

Is a Verbal Instruction Enough for a Building Contract?



Futurepower Developments Pty Ltd v TJ & RF Fordham Pty Ltd t/as TRN Group

Strict compliance with contractual obligations is a sure way to ensure both parties receive their fair side of an agreed bargain. The reality in the building and construction industry is however that builders just want to get on with the job and sometimes forget to lodge all the right paperwork, especially when work is time critical.

The recent Supreme Court decision of *Futurepower Developments Pty Ltd v TJ & RF Fordham Pty Ltd t/as TRN Group* [2019] NSWSC 1554 (**Future Developments**) has recognised this commercial reality and has determined that even when a builder does not strictly comply with the contractual process amounting to a breach of contract, they may nevertheless be able to recover money for works properly done.

Facts

The case of Futurepower Developments involves a contractual dispute between a developer, Futurepower and builder, TJ & RF Fordham (**Fordham**). Futurepower and Fordham entered into a written building contract in respect of roads and drainage works (**Contract**). Futurepower engaged Norther Western Surveys (**NWS**) to undertake project management and surveying tasks associated with works including the management of variation and payment claims (**Works**). An important aspect in this case was that the Contract explicitly specified Mr John Attard of NWS as the Superintendent.

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As is not uncommon, during the course of the Works, Fordham discovered areas of the site had asbestos contamination. This led to another employee of NWS, Mr Harding, directing Fordham to remove the contamination. Later on, Fordham submitted variation claims to recover the extra costs incurred in removing the asbestos. These claims were approved by Mr Harding of NWS, not Mr Attard who was the Superintendent nominated under the Contract.

The Building Contract Dispute

Fordham made claims for payment for the asbestos works but Futurepower however refused to pay them on the basis that Mr Harding was not the Superintendent. Futurepower also argued that the Contract required that variation work be procured through strict formal written communication between the parties and this process had not been followed because Mr Harding's merely provided verbal instructions.

Eventually, the payment claim was referred to adjudication under the *Building and Construction Industry Security of Payment Act*. The Adjudicator determined in favour of Fordham and awarded payment for the additional works undertaken.

Futurepower commenced proceedings in the Supreme Court to "claw-back" some fraction of the asbestos related payment based on the same arguments it ran during the adjudication process.

Legal Outcomes

The Court found that although Mr Harding was not the Superintendent specified under the Contract, it was Mr Harding who fulfilled many of the aspects of the role that a Superintendent would normally perform and both parties accepted this performance. For this reason, Futurepower was *estopped* from denying that Mr Harding was the Superintendent.

The Court also found that Futurepower breached their contractual obligations by failing to ensure that Mr Attard had fulfilled his role as Superintendent, and ruled that because a party cannot benefit from its own breach of contract, it could not refuse Fordham payment for works carried out under instructions from Mr Harding.

Practical Takeaways

The case demonstrates the power of estoppel in providing relief when a contract fails to provide for a fair outcome for the parties. If a party seeks to raise an issue of failure to strictly comply with terms set out in a contract, the representations they have made and the actions they have historically undertaken may bar them from doing so.

Additionally, this case demonstrates the importance of understanding and adhering to formal requirements specified under a contract. The parties in this matter could have avoided litigation if the developer ensured that the Superintendent under the contract had done his job, and if the builder had ensured they dealt with the Superintendent under the contract and followed formal written procedures with variation work.

If however through the course of a project parties fail to comply strictly with the terms of a contract, relief may be found through estoppel. Parties should however be sure to view this as a second defensive line, the first of which is adherence to contractual terms.

To be able to rely on estoppel as a second line of defence, a prudent developer, builder or sub-contractor should ensure they leave a paper trail of any communications, discussions, meetings, and or site inspections that occur during the course of construction. Although the reality of project work in the building and construction industry necessitates oral discussion and bargaining, should parties wish to protect themselves against potential contractual disputes they will require evidence to support representations and actions undertaken by various parties if they wish to utilise estoppel as a means of protecting themselves.

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