



In the *Future*, know the *Power* of Instructions

Futurepower Developments Pty Ltd v TJ & RF Fordham Pty Ltd t/as TRN Group [2019]
NSWSC 1554¹

On 18 October 2019 His Honour Justice Rein delivered a decision in *Futurepower Developments Pty Ltd v TJ & RF Fordham Pty Ltd t/as TRN Group [2019]* NSWSC 1554 which found that a developer was unable to rely on the strict terms of the Contract because of the way the developer had administered the Contract.

The case referred to the established principles of estoppel and dealt with a number of issues including:

- (a) Variation for removal of fill;
- (b) Liquidated damages;
- (c) Estoppel by convention;
- (d) Misleading and deceptive conduct; and
- (e) A claim for Quantum meruit.

FACTS AND BACKGROUND

A developer, Futurepower Developments Pty Ltd (**Futurepower**) and builder, TJ & RF Fordham Pty Ltd t/as TRN Group (**TRN**), entered into a building contract on 12 June 2015 in respect of roads and drainage works to be carried out by TRN at a development site in Edmondson Park NSW (**the Site**).

The original contract sum was \$899,000, but with variations the sum claimed expanded to \$1,399,596.73.

Futurepower engaged North Western Surveys Pty Ltd (**NWS**) to act as its surveyors and project managers on the development project.

ADJUDICATION

TRN issued two separate payment claims to Futurepower under the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**SOPA**) in respect of which two adjudication amounts were awarded to TRN in the total amount of \$922,622.12.

RECOVERY PROCEEDINGS

Futurepower sought to claw back moneys paid under the SOPA from TRN for the variations. The main variations claim was for the Fill Removal Variation certified at \$330,735 and the other various miscellaneous variations totalled \$93,131.

In the recovery proceedings Futurepower also claimed liquidated damages for the alleged delay by TRN.

TRN claimed it was entitled to an additional \$24,723.68 (inclusive of GST) by cross claim in the recovery proceedings.

FILL REMOVAL VARIATION

The Fill Removal Variation was a claim by TRN for the cost of removal of 718m³ of fill and soil contaminated with asbestos.

TRN engaged Enviromanage Systems Pty Ltd (**EMS**) and Pacific Environmental Australia Pty Ltd (**PEA**) to quote on the removal of asbestos at the site, seeking details of their rates. PEA is an environmental consulting firm and EMS is a specialised demolition remediation and waste management contractor holding licenses to handle asbestos.

On 14 July 2015 after its inspection of the site EMS sent a notice concerning asbestos to Workcover noting “About 50 Small Fragments of Asbestos In Soil”, the location being “Right In The Middle Of The Property.”

Futurepower’s case against TRN was essentially the claim that all 718 m³ of fill needed to be removed was not justified as no testing of the 718 M³ was undertaken after it was removed to prove that it was all in fact contaminated.

Futurepower alleged that TRN needed to prove that the fill and soil were in fact contaminated by asbestos and that it was therefore necessary for TRN to carry out the work to remove the soil.

The court however accepted the evidence of TRN, EMS and PEA that they observed asbestos fragments.

The Court found that Futurepower did not establish that the fill that was removed did not contain asbestos contaminated materials or, if it did, in what levels.

His Honour Justice Rein found that the representative of Futurepower did instruct TRN to proceed with the work, notwithstanding the absence of further investigations (which had been offered by TRN) and stated as follows:-

*"Futurepower obtained a clean Site, known to be free of asbestos contaminated material, enabling it to proceed with development of the Site, as instructed. If Futurepower wanted each area to be tested for asbestos fragments before excavation commenced, or before removal from the Site, then it was incumbent on Futurepower to so direct, which it did not do."*²

MISLEADING AND DECEPTIVE CONDUCT

In relation to the Fill Removal Variation, Futurepower alleged that TRN engaged in misleading or deceptive conduct within the meaning of section 18 of the Australian Consumer Law (ACL) which led the acting Superintendent to agree to the Fill Removal Variation.

"I find that TRN's representation that 718 m3 of what had become known as the asbestos contaminated fill was not misleading or deceptive in any respect. It was a statement as to the volume of what had been excavated in accordance with Mr Smith's recommendations."

The Court found that:

- (a) as a fact the representative of Futurepower instructed TRN to proceed with removal of the fill and to retain PEA and EMS;
- (b) TRN did not make any representation to Futurepower as to the level of fill that should be removed and that EMS (and, hence, TRN) relied on PEA for the assessment of what had to be removed by EMS; and
- (c) That PEA performed this task with competence and experience and recommended the fill be removed until "we see natural earth".

The Court concluded based on these findings that there was nothing misleading or deceptive about the rates that TRN passed on to Futurepower for payment.

Further the Court stated that:

"the absence of any evidence from Mr Harding that he relied on something said by TRN is fatal to Futurepower's claim".

THE SUPERINTENDENT POINT (ESTOPPEL BY CONVENTION)

The Contract specifies Mr John Attard as the Superintendent. Both Mr Attard and Mr Harding are employees of NWS, but Mr Harding was not nominated as the Superintendent and he was never appointed by Futurepower or NWS as the Superintendent.

