



Construction contract procedure and dispute resolution: There really is a reason to pay attention to the boring stuff

By Belinda Green

Failure to follow a simple construction contract procedure resulted in a hollow dispute outcome for all in *Cairns Building and Construction v Kaminaras*. This Queensland case reminds us that contractual processes are not just put there by lawyers to annoy us, but are essential to the smooth running of a project.

*Cairns Building and Construction v Kaminaras*¹

The Kaminaras contracted a builder (Cairns Building and Construction) to design and construct a residential house in Cairns. A dispute arose when the builder issued a notice of

practical completion and a final payment claim. The Kaminaras argued that there were defects and omissions that required substantial remedial work and refused to pay.

The matter escalated, and both parties ended up cancelling the contract – the builder for failure to pay the final payment (valued around AU\$110,000), and the owners for failure to carry out rectification works (valued at around AU\$45,000).

The builder started proceedings in the Queensland Civil and Administrative Tribunal, but ultimately walked away with nothing. Instead, the Tribunal found that the Kaminaras were justified in cancelling the contract. So what went wrong for the builder?

Your mother was right: the rules are there for a reason

Both parties claimed to cancel the contract. The perennial problem with cancellation is that you need to be sure you have the right to cancel. If you get it wrong, you have probably repudiated the contract instead (thus giving the other party the right to cancel).

We might be tempted to create the maxim: “You must come to repudiation with clean hands” if we were dealing with an equitable remedy. But as it is based in the more prosaic common law, we might instead prefer the following: “Don’t forget to follow your contract procedure first”.

This is exactly what tripped the builder up here. The Tribunal said that the builder had a *complete disregard to the express terms of the contract*.²

¹ *Cairns Building and Construction Pty Ltd ATF P&T Kelly Trust t/as Phil Kelly Builders v Kaminaras & Anor* [2021]

QCAT 374.

² at [465].





Worse still, it was a pretty simple procedure that let them down. The contract required the builder to respond to a notice of defects with a further notice of practical completion. The builder did not do this. So, the final payment never became due or payable.³ This caused an obvious problem for the builder, who later tried to cancel the contract on the basis that the final payment had not been paid. The defects in work didn't help, of course. But this simple procedural failure was a fatal blow to the builder's position.

Had the applicant simply issued the further notice of practical completion effectively repeating the earlier notice and asserting practical completion occurred without the need to attend to the respondents' requirements, then the contract terms provide a means by which the inevitable dispute would be addressed. ... that's where things went wrong for the applicant. As I observed it during my discussions with him on that correspondence, it had complete disregard to the express terms of the contract.

Confused and confusing

While this decision addresses the law on remedies, defects, and final payments etc, another clear message that readers take away from its pages is about case management.

The claim and counterclaim for the parties here involved around AU\$155,000 in total. A reasonable chunk of money, but nothing particularly large in the grand scheme of things.

The hearing took four days, and the Tribunal noted that it would have wished for five or six to do the matters justice. A total of 12 expert witnesses were called. The resulting decision was issued nearly 40 days after the hearing and runs to 140 pages long. The first 30 of those pages explains in detail why the expert witness testimony was not reliable.

Overall, the witness evidence, claims and submissions are repeatedly referred to as *confused and confusing*. This was clearly a trying experience for all involved including the Tribunal.

And all of this effort resulted in an award of \$0 to the builder and \$0 to the owners.⁴

Dispute resolution needs a cool head and a well-briefed expert

As a result, the true theme of this case might not be that contractual procedure is important (although that is still a message that lawyers would take any opportunity to convey!). Instead, we might note that dispute resolution needs a cool head and a well-briefed expert.

Domestic building work cases in Queensland first undergo "a dispute resolution process" with the Queensland Building and Construction Commission before being determined before the [Tribunal](#). It is a shame that the earlier process did not bring a resolution for these parties, given the relatively low-level sums involved. A four-day hearing with lawyers and expert witnesses on both sides hardly seems proportional to the values involved here.

³ These contract requirements have parallels to New Zealand's statutory [payment regime](#), where a failure to serve a simple notice can also have serious ramifications for debts due.

⁴ The Tribunal found that the owners were entitled to around AU\$44,000 for rectification of defect works. But when deducted from the remaining contract price, the net payable to the owners was Nil.



It was also a shame that some of the expert witnesses were not briefed more clearly – some misunderstanding their role as a whole, while others were unable to answer simple questions about value put to them by the Tribunal.

As the Tribunal expressed it:

[556] The very nature of building disputes means that in most instances the outcome will turn on the expert evidence. This proceeding is no exception. It is unfortunate that the expert evidence presented to this Tribunal was not of the quality that should be expected, and the outcome for the parties reflects that. It is regrettably a sad state of affairs when parties to a contract to build a house as a home end up in this Tribunal and the outcome is a hollow one. The end result has often been described as a shattered dream for the owners. I fear that this is one of those.



ABOUT THE AUTHORS



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* Building Disputes Tribunal is a part of the NZDRC Group.

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