

Crisp Law Newsletter

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Why revisit the Tomkins Commercial & Industrial Builders Pty Ltd v Majella Towers judgement?¹

Back in 2014, the Tomkins decision denied the Principal from accessing the balance of security monies, in circumstances where there was a notice of dispute against the final certificate.

In light of current “head” contract drafting, it is a worthwhile juncture to return to the Tomkins judgement. You would be alert that principals are continuing to expand the principal’s entitlements to access security monies and increasing the time before the balance of the security monies can be reclaimed by a Contractor. Contractors are at risk of losing those security monies due to subjective design failings, for example, building non-performance according to a building rating criteria (i.e. “performance”) requirements.

This Crisp Law newsletter in revisiting the Tomkins judgement identifies it as a key item of contract administration. Also, discussed is the related issue arising from principals extending the range of matters for which “security” monies are held including building rating (i.e: “performance”) requirements.

Tomkins relies on the Court of Appeal decision of *Martinek Holdings Pty Ltd v Reed Construction (Qld) Pty Ltd (“Martinek”)*.²

The relevant clauses in the head contract between Tomkins and the principal (“Majella”) allowing the recourse to the bank guarantee are in Schedule A to the newsletter.

There, the court of appeal construed **cl 37.4** of the head contract between the parties (“Martinek” and “Reed Constructions”) as follows:

- (a) The final certificate is qualified because a notice of dispute has been issued about it;
- (b) The giving of the notice of dispute under cl 42 is a qualification to the second and third paragraphs of cl 37.4 by cl 37.4(d);
- (c) This means that no right to payment has arisen which would otherwise arise according to the third paragraph of cl 37.4, and as such,

¹ Tomkins Commercial & Industrial Builders Pty Ltd v Majella Towers, [2017] QSC 202.

² Martinek Holdings Pty Ltd v Reed Construction (Qld) Pty Ltd [2009] QCA 329, especially at [20].

- (d) No right to payment has arisen, and cl 5.2 cannot be relied upon for recourse to the bank guarantee because the “time for payment” of the amount certified in the final certificate has not arisen and so has not passed.³

Keane JA in *Martinek Holdings Pty Ltd v Reed Construction (Qld) Pty Ltd* stated as follows:

“In my respectful opinion, on the proper construction of cl 37.4, it is only the money certified as due and payable by a certificate unqualified in its effect by the fourth paragraph of cl 37.4 that give rise to a right to payment in accordance with the third paragraph of cl 37.4....”⁴

The relevant clauses are provided in **Schedule A** in the newsletter.

His Honour found that the fourth paragraph of cl 37.4 qualified the second and third paragraphs of cl 37.4. In terms of the second paragraph, if the effect of the final certificate is suspended once disputed, it does not have the effect of evidencing the money, within 5 business days after the receipt of the final certificate and operates to prevent the final certificate from having the effect of making the monies due and payable as provided under the second and third paragraphs pending the dispute.⁵

Martinek was also followed in *Civil Mining & Construction Pty Ltd v Wiggins Island Coal Export Terminal Pty Ltd* (“CMC”)⁶, in which a final certificate was issued, and a notice of dispute was served by the contractor in relation to the final certificate.

Following Martinek,⁷ the court in “CMC” noted that in both instances, the final certificate certifies the amount which, in the opinion of the relevant representative, is finally due from the Principal to the Contractor or from the Contractor to the Principal.⁸

The consequence of serving a notice of dispute on the evidentiary effect of the final certificate is also discussed by Keane JA in the case of *RJ Neller Building Pty Ltd v Ainsworth*,⁹ where his honour and other members of the court agreed, noted at para 40 after discussing the purposes of the Payments Act:

‘Accordingly, the risk that a builder might not be able to refund monies ultimately found to be due to a non-residential owner after a successful action by the owner must, I think, be regarded as a risk

³ Ibid.

⁴ Ibid.

⁵ Tomkins, at: [78].

⁶ *Civil Mining & Construction Pty Ltd v Wiggins Island Coal Export Terminal Pty Ltd* [2017] QSC 85.

⁷ See Martinek, at: [938].

⁸ See CMC decision, at: [938].

⁹ *RJ Neller Building Pty Ltd v Ainsworth* [2008] QCA 397.

*which, as a matter of policy in the commercial context in which the BCIP Act applies, the legislature has, prima facie at least, assigned to the owner.*¹⁰

Brown J in Tomkins followed the decision in *Martinek Holdings Pty Ltd v Reed Construction (Qld) Pty Ltd*. Consistent with the decision of Martinek the issuing of the notice of dispute challenging the final certificate prevents the final certificate from being relied upon identifying a debt due and payable until the “dispute” is resolved.

