the Superintendent is unlikely to make decisions that are unfavourable to the hand that feeds them. However, most standard form contracts require the Superintendent to act impartially, honestly and fairly when making decisions and often include a provision appointing the Superintendent as the agent of the owner. Courts have held that this duty is implied into the building contract. Therefore, a Superintendent who acts unfairly or in a biased manner may render the owner in breach of the building contract.

In 2002, the NSW Court of Appeal found that under the unamended AS2124 contract the Superintendent had power to extend time for the completion of a building contract and the power was able to be exercised in the interests both of the owner and the builder. In the *Peninsula* case, Abigroup had not asked for the extension of time and clearly had not given the

required notices under the contract. The Court gave the extension of time and added that a Superintendent “is obliged to act honestly and impartially in deciding whether to exercise this power”. (*Peninsula Balmain v Abigroup Contractors*.)

Recent trends in contract drafting

In recent times, it has been common for owners to insert into the building contract clauses that give the Superintendent the power to make decisions that are not necessarily based on fairness. These clauses have grown in popularity since the *Peninsula Balmain* decision.

The Hervey Bay case

In the *Hervey Bay* matter, the parties had signed an amended form of the common building contract AS2124. The works had been completed late, and there was disagreement as to the reasons for the delay.

In this update, we focus on only one aspect of the decision. The builder claimed the sum of \$821,440 for delay costs. The Superintendent disallowed the delay claim. The dispute was referred to an adjudicator who found in favour of the builder but reduced the delay component to \$767,000.

The Appeal

The owner appealed to the Supreme Court. The case turned on the precise terms of the contract.

It was not in dispute that the builder had failed to give notices of the delays as required under the contract and therefore lost its contractual entitlement to the delay claim. However, the Superintendent had the power to award an extension of time with resulting delay damages.

The Court had to determine whether, assuming that it was fair to do so, the Superintendent was under an obligation to extend time.

The contract included the following words at clause 35.5A:

*“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.**”*

The words in bold type highlight the difference between the standard form of AS2124 and the amendments made in this case.

Significantly, the clause that required the Superintendent to act honestly and fairly in the performance of his functions referred to several specific clauses in the contract but did not refer to the inserted new clause 35.5A as quoted above.

The decision

The Court found that the Superintendent was not under an obligation to act fairly when exercising his powers under clause 35.5A. The Court said:

“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.”

The consequence of this decision was that the adjudicator’s award was overturned and the builder was not entitled to the claimed delay costs of \$767,000.

Conclusion

The *Peninsula Balmain* position is not changed. Unless the contract expressly provides otherwise, there is an obligation on

the Superintendent to act impartially, fairly and honestly in the exercise of discretion under the contract. This observation particularly applies to the standard form contracts which include terms expressly requiring the Superintendent to act in this manner, and impose an obligation on the owner to ensure that the Superintendent does so.

However, builders should be on guard for amendments to standard form contracts that remove the usual obligations of fairness and impartiality from the Superintendent and offer an “absolute discretion” to the Superintendent.

It is not a sufficient answer to claim that the term in the contract was not explained, or was not noticed at the time of signing the contract.

Absent misrepresentation or misleading conduct, the Courts will take the view that parties who sign contracts are bound by the terms of the contract.

Contributor: Tom Grace

Tom is a former engineer who ran his own construction company for 20 years before becoming a construction lawyer. He has wide experience in the engineering and construction fields and specialises in the resolution of commercial disputes.

Contact Details

Tom Grace – Partner
Direct: (08) 8110 8004
tom.grace@feg.com.au

July 2008

This publication is not legal advice. It is for general interest. You should not rely on it without obtaining legal advice.

Fenwick Elliott Grace is a law firm that specialises in providing legal services to the construction and engineering industries.

Office: Level 10, Optus Centre
431 King William Street
ADELAIDE SA 5000

Ph: (08) 8110 8000
Fax: (08) 8231 2922
Web: feg.com.au

If you would like to receive our legal publications by email, please contact Eunie de Bruyn on (08) 8110 8000 or by email at eunie.debruyne@feg.com.au.