

Judgment : Judge Stott ; County Court of Victoria at Melbourne. 22nd May 2006

BACKGROUND

- 1 The defendant engaged civil engineers Guthridge Haskins & Davey, (GHD), to design a subdivision of 31 lots known as the Riva Villa subdivision at Avondale Heights and engaged GHD to act as superintendent to the project. The project involved the construction of roads, storm water drainage, sewers and water reticulation.
- 2 The plaintiff was the successful tenderer and entered a contract to perform the works on 2 April 2004 which was in the form of AS21 24-1992 general conditions of contract and annexures thereto. Basically it provided for the works to be carried out for the sum of \$520,765. The commencement date was set at 27 April 2004 and the date for practical completion was 3 August 2004, 14 weeks from the execution of the contract. The defects liability period was three months.
- 3 Pursuant to Clause 35.6 of the contract and the annexure, it was provided that if the plaintiff failed to reach practical completion by the date for practical completion, it would be indebted to the defendant for liquidated damages at the rate of \$850 per day. In the notice of acceptance of tender, (Exhibit G), GHD informed the plaintiff that possession of the site shall not be given and work shall not commence on site until appropriate contract insurances have been received and accepted; contract documents have been completed and signed; construction management plan, quality plan and OH&S plan have been submitted; approval of design plans has been received from the City of Moonee Valley.
- 4 There was delay in meeting these conditions so that possession of the site was not given to the plaintiff and work did not commence until June 2004, causing GHD to extend the time for practical completion until 13 September 2004. It is not disputed that extension was properly given.
- 5 From time to time, GHD granted further extensions of time, the validity of which is contested but it is now agreed that the date of practical completion was 20 December 2004, notwithstanding an inconsistent allegation in the defendant's counterclaim and inconsistent evidence from Mr Zervos, a director of the defendant.
- 6 From time to time, GHD also issued progress payment certificates and the defendant paid the amounts shown as due on the first five of them but failed to make any payment in respect of progress payment certificates six and seven. The plaintiff issued proceedings to recover the outstanding amount on 14 February 2005 and on 12 August 2005 obtained judgment against the defendant from Judge Dove for \$120,553.74. On 19 August 2005, the defendant terminated GHD's appointment as superintendent and purported to appoint Resi Check in its place.

THE COUNTERCLAIM

7. This proceeding is the trial of the defendant's counterclaim. As pleaded, it claimed liquidated damages for delay to 28 February 2005 in the sum of \$176,800 together with \$6,125.90 in respect of defects and incomplete works. In his closing address, Mr Herskope who, with Mr Carr, appeared for the defendant abandoned the claim in respect of defects and incomplete works and confined the claim for liquidated damages to the period 13 September 2004 to 20 December 2004, a period of 98 days which at the rate of \$850 per day is productive of a claim for \$83,330. At the conclusion of the defendant's case, the plaintiff made a no case submission and indicated that in any event it would not call evidence.

THE CONTRACT

- 8 Clause 35.5 of the contract as amended by Annexure B provides: "*When it becomes evident to the contractor that anything, including an act of 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.*"
- 9 "*When it becomes evident to the principal that anything which the principal is obliged to do or provide under the contract may be delayed, the principal shall give notice to the superintendent who shall notify the contractor in writing of the extent of the likely delay. If the contractor is or will be delayed in reaching practical completion by a cause described in the next paragraph and within 14 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.*"
- 10 "*The causes are:*
 - (a) *events occurring on or before the date for practical completion which are beyond the reasonable control of the contractor, including but not limited to:*
 - (i) *industrial conditions,*
 - (ii) *inclement weather conditions which differ from the conditions stated in the contract or in the absence of such statement which differ materially and substantially from those conditions which would reasonably have been anticipated by an experienced and competent contractor.*
 - (b) *any of the following events whether occurring before, on or after the date for practical completion,*
 - (i) *delays caused by the principal, the superintendent, the principal's employees, consultants, other contractors or agents,*
 - (ii) *actual quantities of work being greater than the quantities in the bill of quantities or the quantities determined by reference to the upper limit of accuracy stated in the annexures (otherwise by reason of a variation directed under Clause 40),*
 - (iii) *latent conditions,*

