This case highlights the importance of ensuring strict compliance with any time bars and other notice requirements contained in the contract, even in the instance where they may be perceived as harsh and the contractor would otherwise have been entitled to an extension of time.

**Background**

- In 2005, BHP Bilton Iron ORE Pty Ltd (“BHP”) acting on behalf of a joint venture, engaged John Holland Pty Ltd (“John Holland”) to carry out an upgrade and extend a wharf at Finucane Island, on the Western Side of the Port Headland harbour in Western Australia.
- John Holland performed some of the work itself and subcontracted out some of it. In particular, they subcontracted the demolition of Berth C and the associated berthing and mooring “dolphin” structures (structures for the mooring or berthing of ships), connected to the wharf. They subcontracted this to a company then known as Moltoni Adams Group Pty Ltd which changed its name in January 2008 to CMA Contracting Pty Ltd and then in November 2010 to CMA Assets Pty Ltd (“CMA”), the present plaintiff.
- At the same time as CMA was demolishing existing structures, John Holland was following behind, constructing the new wharf. There was one potential issue in the sequencing, the movement of a ship loader which BHP planned to keep at the wharf.

**What are time bars?**

- Critically, in the subcontract between John Holland and CMA, there were ‘time bars’ for the providing of crucial notices under the subcontract.
- A time bar is a contractual provision within which an action has to take place. It is essentially a stoppage placed on the exercise of a claim or judgement after passage of a certain period of time established under the contract.
- They are common place in construction contracts and in fact over the past few years are more prevalent with shorter time limits. Typically, they require a party to serve notice within a strict, specified period after the occurrence of an event as a pre-condition to claiming time or costs.
- Though often perceived as harsh, their roll is essentially to ensure the expeditious passage of information and certainty within a designated time frame. They help contractors to mitigate their exposure both in terms of time and costs and to assist in the decision making process of keeping a project on time and on budget.
- More specifically, at clauses 10.11 and 10.12, the subcontract contained the detailed notice requirements for the making of EoT claims by CMA. In particular, those clauses required CMA to serve on John Holland:
  1. written notice of the likelihood of a delay occurring immediately upon becoming aware of the likelihood of that delay;
  2. written notice of its intention to claim the EoT for the delay within 7 days after the occurrence of the cause of the delay;
  3. a detailed written claim for an EoT within 14 days after the commencement of the delay; and
  4. further detailed written claims for EoTs every 5 days after the first occurrence of the delay until the delay ceases.

**The Disputes**

- In the course of undertaking the subcontract works, CMA claimed that it was delayed by a number of factors.
The biggest problem which CMA encountered was that the dolphins were significantly more difficult to demolish than had been originally thought. They had previously been reinforced which had not been contemplated by the subcontract. During the demolition process, the fragments from the demolition were of an infinitely more substantial size and not the small fragments which had been anticipated. The result being that the removal process of the fragments was much more complicated, time consuming and expensive than had originally been planned. CMA fell into delay as against the subcontract milestones. CMA claimed for additional work to demolish the berthing dolphins (variation 79).

In addition, CMA claimed that it was delayed by John Holland’s delay in moving the ship loader located on the wharf to allow CMA to demolish that part of the wharf and also for delays to access to certain other structures required to be demolished. Critically, CMA did not submit notice of delay pursuant to the time bars as contained within the subcontract for any of the delay issues.

By late 2007, John Holland and CMA were in dispute about John Holland’s failure to pay certain amounts claimed by CMA. On 10 October 2007, CMA sent a notice of dispute to John Holland under the subcontract and by December CMA had filed an adjudication application. By March 2008, CMA had commenced proceedings.

CMA’s Claims

Disputes arose as to who should bare the unexpected costs associated with the larger fragment removal and subsequent delays caused by the demolition of the dolphins.

Though CMA acknowledged that it had given notice of the delays outside of the contractually prescribed periods, it argued that this had no affect given that the events that caused the delay were either within the control of and/or known by John Holland, therefore satisfying the initial condition precedent that John Holland should have awareness of the delay.

John Holland’s Response

John Holland argued that CMA was not entitled to an EoT and was time barred owing to the fact that notices had been given outside of the strict time period stipulations within the subcontract.

Further, John Holland rejected the EoT claims and considered that the work, the subject of the variation request, was within the original scope of works.

In addition, John Holland also counter claimed for liquidated damages, and further damages flowing from alleged CMA breaches of the subcontract.

Of additional note, John Holland were also in dispute with BHP.

The Court’s Decision on CMA’s Claims

Despite finding that John Holland had delayed CMA by the late movement of the ship loader, the Court upheld John Holland’s argument that CMA’s EoT claim should be denied on the basis of the strict interpretation of the time bars contained within the subcontract.

On examining the evidence, His Honour Justice Allanson held that CMA had not complied with the Notice requirements, either in terms of the required timing or the requirements of the content of the notices.

In relation to the relocation of the ship loader, CMA had served notice three weeks after the ship loader was scheduled to be moved and some four months after becoming aware of the delay. The time bar provision within the contract was 7 days, as a strict precondition to any entitlement to EoT.

