Palmer AJ held Halton’s mistaken belief about clause 7 was not induced by or attributable to the contractor in any way. Further, that it followed that Halton’s attack on clause 7 based upon misrepresentation or breach of section 52 of the Trade Practices Act failed.
- John Tyrrell

Variations - Duty of Fairness to Order

Davey Offshore Ltd v Emerald Field Contracting Ltd [1991] 55 Build. LR 22

This case arose out of a lump sum design and construct (turnkey) contract for the construction of facilities for the Emerald Oilfield in the North Sea. The contract price was $127m but the contractor’s cost of completing the work was estimated at more than $200m. The contractor sought to establish that the principal had a duty to order variations to correct inconsistencies in description of the work in schedules which formed part of the contract. The case is interesting in that the Official Referee, Judge Thayne Forbes QC held that there is no principle of law that there is a duty of fairness requiring the principal or the superintendent to order a variation to assist a contractor.

The Official Referee found that there were discrepancies in the contract documents but that the contract did not impose any express or implied obligation upon the principal to exercise the power to order a variation and consequently be liable to pay extra. The contract did not include provision for a superintendent but the Official Referee found that the principal was in no different position than if the contract had vested in the principal the same powers and duties normally given to a superintendent.

The Official Referee (at p61) said:

“I accept that an architect or engineer appointed to a contract is obliged to act fairly in the discharge of such of his duties under the contract as require him to use his professional skill and judgment in forming an opinion or making a decision where he is, in effect, “holding the balance between his client and the contractor”: see for example the speech of Lord Reid in Sutcliffe v Thackrah [1974] AC 727 at pages 736 to 737 and Pacific Associates v Baxter [1990] QB 993. In my judgment, it is clear that the obligation to act fairly is concerned with those duties of the architect/engineer which require him to use his professional judgment in holding the balance between his client and the contractor. Such duties are those where the architect/engineer is obliged to make a decision or form an opinion which affects the rights of the parties to the contract, eg valuations of work, ascertaining direct loss and expense, granting extensions of time, etc. When making such decisions pursuant to his duties under the contract, the architect/engineer is obliged to act fairly.

I accept (the principal’s) submission that the authorities do not support the proposition that an architect/engineer (or in the case of this contract, the employer) has to exercise a power to order a variation when it is fair to do so. There may be cases where, unless the architect/engineer exercises his power to vary the contract, the contractor will be unable to perform the contract (the contractual deadlock). In such a case, depending on the terms of the contract in question, the court will imply a term that the employer exercise his power to vary (even when expressed permissively), the exercise of which is in such circumstances necessary for the performance of the contract by the contractor: see NWMRHB v Bickerton [1970] 1 WLR 607 and Holland Hannen & Cubitts v Whitso [1981] 18 BLR 80. However, such a term is not a term that the architect will act fairly and it is implied because it is necessary, not because it is fair to do so (although it may be fair from the contractor’s point of view). In my opinion Judge Newey QC did not purport to found his decision on the concept of fairness to the contractor, nor was that the basis of the decision in Bickerton. It was necessity which was the basis of the implication in both cases.

I am of the opinion that the question, whether a party is obliged to exercise a power which he possesses under the contract, is not to be answered by reference to a concept such as fairness to the other party, but by reference to the following:

(i) the express terms of the contractual provision from which the power derives, to see if and to what extent there is an obligation to exercise the power;
(ii) where the contract will not otherwise work, in which case a Bickerton type term will be implied.

The Official Referee found that there was no implied term that in and about the operation of the power to order variations, the principal by its servants and agents would act fairly between the principal and the contractor.

The contract included the express term that the principal “shall not by any acts or omissions delay or obstruct (the contractor) in the performance of the Work”. The Official Referee held that that clause did not impose any obligation upon the principal to order a variation to assist the contractor.

- Philip Davenport