

Late Extension of Time Claims

Australian Development Corporation Pty Limited v White Constructions (ACT) Pty Ltd & Ors, unreported, Supreme Court of New South Wales, Giles CJ, 30 January 1996.

A contractor's failure to make an extension of time claim within the time frame stipulated in the contract was not, until recently, thought to be fatal to its right to make an extension of time claim later.

A school of thought has existed which viewed a contractor's failure of this type as a breach of contract for which the principal would be entitled to claim damages. According to this line of reasoning, the contractor's breach would not disentitle it from lodging its claim for an extension of time and having it dealt with by the contract administrator.

The life cycle of this school of thought may well have reached its end with a number of Supreme Court decisions which adopt a more stringent approach that bars extension of time claims which are not lodged within the time stipulated in the contract.

The most recent decision in this area was given by Giles J in the Supreme Court of New South Wales in *Australian Development Corporation Pty Limited v White Constructions (ACT) Pty Ltd & Ors*.

The contract in question in this case appeared to be a "one-off". The extension of time clause provided:

"If the Company is delayed at any time in the progress of the Project by any cause whatsoever beyond the control of the Company (which are the causes of delay listed in Article A4.4.2), then the Date for Practical Completion shall be extended by a period equal to the extent of such delay to the Company. Within 30 days of when the Company reasonably believes that delay has occurred within the meaning of this clause, it shall notify the Developer of the time of commencement and actual or estimated termination of the delay, the cause thereof and the manner in which the progress of the Project has been or will be delayed and the Developer shall determine the time by which the Date for Practical Completion shall be extended."

Notwithstanding, the fact that the clause appears to have been drafted specifically for the project, the decision may have consequences for the way in which extension of time provisions in standard forms contracts are considered.

On the facts of this case the contractor needed to establish significant extensions of time to advance its cause.

The principal submitted that compliance with the notification provisions of the extension of time clause was

a necessary step to the granting of an extension of time so that if the notification provisions were not complied with, there was no right to proceed with the extension of time claim which was lodged late. In other words, the contractor would lose its entitlement to claim the extension of time.

The court stated:

"Imposing the notification requirement upon" the contractor "was a deliberate and important part of the mechanism for determining the time by which the date for practical completion could be extended. It was in mandatory terms ("shall notify") equivalent to the mandatory terms imposed on ADC ("shall determine the time"), and as in Wormald Engineering Pty Limited v Resources Conservation Co International "to give" the contractor "no more than an action for damages if timely notification was not given would not be satisfactory".'

This is not the first time that a decision along these lines has been given.

In 1988 the Supreme Court of New South Wales in *Wormald Engineering Pty Limited v Resources Conservation Co International* came to a similar conclusion in connection with the variations provision of AS2124-1978 holding that a failure to give a notification under clause 40.2 of the contract was destructive of an entitlement to recover under the clause.

In *Opat Decorating Service (Aust) Pty Limited v Hansen Yuncken (SA) Pty Limited* (1994) 11 BCL 360 the Full Court of the Supreme Court of South Australia considered clause 31 of SCNPWC Edition 3 and found that the time provision in that clause for claiming extensions of time was mandatory. There the subcontractor's claim to an extension of time was barred by its failure to give notice within the prescribed time.

A common feature of the extension of time clauses in *Australian Development Corporation Pty Ltd v White Constructions (ACT) Pty Limited & Ors* and in *Opat Decorating Service v Hansen Yuncken* was that in both instances the party claiming the extension of time was obliged to notify the other party of the claim:

"Within 30 days of ... shall notify the Developer" - ADC v White Constructions; and

"The subcontractor shall if he desires to claim an extension of time for completion of the Works give to

the contractor not later than fourteen (14) days ... notice in writing" - Opat Decorating Service.

In both cases the mandatory nature of the requirement to give notice within a prescribed period of time was held, in effect, to be a pre-condition to proceeding with the claim, so that when there was a failure to give notice within the time limit, the right to claim an extension of time was lost.

The fact that these provisions did not state, in terms, that a failure to comply with their time limits would destroy the right to make an extension of time claim in respect of the cause of delay in issue did not prevent the courts from finding that compliance with the provisions was mandatory.

The JCC form of contract in clause 9.1 has a notification of delays clause which includes a mandatory requirement for the builder to give written notice within a 20 day period, such notice to contain certain specified details. While clause 9.1 of JCC is not identical to the extension of time clauses referred to in the cases cited, it would seem that the drafting of the clause could attract the arguments that were successfully deployed in those areas.

In AS2124-1992, the extension of time clauses are worded somewhat differently to the time provisions in the contracts the subject of the cases referred to. Accordingly, the application of those cases to that form of contract does not necessarily follow. As Bollen J stated in *Opat Decorating Service*:

"No case is decisive of the matter nor could any case be decisive. We may see principles in cases. But in the end it is the words used in the relevant clause or clauses of the subcontract which are decisive."

Nonetheless, clause 35.4 of AS2124 does contain the requirement to give notice of delay to work under the contract and the entitlement to an extension of time is, on one view of it, dependent upon the giving of a written notification within a 28 day period. These factors lead to the prospect that the principles applied in the above cases may be capable of application to the AS2124 form of contract.

Clause 34 of the 15 July 1996 draft revision of AS2124 which is also drafted in substantially different terms to the extension of time clauses in the cases referred to, still has notification provisions which are capable of being construed as mandatory.

It is suggested that the provisions of the C21 Construction Contract conditions, insofar as they relate to extensions of time, would allow a principal to make similar submissions concerning the mandatory nature of the notice requirements as were advanced by the developer in *Australian Development Corporation v White Constructions* and the contractor in *Opat Decorating Service v Hansen Yuncken*. Clause 66.2 requires the contractors to give 2 written notices within specified time limits in support of an application for an extension of time.

The most recent decision in *Australian Development Corporation Pty Limited v White Constructions* emphasises

the trend of the earlier authority and puts contractors and subcontractors on notice. If an extension of time claim is important enough, and the intention is to rely upon it, then it should be lodged with the contract administrator within the time set out in the contract. Failure to do so may see a loss of the right to claim an extension of time for that particular cause of delay.

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