



October 2022

## LESS FUSS WITH COST PLUS

*Keegan v Ballast* [2022] NSWCA 179

### SUMMARY

On 13 September 2022 the NSW Court of Appeal handed down its decision in *Keegan v Ballast Point Pty Ltd* [2022] NSWCA 179.

The case focuses on the Master Builders Australia (MBA) Cost Plus (Residential) Building Contract (**the Contract**), in particular the operation of the general clauses and the additional special conditions.

### THE FACTS

On 23 June 2017 the Appellant, Keegan, entered into the Contract with the Respondent, Ballast Point Pty Ltd, to make alterations and additions to the Appellant's Sydney property.

The Contract was a standard form contract published by the MBA. The special conditions included in the Contract were those provided by the MBA. Parties may elect to have these special conditions added onto the Contract.

The clauses in issue are the following:

#### **Clause 17 - Payment**

"(a) The Owner must pay to the Builder:

- (i) The Cost of Works as set out in Schedule 1 Part A;
- (ii) The fee set out in Schedule 1 Part B

(b) The above amounts must be paid to the Builder in accordance with the timetable set out in Schedule 1 Part B.

#### **Special Conditions**

"In order to determine the amount of money, if any, payable to the Builder by the Owner, the Architect is to assess and certify claims by the Builder pursuant to the provisions of the contract. The Architect must follow the terms of the contract in this regard."

Following completion of construction, a dispute arose between the parties as to whether monies remained owing by the Owner for the costs of works undertaken even where the Architect had not assessed and certified the payment claim.

### THE DISPUTE

The key dispute in this matter was whether Special Condition 3 meant that the Owner only had to pay those payment claims assessed and certified by the Architect.

The Owner argued that, with the inclusion of Special Condition 3, that they were not obliged to pay the Builder until the Architect had assessed and certified the Builder's payment claim.

The Builder argued that the obligation to pay the Builder remained regardless of whether the Owner's received an assessment from the Architect, and that the inclusion of Special Condition 3 was merely to assist the Owner in administering the Contract (as included in the instructions at the commencement of the Contract).

### THE COURT DECISION AT FIRST INSTANCE

At first instance, the District Court found for the Builder on the basis that Clause 17 describes the Builder's entitlement to payment, and that the inclusion of Special Condition 3 played no relevant contractual role in the Builder's entitlement to payment. [i]

The Owner appealed this decision.

### THE APPEAL

The NSW Court of Appeal ruled in favour of the Builder, giving the following reasons:[ii]

1. The language of Special Condition 3 did not expressly describe or imply the interpretation as argued by the Owner;

There was no provision in the Contract that provided that the Builder was bound to follow the decision of the Architect;

2. To construe Special Condition 3 with the Owner's approach would be inconsistent with the introduction to those special conditions, which state that the purpose of the special conditions is to enable the administration of the contract; and
3. That the Builder's interpretation is sensible and consistent with the rest of the Contract.

The Court held that the correct interpretation of Clause 17 and Special Condition 3 was as follows[iii]:

1. That the Owner's obligation under Clause 17 is to assess the payment claim and then pay the Cost of Works, rather than the amount claimed, within the time stipulated in the timetable provided at Schedule 1 Part B (in this case being 10 days from receipt of the payment claim).
2. Within the 10 days, the Owner may elect for the Architect to undertake the assessment of the Cost of Works on the Owner's behalf. The outcome of the Architect's assessment then allows the Owner to make an informed judgement as to the amount they think they should pay the Builder.
3. The process as stated above is intended to put the Owner in a position where they can make an informed decision and provide the Builder with evidence as to why they paid a different amount to that of the payment claim.

## Summary of Principles regarding the interpretation of the Special Conditions included in the MBA Cost Plus (Residential) Building Contract

In arriving at this conclusion, the Tribunal provided a useful summary of the principles applied when interpreting contractual terms:

*[26] The principles by reference to which the Court's task of construction must be approached are not controversial. The objective theory of contract requires that the meaning of the contractual language be ascertained by reference to what a reasonable person in the position of the parties would have understood it to convey, taking into account the commercial purpose and object of the contract. Whilst the immediate controversy between the parties here concerns the meaning of Special Condition 3, **in resolving that question regard must be had to the provisions of the contract as a whole, and not merely to that provision or the other Special Conditions.** As the plurality in *Wilkie v Gordian Runoff Ltd* (2005) 221 CLR 522; [2005] HCA 17 emphasised at [16], in construing a contract preference is to be given to a construction supplying a "congruent operation to the various components of the whole".*

[emphasis added]

*[48] As Lord Hoffmann ventured in *Beaufort Developments*, **"one should require very clear words before construing a contract as giving an architect" powers to issue certificates as to the value or cost of works for which the contractor is from time to time entitled to payment** (at 275-276). That is more obviously so where the Special Conditions do identify the respects in which the Owner is to be bound by any instruction or direction or consent or decision of the Architect made in administering the contract on his behalf (Special Conditions 2 and 7(b))."*

[emphasis added]

## KEY TAKEAWAYS

This case contains useful lessons for those who are party to, or considering being party to, the MBA Cost Plus (Residential) contract. Specifically, parties to this type of contract need to remember that:

1. the Special Conditions provided by the MBA do not override the General Conditions in the Contract. They instead compliment the General Conditions;
2. when interpreting a contract, you must consider the entire document not just the clauses in dispute;
3. in order to override a builder's right to payment, a contract must use clear and express language; and
4. ensure that, before signing a contract, you also read any instructions attached to the contract, as they are considered to be part of the contract.

Please note that since the amendments to the *Security of Payment Act 1999* (NSW) in October 2019, home owners are liable to pay Builders Progress Payments no later than 20 business days after a payment claim is issued.

For more on SOPA, please see the following article:

<https://kreisson.com.au/insights/amendments-to-the-security-of-payment-act-are-commencing-21-october-2019/>

## Footnotes

i At [4]

ii [47] to [50]

iii [52] to [54]

## CONTACT US

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