

## Recent Cases

### Breach of Subcontract - Termination Clause - No Power To Terminate

*Thiess Contractors Pty Limited (t/as Thiess Thyssen North Shore Tunnels Joint Venture) v Peter Grogan (t/as P Grogan & Co)*, unreported, NSW Court of Appeal, 24 July 1996.

The decision in *Thiess Contractors Pty Limited (t/as Thiess Thyssen North Shore Tunnels Joint Venture) v Peter Grogan (t/as P Grogan & Co)* dealt with a condition in a subcontract.

Thiess entered into a subcontract with Grogan and Grogan failed to do certain things, which constituted a default within condition 8 of the subcontract. At a later date, Thiess purported to terminate the subcontract pursuant to its interpretation of condition 8.

Condition 8 read:

*"In the event of any default on the part of the subcontractor in observing ... any of the terms or conditions of this subcontract or in the event of the subcontractor being unable or unwilling to meet its debts ... the contractor shall have the right at its discretion:*

*(a) to determine the employment of the subcontractor and to employ and pay other persons to carry out and complete the subcontract work at the expense of the subcontractor ..."*

Justice Sheller noted that termination of a contract for breach or repudiation excuses the innocent party or, in some cases, both parties from further performance. However, the contract is not rescinded and remains in existence. Contractual terms intended to deal with the consequences of breach or termination must be taken into account.

Therefore, whether condition 8 enabled Thiess to terminate the contract depended on its proper construction. In determining that condition 8 did not enable the contractor to terminate the contract, Justice Sheller construed the condition in what he considered to be the least draconian and more commercially viable manner as intended.

President Mahoney stated that the provisions of condition 8 indicated that it was not the purpose or effect of the contract to authorise the contractor, Thiess, to terminate the contract for the reasons set out in condition 8.

He noted that, read literally, condition 8 did not authorise termination of the contract. It authorised the contractor only:

*"to determine the employment of the subcontractor ... and complete the subcontract work at the expense of the subcontractor."*

#### A Comparatively Minor Default

Money and tools otherwise the property of the subcontractor might be used, but the right to use them depended on the contract and suggested that the contract was to remain on foot. The right to exercise the power did not arise only upon a substantial breach of the subcontract or a breach of sufficient seriousness to constitute a basis for terminating the contract.

The contractual right arose "*in the event of any default*", whether or not that default was serious. President Mahoney felt it was unlikely that the draftsman intended that a right of termination at law should arise because, as in the present case, of a comparatively minor default.

Accordingly, the Court held that the powers conferred on the contractor under condition 8 did not enable it to terminate the contract.

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