Aussie Rules – the prevention principle & the duty of good faith

By Hannah Aziz

Introduction

Two recent cases highlight the differing approaches adopted by the courts in Victoria and New South Wales when considering the effect of the prevention principle[1] and the implied duty of good faith.

New South Wales Court

The Supreme Court in *Growthbuilt Pty Ltd v Modern Touch Marble & Granite Pty Ltd* held that the parties had contracted out of the implied duty to act reasonably and/or in good faith when considering the application of the prevention principle.[2]

Background

The dispute in *Growthbuilt* arose from four subcontracts. Modern Touch Marble & Pty Ltd (**Modern**) acted as subcontractor. Modern commenced building works under the subcontracts but there were delays in progress. On 30 June 2016, Growthbuilt terminated the subcontracts due to Modern's failure to complete the works on time. Growthbuilt commenced proceedings to recover liquidated damages.

Modern defended the claim on the basis that:

- in applying the prevention principle, Growthbuilt should have unilaterally granted an extension of time for the works to be completed; or
- the rate of liquidated damages in the subcontract rendered them unenforceable as a penalty.

Clause 11 of the subcontracts contained a provision granting Growthbuilt a discretionary power to unilaterally extend time and also provided that Growthbuilt was under no obligation to extend, or consider whether it should extend, the date for completion.

Modern had not claimed any extension of time (**EOT**) under the subcontracts in accordance with clause 11. Growthbuilt's position was that Modern could not rely on any preventing conduct because Modern had failed to exercise the contractual right to claim EOTs.

Modern relied upon *Probuild*.[3] It argued that despite not seeking EOTs, Growthbuilt was obliged to act reasonably and in good faith through exercising its discretionary power under clause 11, having regard to the prevention principle if the delays in completing the works were due to Growthbuilt. Modern relied upon the case of *Peninsula* in this regard.[4]

The decision

The Court held:[5]

> …the discretionary power to extend the Dates for Completion that is described as "absolute" is contained in a clause that also expressly excludes any obligation on Growthbuilt to exercise the power to extend or to consider whether to do so…the express terms of the subcontracts make clear that, despite having the discretionary power to do so, Growthbuilt has no obligation to extend or make any decision whether or not to extend time under the subcontracts at all.

In distinguishing *Probuild* and *Peninsula*, the Court determined that implied terms of good faith

1 Where a party cannot insist on the performance of a contractual obligation by the other party if it itself has caused the other party's non-performance. See *Spiers Earthworks Pty Ltd v Landtec Projects Corporation Pty Ltd (No 2)* [2012] 287 ALR 360 at [47].
2 *Growthbuilt Pty Ltd v Modern Touch Marble & Granite Pty Ltd* [2021] NSWSC 290.
3 *Probuild Constructions (Aust) Pty Ltd v DDI Group Pty Ltd* [2017] NSWLR 82.
4 *Peninsula Balmain Pty Ltd v Abigroup Contractors Pty Ltd* [2002] NSWCA 211.
5 *Growthbuilt* at [71].

could not be implied into subcontracts where it would be inconsistent with the express terms of the subcontracts.

Key takeaway

This case highlights the differences that can take effect when construction contracts give a party discretion. The case acts as a reminder to parties that failure to amend a discretionary EOT clause could risk entitlement to enforce liquidated damages and render any time bar ineffective.

Victorian Court of Appeal

The Victorian Court of Appeal considered whether a contractual breach of an implied duty to cooperate can enliven the prevention principle.

Background

In the case of *Bensons,* Key Infrastructure (**KIA**) and Bensons Property Group (**Bensons**) entered into a development management agreement (**DMA**) for a site in Port Melbourne. Pursuant to the DMA, KIA agreed to procure the planning permit for the site by the sunset date of 31 December 2016 in exchange for a $2 million management fee.[6] The fee was payable in instalments. If KIA failed to procure the permit by the sunset date, the instalments would be repaid and the DMA would be terminated.

By May 2016, the council had not issued the permit. KIA filed an application to the Victorian Civil and Administrative Tribunal (**VCAT**) to have the permit determined. On 18 May 2016, Bensons sent a letter to KIA stating that any application to VCAT constituted a breach of the DMA. KIA withdrew its application to VCAT and re-issued it on 5 July 2016. On 22 December 2016, VCAT directed the council to issue the permit. On 9 January 2017, Bensons terminated the DMA due to KIA's failure to secure the permit by the sunset date. Bensons sought repayment of two instalments of the management fee. The permit was eventually issued on 6 February 2017.

Trial decision

KIA sought to recover the sums outstanding under the management fee, and damages for breach of the DMA. Bensons counterclaimed for recovery of the sums paid under the DMA. The Court held that Bensons had prevented KIA from securing the permit by the sunset date and was therefore prevented from relying on that time limit. Alternatively, the Court held that Bensons had breached the implied duty in the DMA to cooperate. The Judge determined that KIA had mitigated its losses and Bensons was ordered to pay nominal damages.

6 *Bensons Property Group Pty Ltd v Key Infrastructure Australia Pty Ltd* [2021] VSCA 69.

Appeal decision

Bensons appealed the decision on grounds that the Judge:

- applied the prevention principle without considering whether the act of prevention was a breach of the DMA; and
- erred in holding that Bensons breached the implied term to cooperate in the DMA.

The appeal was allowed. KIA was ordered to refund the management fee instalments it had received.

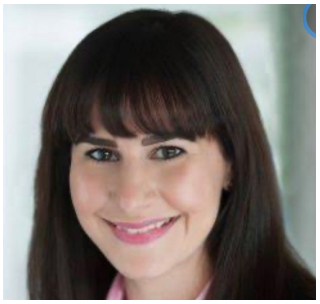
Key takeaway

In this case, the Court held that the prevention principle applies by reference to contractual obligations. The prevention principle cannot be applied as a separate legal principle that carries remedies outside of the contract. Regarding the implied duty to cooperate, this duty arises as an implied term because of necessity, and must give way to the express terms of the contract.

Conclusion

It is generally accepted that Victoria's approach to considering whether or not a duty of good faith should be implied by law into commercial contracts, is more conservative.[7] In contrast, New South Wales has recognised the duty of good faith as a potential basis for enlivening the prevention principle. These contrasting results show that the operation of the prevention principle remains a matter for debate which extends beyond these regions.

ABOUT THE AUTHOR



Hannah is a commercial litigation solicitor by background and qualified in England and Wales. Hannah has experience advising clients across various sectors including energy, banking and retail and she also has experience in regulatory matters and IP litigation. Prior to moving to New Zealand, Hannah worked in house for a European insurer. She now works as a Knowledge Manager in NZDRC's Knowledge Management Team.

7 *Key Infrastructure Australia Pty Ltd v Bensons Property Group Pty Ltd* [2019] VSC 522 at [291]-[298].