

## JCCA - 1995 - Code With No Residual Right To Common Law Damages

*Turner Corporation Limited (Receiver & Manager Appointed) v Austotel Pty Limited*, unreported, Supreme Court of New South Wales, Cole J, 2 June 1994.

A recent decision held that under the JCCA contract, proprietors no longer have any residual right at common law to have incomplete or defective work executed by others at the builder's cost. Rather the proprietor or his architect must comply with the notice and procedural provisions of the JCCA contract to trigger his right.

In *Turner Corporation Limited (Receiver & Manager Appointed) v Austotel Pty Limited*, a proprietor engaged others to complete the works and rectify defective workmanship and materials. It sought to recover these costs against the builder pursuant to its common law right but did not comply with the procedural steps and notice provisions in the JCCA contract.

The key issue was whether the proprietor had a wider common law right beyond the contract enabling it to engage others and then sue the builder for costs incurred in a claim for damages for breach of contract. The task before the court was one of construction of clauses 5 and 6 of the JCCA contract 1985. Clause 5 provides a structure for administering the contract and, inter alia, enables a proprietor, if it so desires, to cause the architect as its agent to invoke the machinery whereby a proprietor may recover costs incurred by the engagement of others. For example, where there are defects in the works, the architect may issue an instruction to the builder to rectify the defects within a reasonable period (clause 6.11.01). If the builder fails to comply, the architect may issue a second notice requiring compliance within a reasonable time (clause 5.06.01). If the builder does not comply with the second notice, the proprietor may then employ others to carry out the rectification work and recover the cost of so doing from the builder (clause 5.06.02 and 5.06.03).

In this case the proprietor admitted that it had not complied with the notice and procedural steps set out in clauses 5 and 6. However, it argued that there was a wider common law right enabling it to engage others and recover the costs against the builder. The proprietor emphasised that the notice provisions in clause 5 use the word "may" which indicated that they were discretionary provisions which gave the proprietor an alternative right in common law to engage others and recover the cost from the builder. The proprietor found support for this argument in the decision of *Baese Pty Limited v RA Bracken Building Pty Limited* (1990) 6 BCL 137 (see ACLN Issue #11, p39) where Mr Justice Giles said that clause 10.14 of the JCCB contract was not an exhaustive statement of the proprietor's entitlement in the event of failure to bring the works to practical completion by the date for practical completion. His Honour said that the clause did not provide that the architect shall give notice and, moreover, opened with the words "if such notice is given ...".

The proprietor in *Baese* was entitled to rely upon its common law right to damages for breach of contract even though it had failed to invoke the machinery and notice provisions set out in clause 10.14 of the JCCB. His Honour made it clear that it would require clear words for a party's common law right to be contractually extinguished.

To the contrary, the builder in *Turner Corporation* argued that the JCCA contract was a code containing procedural steps which must be complied with before a proprietor can engage others and recover the costs from the builder. The court agreed with the builder's argument and held that there was "no room for a wider common law" right in the proprietor to treat non-compliance with the contractual obligation by the builder as a separate basis for claiming damages ... because the contract specifies and confers upon the proprietor its rights flowing from such breach".

The court said that clauses 5 and 6 set down the steps necessary to be followed before the proprietor could, at the builder's cost, engage others to complete the works or rectify defective work. Failure to comply with these steps was fatal to the proprietor's claim. Further, the court found that on a proper construction of the JCCA contract as a whole it could be said that the proprietor had surrendered its common law right to damages for the cost of having the works completed or defective work rectified. The rationale for the decision was that the notice provisions allowed the builder the opportunity to complete the works, or rectify the works, conceivably, at a lesser cost.

Given this decision, a proprietor working under a JCCA contract can no longer rely on a common law right under the general law to have incomplete work and defects executed by others at the builder's cost. The proprietor or his architect must follow the steps set out in clauses 6.11 and 5.06 to trigger this right.

- **Reprinted with permission from Clayton Utz's Construction Issues.**

### Editorial Note:

This decision was in relation to an application for leave to appeal from an interim award of two arbitrators. In addition to the above findings, Cole J held that the issue raised an important question of construction of a standard form contract and that a determination of the issue would add substantially to the certainty of the commercial law. In Cole J's view, there was strong evidence that the arbitrators had made an error of law. Cole J found that the requirements of section 38(5) of the *Commercial Arbitration Act* 1984 (NSW) were made out and granted leave to appeal.

- JT