Crisp Law Newsletter

Baulderstone, Kell & Rigby and Ignoring a Superintendent's Certificate Claims

Introduction

It is well-known that the construction industry relies upon an administrative process that grants the superintendent unilateral discretion to grant extensions of time and determine key on-site decisions, pertaining to defective work and completion.

In essence, the Superintendent's role is to give directions, to make both interim and final assessments; with the respective rights of the parties being dependent upon those assessments[1]. It is also well-established that the superintendent must, in exercising their discretions, act fairly and impartially while considering the respective rights and interests of the principal and the contractor[2]. This results in a position whereby the Superintendent is performing a balancing act between both party's interests.

When there is a departure by the Superintendent of such impartial standards, there is potential for the Superintendent certificates to be reviewed. This statement generally aligns with the principle espoused in *Kell and Rigby Holdings Pty Ltd v Lindsay Bennelong Developments Pty Ltd* [2010] NSWSC 777 and *Baulderstone Hornibrook Pty Ltd v Qantas Airways Ltd* [2003] FCA 174, that "*if a person in a position of the Superintendent does not act honestly and fairly, their certificate can be ignored*". And thus, this article will explore the validity of that statement in the respective cases and relevant academic literature concerning the role of Superintendents.

Academic Support for The Invalidation of Certificates Issued by Certifier

There is support for the proposition that if the certifier allows himself to be controlled and does not apply his own mind to the matter, there will be a breach of contract, or a binding certificate may be invalidated[3]. Similarly, where the contract sufficiently indicates the matters or principles which the certifier should consider or apply when certifying, their taking into consideration of matters extraneous to proper jurisdiction, if known to and concurred in by the owner, may invalidate their certifying decisions[4].

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[1] John Tyrril, 'Role of the Superintendent' *Building and Construction Law Journal* (1986) 4(2).
[2] 'Superintendent's duty to be fair' *Building and Construction Contracts in Australia* (2024).
[3] Duncan Wallace, *Hudson's Building and Engineering Contracts* (Sweet and Maxwell, 11th ed vol 1, 1994), ch 6, 839 [6-168].
[4] Duncan Wallace, *Hudson's Building and Engineering Contracts* (Sweet and Maxwell, 11th ed vol 1, 1994), ch 6, 792 [6-096].

The rhetoric of invalidating certifying decisions has found support in cases where certifiers have an undisclosed interest or where there is fraud or collusion of the certifier with one of the parties, (usually the owner)[5].

It should be noted that when there is a departure by the Superintendent of such impartial standards, there is potential for the Certificate to be reviewed and or for the Superintendent to be liable to the contractor for damages. This was affirmed by the Court in ***Michael Salliss & Co Ltd v Calil***[6] where they said that the Contractor has an option to gain recovery of his damages against the Superintendent and an entitlement to review the issued certificates by means of arbitration[7].

Kell and Rigby Holdings Pty Ltd v Lindsay Bennelong Developments Pty Ltd [2010] NSWSC 777

Facts

The defendant, a property developer entered a construction contract with the plaintiff, a builder for the construction of a mixed commercial and residential development in Sydney. In addition to being the Principal, the defendant is appointed Superintendent under the Contract.

The project involved three stages and the first and second stages were certified as complete on 24 November 2008 and 3 December 2009 respectively.

Part way through construction, the parties entered into an advance payment deed pursuant to which Kell & Rigby provided bank guarantees to the developer as security for the advance of two unconditional bank guarantees for the amount of $1 million each.

As part of entering the Deed, a new cl 42A was inserted into the Contract. Importantly, clause 42A.4 stipulated that if the bank guarantees were not repaid to the Contractor on or before the date of issue of the Certificate of Practical Completion for Stage 3; the Guarantees would become a debt due and payable by the Contractor to the Principal when the date of Practical Completion was certified for Stage 3 of the works.

> **42A.4 Repayment of Advance Payments**
> (d) If an Advance Payment has not been repaid on or before:

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[5] Duncan Wallace, *Hudson's Building and Engineering Contracts* (Sweet and Maxwell, 11th ed vol 1, 1994), ch 6, 792 [6-096].
[6] *Michael Salliss & Co Ltd v Calil* (1987) 13 CON LR 68.
[7] Patrick Mead and Carter Newell, 'Liability of The Superintendent for Wrongfully Certifying' *Australian Construction Law Newsletter* (1999) (65).

(i) the date of issue of the Certificate of Practical Completion for Stage 3;

the **whole of the balance of all Advance Payments then outstanding shall immediately become a debt due and payable by the Contractor to the Principal**.

Disputes that arose?

By May 2010, the parties were in dispute because the Principal asserted that the builder had not paid subcontractors and was failing to complete works under the Contact; with respect to Building D, Building E and the Stage 3 Works.