- (iv) variations directed under Clause 40,
 - (v) repudiation or abandonment by nominated contractor,
 - (vi) changes in the law,
 - (vii) directions by municipal, public or statutory authorities but not where the direction of those from the failure of the contractor to comply with the requirement referred to in Clause 14.1,
 - (viii) delays by municipal, public or statutory authorities not caused by the contractor,
 - (ix) claims referred to in Clause 17.1 (v),
 - (x) any breach of the contract by the principal,
 - (xi) any other cause which is expressly stated in the contract to be a cause for extension of time for practical completion."
- 11 "When more than one event causes concurrent delays and the cause of at least one of those events but not all of them is not a cause referred to in the preceding paragraph, then to the extent that the delays are concurrent, the contractor shall not be entitled to an extension time for practical completion."
- 12 "In determining whether the contractor is or will be delayed in reaching practical completion, regard should be had to whether the contractor can reach practical completion by the date for practical completion without an extension of time, whether the contractor can by committing extra resources or incurring extra expenditure make up the time lost. With any claim for an extension of time for practical completion or as soon as practicable thereafter, the contractor shall give the superintendent written notice of the number of days extension claimed."
- 13 "If the contractor is entitled to an extension of time for practical completion, the superintendent shall within 14 days after receipt of the notice of the number of days extension claimed, grant a reasonable extension of time. If within the 14 days the superintendent does not grant the full extension of time claimed, the superintendent shall before the expiration of the 14 days give the contractor notice in writing of the reason."
- 14 "In determining a reasonable extension of time for an event causing delay, the superintendent shall have regard to whether the contractor has taken all reasonable steps to preclude the occurrence of the cause and minimise the consequences of the delay. The contractor shall not be entitled to any payment arising from the granting of an extension of time over and above any payment to which he is entitled under the contract for the event that has caused such an extension of time."
- 15 "Notwithstanding that the contractor is not entitled to 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 and there shall be no payment to the contractor because of the granting of such extension of time."
- 16 "A delay by the principal or the failure of the superintendent to grant a reasonable extension of time or to grant an extension of time within 14 days shall not cause the date for practical completion to be set at large but nothing in this paragraph shall prejudice any right of the contractor to damages."
- 17 So far as is relevant to this case, the effect of this clause is to give the superintendent two methods by which it can grant the contractor an extension of time. The first method is that where the contractor makes a claim within 14 days after the event causing delay occurs and the delay is of a type specified in the list of delay-causing events, the contractor becomes entitled to an extension of time and the superintendent must grant a reasonable extension after it has had regard to whether the contractor has taken all reasonable steps to preclude the occurrence of the cause and minimise the consequences of the delay.
- 18 The second method is the provision whereby the superintendent is given the discretionary power, at any time and from time to time before the issue of the Final Certificate, to extend the time for practical completion for any reason and there shall be no payment to the contractor because of the granting of such an extension of time.

THE DEFENDANT'S SUBMISSIONS

- 19 The defendant concentrated its submissions on the first method, submitting that the plaintiff had failed to comply with the condition of making claims for delay within 14 days of the delay occurring and cited authorities such as **Opat Decorating Service (Aust) Pty Ltd v. Hansen & Yuncken (SA) Pty Ltd** 1995 11 B.C.L. 360 and **Australian Development Corporation v. White Constructions (ACT) Pty Ltd** 12 B.C.L. 317 as persuasive authorities to the effect that making a claim for delay not later than 14 days after the cause of delay arose was a mandatory requirement and a condition of any entitlement for an extension of time for delay. See also *Queensland v. Multiplex Constructions Pty Ltd* 14 B.C.L. 329 at 332. It was further submitted that there was no evidence that the superintendent granted any of the contractor's requests for extension of time pursuant to the second method.

THE EVIDENCE

- 20 Mr Lazarus, who was called by the defendant and was a civil engineer employed by GHD with 30 years' experience in the land development subdivision industry and who was involved with this project and who was on site during the works at least monthly, said he assessed the various claims for delay made by the plaintiff, granted those he regarded as justified but did not allow all the claims.
- 21 He said that he had regard to his personal knowledge of the site, his knowledge of the weather, the difficulty in getting the electrical contractor AGL to perform its work, the amendments the council made to the plans, the consequent requirement to move the water main, the difficulty ascertaining the location of the live water main, the

council's change of requirement concerning the asphalt wearing course and its delay in approving names for the streets and its late requirement for a speed hump, line marking and traffic signs.