The court accepts the construction contended for by Tomkins and considers that the bank guarantee should have been returned on 15 June 2017, on the basis that no amount remained unpaid according to which Majella (or the body corporate) could have recourse to the security. Accordingly, Majella was obliged to deliver the Bank guarantee to Tomkins under cl 5.4 on 15 June 2017.

The Tomkins judgement illustrates the importance of effective contract administration and being prepared to challenge an unsatisfactory determination of the superintendent.

Despite this and by allowing a principal to expand the categories of claims on the subject of security, contractors are making it easier for a superintendent to reallocate the “security” from a contractor to a principal.

An example is the expanding requirements to comply with “ESD” principles including a building meeting a rating standard before the return of the balance of the security monies.

Other examples include increasingly subjective requirements for compliance from “Agreements for lease” and “retail” contracts identifying three or four separate categories for which “liquidate damages” are payable. All the above examples require subjective assessment.

With the last example of “liquidated damages,” the programming clauses' current complexity makes it very difficult to obtain “EOTs”.

Query whether by accepting and validating an increasing range of outcomes on the subject of “security” a contractor is simply expanding the principal’s ability to obtain the monies that the security represents.

¹⁰ *RJ Neller Building Pty Ltd v Ainsworth* ([2008] QCA 397, at: [40]).

Schedule A

Relevant contract clauses in relation to the decision of **Tomkins Commercial & Industrial Builders Pty Ltd v Majella Towers**, [2017] QSC 202.

Clause 5.2 of the general conditions of the contract, enables a party to have recourse to security, provided that the party who remains unpaid after the time for payment has passed and 5 days have elapsed since that party notified the other party of its intention to have recourse.¹¹

Clause 5.2 Recourse provides as follows:

5.2 Recourse

Subject to the following paragraph, the security shall be subject to recourse by a party who remains unpaid after the time for payment where at least 5 days have elapsed since that party notified the other party of intention to have recourse. (emphasis added)

*The Principal is not entitled to have recourse to security to obtain an amount owed under the Contract unless the Principal has given written notice of the proposed use and the amount owed and such notice shall be given within 28 days after the Principal becomes aware, or after the Principal ought reasonably to have become aware, of the Principal's right to obtain the amount owed."*¹²

Clause 5.4 of the general conditions provides for the reduction and release of security. It relevantly provides:

"5.4 Reduction and release

*Upon the issue of the certificate of practical completion a party's entitlement to security (other than in Item (14e) shall be reduced by the percentage or amount in Item 14(f) or 15(d) as applicable, and the reduction shall be released and returned within 14 days to the other party ..."*¹³

Clause 37.4 of the general conditions provides:

... "Within 42 days after the expiry of the last defects liability period or within 10 business days after the receipt of the final payment claim, whichever is the earlier, the Superintendent shall issue to both the Contractor and the Principal a final certificate evidencing the money finally due and payable

¹¹ Tomkins Commercial & Industrial Builders Pty Ltd v Majella Towers, [2017] QSC 202, at:[16].

¹² Tomkins at: [19].

¹³ Tomkins, at:[20].

between the Contractor and the Principal on any account whatsoever in connection with the subject matter of the Contract.

Those money certified as due and payable shall be paid by the principal or the contractor, as the case may be, within 5 business days after the principal receives the final certificate, within 15 days after the unresolved issues the subject of any notice of dispute pursuant to clause 42, served before the 7th day after the issue of the final certificate."

Relevant contract clauses in relation to the case of *Martinek Holdings Pty Ltd v Reed Construction (Qld) Pty Ltd*

Clause 37.4 of the contract between Martinek and Reed construction provides as follows:

"37.4 Final payment claim and certificate Within 28 days after the expiry of the last defects liability period, the Contractor, shall give the Superintendent a written final payment claim endorsed 'Final Payment Claim' being a progress claim together with all other claims, whatsoever in connection with the subject matter of the Contract.

Within 42 days after the expiry of the last defects liability period, the Superintendent shall issue to both the Contractor and the Principal a final certificate evidencing the money finally due and payable between the Contractor and the Principal on any account whatsoever in connection with the subject matter of the Contract. Those moneys certified as due and payable shall be paid by the Principal or the Contractor, as the case may be, within 7 days after the debtor receives the final certificate.

The final certificate shall be conclusive evidence of accord and satisfaction, and in the discharge of each party's obligations in connection with the subject matter of the Contract except for:

- a) fraud or dishonesty relating to WUC or any part thereof or to any matter dealt with in the final certificate;*
- b) any defect or omission in the Works or any part thereof which was not apparent at the end of the last defects liability period, or which would not have been disclosed upon reasonable inspection at the time of the issue of the final certificate;*
- c) any accidental or erroneous inclusion or exclusion of any work or figures in any computation or an arithmetical error in any computation; and*
- d) unresolved issues the subject of any notice of dispute pursuant to clause 42, served before the 7th day after the issue of the final certificate."¹⁴*

¹⁴ Martinek, at:[9].