Approximately six months later, LBD (in its capacity as superintendent) issued to Kell & Rigby (on the same date) two notices described below:

1. a "Notice of Variation to the Works" which varied the Contract and provided that all incomplete works and work yet to be performed had been deleted from the Works under the Contract (i.e. Stage 2 and Stage 3); and
2. a Certificate of Practical Completion which provided that practical completion of Stage 3 had been achieved on 21 June 2010.

As such LBD in varying the works under the contract and certifying that the works were practically complete sought liquidated damages of $7000 and immediately made a demand to the Bank for the Guarantees pursuant to the "new" Clause 42A.4.

Before any payment was made, the plaintiff urgently obtained an interim injunction restraining the defendant from making a demand for the Guarantees.

Issues

The issues in this case are two-fold:

1. Was the variation instruction beyond the power of the superintendent?
2. Did the superintendent act unfairly and or unconscionably when issuing the variation instruction and certificate of practical completion?

Legal Reasoning

1. Was the variation instruction beyond the power of the superintendent?

In short, the Court held that the state of the Works was such that Practical Completion had not reached its "stated purpose" as within the meaning of cl 2, and that this stage would not have been reached without the Notice of Variation to the Works issued by the Principal acting as Superintendent.

In determining whether the Superintendent's discretion allowed for the exclusion of the Stage 3 works, Hammerschlag J hinges on the language in cl 40.1.13 and Clause 2 to say at paragraph 43 of the judgment that the Notice of Variation to the Works was unauthorised.

> *[43] Clause 40.1.13 is to be construed not on its own but as part of the Contract as a whole*[8].
>
> *[46] Clause 2 defines Practical Completion to mean that stage ..... when the Works are complete except for minor omissions and minor defects which do not prevent the Works from being reasonably capable of being used for their* ***stated purpose***[9].
>
> *[47] The power given to the Superintendent under cl 40.1.13 is a power to vary or amend the Works which the Contract contemplates. As cl 2 makes clear, the Contract contemplates the Works being something which have a stated purpose and which will when practically complete be reasonably capable of being used for that purpose*[10].

His Honour, in addressing the definition of "stated purpose," referred to the accompanying Contract Documents and clarified that the term means ensuring that the use of the buildings is fit for purpose as multi-storey commercial and residential structures.

> *[48] .... A consideration of the contractual documents makes it abundantly clear that the stated purpose of the Works is use as multi-storey commercial and residential buildings*[11].

Applying this reasoning, Hammerschlag J held that the Superintendent could not have formed the view that the Works were reasonably capable of being used for their "stated purpose". As such, the issuance of the Principal's Notice of Variation to the Works by the Contractor was unauthorised.

> *[51] In my view the plain meaning of the words seen in the context of the Contract do not confer a power to effect variation to the Contract which changes the Works so that what is constructed cannot reasonably be capable of being used for their stated purpose*[12].

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[8] *Kell and Rigby Holdings Pty Ltd v Lindsay Bennelong Developments Pty Ltd* [2010] NSWSC 777 43.

[9] Ibid 46.
[10] Ibid 47.
[11] Ibid 48.
[12] Ibid 51.

> *[53] I find that the variation which the Notice of Variation to Works purported to bring about was unauthorised and was of no force or effect**.** On no honest and fair view of the state of the Works as at 21 June 2010 could the Superintendent have formed the view that the Works were complete reasonably capable of being used for their stated purpose. It follows that the Certificate of Practical Completion was also ineffective*[13]*.*

2. Did the superintendent act unfairly and or unconscionably when issuing the variation instruction and certificate of practical completion?

The Plaintiff argues that in granting the Certificate of Practical Completion, and issuing the Notice to vary the Works, the Superintendent acted unfairly and thus contrary to the language of section 23.1 (a) of the Contract. Therefore, the Contractor argues that the certificate issued should be vitiated and ignored. In making this assertion, the Plaintiff relies on the following citation in *Balderstone Hornibrook Pty Ltd v Qantas Airways Ltd and Hickman & Co v Roberts* to make this assertion:

> *[57] "If a person in a position of the Superintendent does not act honestly and fairly, his certificate can be ignored". In Baulderstone Hornibrook Pty Ltd v Qantas Airways Ltd at Finkelstein J said*[14]*:*
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> > *The circumstances in which a certificate will be vitiated cannot be exhaustively stated. Hudson's Building and Engineering Contracts, 11th ed 1995 by I N Duncan Wallace, suggests the following broad categories:*
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> > *(1) where the decision-maker has a special interest in the result;*
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> > *(2) fraud or collusive conduct;*
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> > *(3) improper pressure, influence or interference by the owner;*
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> > *(4) conduct which falls short of the proper standard of fairness, independence and impartiality;*
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> > *(5) breach of contract or other act or omission of the owner having the effect of preventing the builder obtaining a decision;*
> >
> > *(6) unreasonable refusal by the decision-maker to consider the matter; and*
> >
> > *(7) taking improper considerations into account.*

[13] Ibid 53.
[14] Ibid 57.

Hammerschlag J, applying the above held that the Superintendent did not take the proper considerations into account, and acted unfairly in giving the Notice of Variation to Works and issuing the Certificate of Practical Completion.

