

**POWER TO EXTEND
TIME: A WARNING TO
PRINCIPALS**

*Abigroup Contractors Pty
Ltd v Peninsula Balmain Pty
Ltd (No.2) (2002) 18 BCL 15*

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The power of a Superintendent to grant an extension of time (EOT) was reviewed in the recent NSW Court of Appeal decision of *Abigroup Contractors Pty Ltd v Peninsula Balmain Pty Ltd (No.2)* (2002) 18 BCL 15. The CA held that a Superintendent must exercise its unilateral power to grant an EOT if it considers it 'reasonable', regardless of whether other contractual conditions precedent have been met.

The case concerned the well-known AS2124-1992 standard form general conditions of contract which gives the Superintendent discretion to grant an EOT 'for any reason'. Clause 35.5 of the contract states:

Notwithstanding that the contractor is not entitled to an extension of time the Superintendent may at any time and from time to time before the issue of the Final Certificate by notice in writing to the Contractor extend the time for Practical Completion for any reason.

Many modern building contracts contain similar clauses.

The Superintendent had previously extended the contractual date for completion. The Builder, Abigroup, had not sought any further EOTs, and the contractual procedures for claiming any further EOTs were not met. Notwithstanding this, the CA upheld the court's decision at first instance granting further EOTs. The CA relied on clause 23 of the contract which states that the Principal shall ensure that the Superintendent acts honestly and fairly. The CA indicated that the Principal would be in breach of contract to the Builder if the Superintendent did not exercise its right to unilaterally extend time in the Builder's favour.

The Principal, Peninsula, argued that the power granted to the Superintendent was for the benefit of the Principal, and that it no longer existed after termination of the contract. Further, the power could not be exercised when no claim for EOTs had in fact been made to the Superintendent.

The CA rejected Peninsula's arguments and held that the Superintendent may exercise the unilateral power in clause 35.5 for the benefit of either party. The power also does not automatically come to an end with the termination of the contract for the Builder's breach. Further, it may be exercised even where no claim for EOT had been submitted by the Builder. The CA suggested that the overriding obligation of the Superintendent in exercising this power is to act honestly and fairly under clause 23 of the contract.

COMMENT

The CA's decision is surprising, not least because AS2124-1992 and clause 35.5 are widely used in the industry. The wording of clause 35.5 was intended to allow Superintendents to grant EOTs where delay has been caused by the acts of a Principal, but these acts are not within the contractual grounds entitling an EOT claim i.e. the prevention principle. It also allows a Superintendent to unilaterally grant an EOT for circumstances outside the contractual grounds where it believes an EOT should be granted i.e. a discretionary power. Before the CA's decision in this case, it was commonly accepted that the clause should be invoked only in these circumstances.

The CA's decision has significantly altered the emphasis of the clause so that Principals must now ensure that the Superintendent is now under an

obligation in every case to exercise that unilateral power where it is required to act *'honestly and fairly'*. Failure by the Principal to do so renders it in breach of the contract to the Builder.

Given the CA's interpretation of the clause, the CA's decision serves as a warning to Principals first to ensure that the Superintendent exercises the power in clause 35.5. It also exposes principals to the uncertainty as to when they should procure the exercise of that power. The power to unilaterally extend time *'for any reason'* is unduly wide and ambiguous. The CA did not expound on what *'for any reason'* might encapsulate, although Hodgson J suggested that if the basis for an EOT claim cannot be established due to lapse of time, a refusal to extend time may be fairly exercised. However, this raises issues of what is a reasonable time. The CA also indicated that the Superintendent must act *'honestly and fairly'* in exercising its power. Whether *'honesty and fairness'* should be judged subjectively or objectively is unclear.

In view of the uncertainties created by the decision, if drafting a contract for a Principal, one may need to amend clause 23 to remove its correlation to clause 35.5 as interpreted by the CA. Clause 35.5 may also be amended to ensure that only the Principal benefits from the power in the clause. Other amendments may be to expressly restrict the power after termination of the contract, and render it ineffectual where no EOT claims have been submitted by the Builder. Express wording to reflect the industry intention of clause 35.5 may also promote more certainty.