In relation to any other remaining delays, there was no evidence that CMA had in fact ever complied with the requirements under the subcontract.

The Court rejected CMA’s argument stating that John Holland were entitled to rely upon the strict contractual position and deny liability for the delay.

The Court held,

"there is no doubt the strict application of cl 10.12 and cl 10.13 is harsh. But I am not satisfied that it is without purpose and absurd, so that an alternative construction must be given, notwithstanding apparently clear words."
Were the Time Bars Enforceable?

- Having failed to show compliance, CMA advanced other arguments in support of its claim that the notice requirements did not apply.
  1. Estoppel
     CMA pleaded that by a code of conduct between the parties, the parties adopted a convention by which they did not strictly comply with the notice provisions in the subcontract including in relation to EoTs.
     The Court did not agree and stated:
     "the evidence does not support the claim, that there was any common assumption between the parties." \(^2\)
  2. Length of time of the delay was unknown
     CMA argued that their obligation to give notice did not arise because neither they nor John Holland knew and could not have known the likely length of the delay.
     Again, this was rejected by the Court. It stated that there was not a requirement that CMA knew the precise length of the delays, it was simply required to give an estimate of that length.

John Holland Counter Claims

- John Holland claimed by reason of a counterclaim an amount for dredging blast debris from the harbour floor, the cost of conveying dredge concrete debris to the shore and onshore, disruption to pile driving works as a result of CMA’s failure to clear debris from the demolition and finally, liquidated damages for failure to reach completion within the time agreed.
- John Holland put its counter claim on a number of alternative basis, namely:
  1. that there was an agreed variation to the terms of the subcontract about the mechanism by which the parties would share the cost of debris removal and transport;
  2. if there was no variation, in quantum meruit;
  3. damages; and
  4. finally, through a debt arising out of the provisions of the subcontract.
- The counter-claim total sum was $1.7m.
- Further, John Holland claimed damages for misleading and deceptive conduct.

The Court’s Decision on the Counter Claim

- The Court rejected John Holland’s variation and quantum meruit claims, ie. points 1 and 2.
- The Court found by construction of the scope of works that CMA did have an obligation to remove debris from the seabed, which they had failed to do. This had caused John Holland to suffer loss and damage, ie. point 3.
- In relation to the misleading and deceptive conduct claim, John Holland claimed that part of its loss related to damage sustained to the dredging barge as a consequence of the size of the debris at the sea floor, which was caused by CMA’s misleading or deceptive conduct. The dredging barge had had to be stood down for repair caused by the debris.
- The Court upheld John Holland position and stated,
  "on those findings, I would hold CMA liable for loss and damage caused by its misleading or deceptive conduct. Ultimately, it may be of little practical importance because the loss that resulted from misleading conduct is part only of the costs incurred by John Holland in retrieving the demolition debris from the harbour floor". \(^3\)

Liquidated Damages

- As the Court had upheld John Holland’s rejection of the extension of time claims, it automatically followed that John Holland was entitled to liquidated damages associated with CMA’s delay in completing the debris removal works.
In response, CMA argued that John Holland’s actions caused the delays and that John Holland could not benefit for its own breach.

The court did not agree with CHMA. The Court held that even in the circumstances were the relevant delay had been caused by John Holland, CMA were still liable for liquidated damages. In particular, the Court stated, "The application of the prevention principle must be considered in the context of the particular contract. The Subcontract between John Holland and CMA directly addressed this question in cl 10.13, providing that if CMA failed to comply with the notice procedures in clause 10.12 it shall have no entitlement to extension of time and any principle of law or equity which might render the Date for Practical Completion unenforceable shall not apply. CMA is precluded from the benefit of an extension of time and is liable for liquidated damages, even where the relevant delay has been caused by John Holland."¹⁴

The Dispute with BHP

Finally, CMA had argued that any loss which John Holland had sustained ought to be reduced by any agreement John Holland had come to with BHP in so far as that settlement related to the claims and issues between John Holland and CMA.

On the facts, the Court found that CMA had not been able to prove that any amount of the settlement between BHP and John Holland was referable to any claim between John Holland and CMA. This part of the defence also failed.

Summary

This case clearly shows the critical need for contractors to comply with any time provisions contained within the contract. Failure to do so is likely to result in the contractor being barred from bringing what would otherwise have been valid claims under the contract. The loss of this benefit being catastrophic. It is interesting to note that administrators were appointed in relation to CMA on 2 August 2013.

This no doubt places a significant administrative burden on contractors. However, the significance of not complying is far greater than any administrative burden. The case also shows the importance of keeping detailed records, to ensure that sufficient information is provided pursuant to the terms of the contract.

It is therefore critical that contractors have a full understanding of the terms and conditions at the outset of entering into the contract. The use of flow charts, setting out procedures to be undertaken at certain steps can be beneficial internally, but they must be strictly followed. This case clearly demonstrated the willingness of the Court to uphold a clearly drafted time bar provision even where that effect is “harsh”.

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¹ At para [375] ³ At para [666]
² At para [381] ⁴ At para [865]