- 22 He said at transcript p.373 that on occasions, claims for delay for inclement weather overlapped with delays caused by the other reasons stated above and if one reason was regarded as legitimate, it was unnecessary to consider any other reason. Importantly, the factual basis for the grant of extensions of time by GHD was not challenged and no contrary evidence concerning the fact or cause of delay was called.
- 23 The challenge was confined to failure to make claims within the 14 day period and failure to set out the facts on which they were based. Mr Lazarus had knowledge of the delays and the facts on which they were based. He is not a party to this litigation and there is no evidence to suggest that GHD acted otherwise than in accordance with the contract or in such a way to justify me in going behind GHD's grants of extension of time for practical completion or the certificate of practical completion on 20 December 2004.
- 24 The plaintiff cannot be said to be in breach of contract simply because it claims extensions of time. In **Boulderstone Hornibrook Pty Ltd v. Qantas Airways Ltd** 2003 FCA 174, Finkelstein J. had to consider a clause in the contract which was in similar terms to that part of Clause 35.5 that deals with the second method and said at paragraph 89: "The circumstances in which a certificate will be vitiated cannot be exhaustively stated. The most recent addition of Hudson's Building and Engineering Contracts, 11th Edition 1995 by I.N. Duncan Wallace suggests the following broad categories: (1) whether the decision-maker has a special interest in the result, (2) fraud or collusive conduct, (3) improper pressure, influence or interference by the owner, (4) conduct which falls short of the proper standard of fairness, independence and impartiality, (5) breach of contract or other act or omission of the owner having the effect or preventing the builder obtaining a decision, (6) unreasonable refusal by the decision-maker to consider the matter and (7) taking improper considerations into account."
- 25 Not one of those stated circumstances has application in this case. The result is that there is nothing to show that GHD acted otherwise than in accordance with the contract in extending the date for practical completion. As pointed out in **Peninsula Balmain Pty Ltd v. Abigroup Contractors Pty Ltd** 2002 NSWCA 211 at paragraphs 69 to 72, the obligation on the superintendent to act reasonably meant that he could grant an extension of time even if the contractor had not followed the Clause 35 procedure. Accordingly, the plaintiff had been granted a valid extension of time for practical completion to 20 December 2004 and the defendant has failed to make out an arguable case for its claim for liquidated damages.
- 26 Clause 2 of the contract defines date for practical completion as meaning "(a) where the annexure provides a date for practical completion, the date, (b) where the annexure provides a period of time for practical completion, the last day of the period, but if any extension of time for practical completion is granted by the superintendent or allowed in any arbitration or litigation, it means the date resulting there from."
- 27 Whilst this enables the court to extend the date for practical completion, it is unnecessary for this court to do so because in my view, GHD validly and properly extended the date for practical completion to 21 December 2004 and practical completion occurred on 20 December 2004. If I am subsequently held to be wrong about that, then on the evidence of Mr Lazarus, I would extend the date for practical completion to 20 December 2004.
- 28 Mr Zervos, a director of the defendant, when cross-examined espoused a novel view of when practical completion occurred which was different from and contrary to what was provided in Clause 2 of the contract. This view was not adopted by Mr Herscope in his final address and accordingly no further comments is required. In view of my findings, it is also unnecessary to consider whether the amount provided by the contract for liquidated damages was a penalty or to comment on Mr Zervos' evidence on that topic.

INCLEMENT WEATHER

- 29 At trial, much time was taken considering delays caused by inclement weather and the wording of 35.5(a)(ii). The wording which follows the words "inclement weather" is obscure and I find it impossible to ascribe to it any precise meaning and would, if required, hold it void for uncertainty and sever it from the contract, see (**Scammell G & Nephew Ltd v. Ouston** 1941 A.C. 251 which was approved in **Upper Hunter County District Council v. Australian Chilling and Freezing Company Ltd** 1968 118 C.L.R. 429 at 437).
- 30 It is unnecessary to do so as in any event, there was no evidence led as to what conditions an experienced and competent contractor ought reasonably have anticipated, whether such conditions differed materially and substantially from the conditions stated in the contract or when such assessments should have been made. The defendant did not submit that the clause was not void for uncertainty, leaving it for me to decide but submitted that even if it was, the plaintiff was still bound to comply with the regime set out in the first method in Clause 35.5. Insofar as it goes, that submission is clearly correct but it ignores the second method of granting extensions of time for practical completion which remain extant and applicable in this case.
- 31 An attempt was made at trial to bolster the defendant's counterclaim by relying on Certificate 8 issued by Resi Check on 23 August 2005, (Exhibit E), and the evidence of Mr Cheong. In his closing address, Mr Herscope abandoned reliance on Certificate 8 and the claim for defective and incomplete works, which renders the evidence of Mr Cheong irrelevant.
- 32 This being a no case submission, the applicable test is whether the court could on the evidence adduced find for the party against whom the no case submission is made. See **Protean (Holdings) Ltd v. American Home Assurance Company** 1985 V.R. 187 at 120. The head note to that case states in paragraph 7, "a submission that there is no

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case to answer will fail if the respondent shows that there is a case to answer, not because it will ultimately succeed, but because there is evidence which ought reasonably satisfy the tribunal that the facts which it seeks to prove have been established."

- 33 In my opinion and for the reasons stated, the court could neither on the evidence adduced find for the defendant on the counterclaim or hold that the evidence reasonably satisfies me that the facts it seeks to prove have been established.
- 34 Accordingly, there will be judgment for the plaintiff on the counterclaim. I order that the amount of \$137,085.01 paid into court by the defendant pursuant to my order of 24 February 2006 together with any interest accrued thereon be paid out to the plaintiffs solicitors for the plaintiff forthwith. I will hear from counsel as to the matters of costs and other orders.

Ms K.P. Hanscombe SC for the plaintiff with Mr T. D. Cordiner instructed by Coburn & Associates
Mr M.H. Whitten 15 November 2005 for the defendant : Mr B. Carr 8-16 May 2006 : Mr A. Herskope 12-16 May 2006 instructed by Noble Lawyers