Futurepower alleged that since Mr Harding was not the Superintendent, none of his approvals, directions or certificates have any force or relevance.

TRN puts its defence on this issue on these bases:

1. The terms of the Contract – in particular clause 20 which requires Futurepower to ensure that at all times the Superintendent fulfils all aspects of the role and functions of Superintendent reasonably and in good faith.

2. Conventional estoppel – which precludes a party from denying the assumed facts or law if it would be unjust to allow him to go back on the assumption.

3. Estoppel by representation.

His Honour concludes that:-

"it is clear that both TRN and Mr Carbone on behalf of Futurepower were proceeding on the basis that Mr Harding was the Superintendent and both intended that the other would act on that basis. Departure from this assumption would cause TRN significant loss because it would potentially entitle Futurepower to recover payments made for work done and approved by Mr Harding and entitle Futurepower to recover damages for delay because the named Superintendent had not received the claims for extension and had not approved them."

LIQUIDATED DAMAGES

The Contract provided for liquidated damages of \$500 per day for delay beyond the contracted period. Futurepower claimed \$500 per day for 325 days (total of \$162,500).

The Court found that the acting Superintendent granted extensions of time that were claimed by TRN (mainly for wet weather but also due to the excavation of the septic tank and fill) taking the Date for Completion to 24 August 2016.

On 6 September 2016 the acting Superintendent issued a Notice of Practical Completion specifying the Date for Completion as 2 September 2016.

The Court did not grant liquidated damages to Futurepower even for the period between 24 August 2016 and 2 September 2016 finding that clause 34.7 of the Contract requires certification by the Superintendent of liquidated damages and no such certification by the Superintendent (Mr Harding or Mr Attard) was in evidence.

THE MISCELLANEOUS VARIATIONS

Some of the miscellaneous variations were the subject of a written direction and some oral only.

The acting Superintendent approved all of the Miscellaneous Variations (and fill removal variation) and certified that the work had been carried out by TRN for the value claimed.

Futurepower alleged that it was entitled to recover all the variations due to the failure by TRN to abide by the Contract's terms.

The Court found that:

"I do not think it can be open to the principal to resist payment of a claim certified by the superintendent because the contractual requirements for approval by the superintendent were not adhered to. Whether this is because the certificate has contractual force or because reliance on the superintendent's failure to issue a written direction would amount to another example of relying on Futurepower's failure to ensure that the Superintendent was performing his task adequately, or as estoppel or because the certificate must be taken to be a decision by the Superintendent on behalf of Futurepower not to require strict adherence, is probably not necessary to decide, because the absence of the "final certificate" is another example of Futurepower's failure to ensure that the Superintendent fulfilled all aspects of his role and functions reasonably and in good faith."

QUANTUM MERUIT

TRN made a claim in quantum meruit for the value of its work performed. Futurepower did accept that TRN might be able to claim on a restitutionary or quantum meruit basis.

Futurepower argued however that TRN could not prove the value or benefit received by it for the work the subject of the Fill Removal Variation as they did not have proof via testing that the fill removed was contaminated.

The Court found that:

"If Futurepower wanted each area to be tested for asbestos fragments before excavation commenced, or before removal from the Site, then it was incumbent on Futurepower to so direct, which it did not do."

Further the Court noted it would have accepted the quantum meruit value assessed by the expert quantity surveyor for TRN in any event.

In summary Futurepower failed in its recovery action and the court found in favour of TRN and awarded TRN judgment of the additional claim in its cross claim of \$24,723.68.

SOME KEY TAKEAWAYS

The case explores a range of issues that can typically arise in a construction dispute and provides useful guidance and warnings of where challenges can arise in a construction project. Some of the key takeaways from the case include the following:

- ◆ Where parties fail to strictly comply with the terms of a Contract they may be estopped and lose the right to rely on the strict provisions of the Contract to protect their interests.
- ◆ The importance of parties making sure that they consistently comply with the strict terms of the Contract.
- ◆ Clearly understanding what the Contract says and how it should be administered is an obvious and necessary starting point.
- ◆ Principals need to make sure that where they have appointed a Superintendent they ensure that the Superintendent fulfils all aspects of their role and functions reasonably and in good faith.

CONTACT US

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1. <https://www.caselaw.nsw.gov.au/decision/5dc37301e4b0c3247d712d26>
2. Paragraph 86 of Futurepower Developments Pty Ltd v TJ & RF Fordham Pty Ltd t/as TRN Group [2019] NSWSC 1554.

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Combustible Cladding

Across Australia various state governments have introduced a series of measures to address community concerns about public safety and to identify the extent of the issues posed by combustible cladding.



Developer Building Bonds

Developers are now required to lodge a building bond with NSW Fair Trading to the value of 2 percent of the contract value for works to secure funding for the rectification of defective building work.



SOPA Amendments

The amendments to the Building and Construction Industry Security of Payment Act 1999 (NSW) commenced on 21 October, 2019; posing significant changes upon the building and construction industry.

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