> *[62] Mr Bryden paid either no or insufficient regard to the plaintiff's interests and did not act with any impartiality*[15].
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> *[64] Whilst he had regard for the interests of the defendant and, to the interests of residents of Stage 2, it was not evident that he took any account of the plaintiff's interests*[16].
>
> *[66] The course adopted was thus driven by the improper consideration that it was a means by which the defendant as Principal could take over the project rather than a means to bring about appropriate variations to the Works*[17].
>
> *[71] I conclude that the Certificate of Practical Completion was vitiated as a result of the failure by the Superintendent to act fairly*[18].

Baulderstone Hornibrook Pty Ltd v Qantas Airways Ltd [2003] FCA 174

Facts

Qantas (Principal) entered into a contract with Baulderstone Hornibrook Pty Ltd (Contractor). BHPL was engaged by Qantas to construct the extension of domestic terminal 3 at Melbourne Airport, a new valet car park, and a new concourse.

Prior to the Contract and as part of the tender process, Qantas's agent, Cliftons, provided a programme referred to as FAC 10. The FAC 10 programme set out the timetable for certain roadworks on the same site to be completed by other contractors. BHPL's works were delayed because of difficulties in getting access to the site. BHPL subsequently argued that Qantas thereby misrepresented the access BHPL would have had pursuant to the FAC-10 program.

Moreover, BHPL made claims for an extension of time, contending that it could rely on the dates set out in the FAC 10 construction programme. However, Qantas contended this by arguing that the programme was a statement of intention.

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[15] Ibid 62.
[16] Ibid 64.
[17] Ibid 66.
[18] Ibid 71.

BHPL also alleged that Qantas made vigorous attempts via letters and correspondence to ensure that BHPL's extensions of time were not granted by the Superintendent. As a result, BHPL claimed damages for breach of an implied term of the contract that Qantas improperly interfered with the Superintendent's duty to act impartially to determine the EOTs and delay damages due.

Issue

Did the Superintendent act impartially and independently in refusing to issue BHPL its EOTs?

Held

The Court found that the Superintendent had acted impartially and independently.

Firstly, the Federal Court rejected BHPL's misleading and deceptive conduct complaint regarding the FAC 10 program to say in summary that a precontract programme is not to treated as a representation at all because of the ever-present risks and reasons that may be beyond the control of the parties. This was said in paragraph 58 of the judgment[19].

> *[58] …. there is a significant risk of delay and disruption inherent in every major construction project. Numerous things can go wrong at any one of the many stages between the planning and completion of construction. Things may be overlooked; mistakes can be made; climatic and physical conditions may not be as expected; contractors, suppliers or agents may not meet their obligations, to name just a few. It is inevitable that time will be taken up with these matters and costs will be incurred. For this reason, a works program, especially a program which is not contractually binding may, when prepared by a contractor, be little more than a statement of intention or a statement that the contractor will use his best endeavours to comply with it. If prepared by an owner, a works program may be more than a statement of expectation; it may be said to contain a timetable which is regarded as feasible.* ***But, in each case, the program will always be regarded as subject to the ever-present risk that the project may be delayed or disrupted for a myriad of reasons, including reasons that may be beyond the control of the parties***.

Moreover, the Federal Court at paragraph 99, held that BHPL had not established that there was anything improper in the way the Superintendent came to the decision to refuse BHPL's extension of time[20].

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[19] *Baulderstone Hornibrook Pty Ltd v Qantas Airways Ltd* [2003] FCA 174 58.
[20] Ibid 99.

> *[99] However, having listened very carefully to Mr Crawford's evidence,* ***I am satisfied that he did in fact carefully consider the extension of time claims and resolved them on what he regarded to be their merits, without being influenced by Qantas' or Mr Richards' urgings that the claims be rejected****. Indeed, Mr Crawford was sufficiently sympathetic to BHPL's plight that, notwithstanding his view that BHPL was not entitled to all the extensions sought, he exercised his discretion under cl 9.05 to grant an additional 26 days extension in excess of what he believed to be its only entitlement. In these circumstances I am not able to ignore Cliftons' certificate and will not myself undertake an assessment of the extension claims.*

Conclusion

In conclusion, this newsletter has highlighted the critical role Superintendents play in certifying Extensions of Time and issuing Certificates related to project completion. This duty requires that the Superintendents act fairly and honestly and consider both the Principal's and the Contractor's interests in coming to a determination.

In *Kell and Rigby*, the Superintendent's certificate was ignored because Mr Bryden paid insufficient regard to the plaintiff's interests and did not act with impartiality. This led the Court to vitiate the Certificate of Practical Completion on the grounds of improper consideration.

Whereas in *Baulderstone*, the Court held that the Superintendent had carefully considered the extension of time claims and resolved them on what he regarded to be their merits, without being influenced by Qantas or Mr Richards urgings. Thus, the Superintendent appropriately fulfilled his duties and obligations.