Approved Variations Determined Not Final on Appeal: NSW Court of Appeal Wipes $3.2m off Builder's Claim

Case Note: Kaloriziko Pty Ltd as trustee for Ryde Combined Unit Trust v Calibre Construction Group Pty Ltd (No 2) [2025] NSWCA 259

Executive Summary

This case provides an example of where 'approved' variations were unwound. On the basis of the contractual interpretation determining that all payments other than the final payment were 'on account' only; the Court was able to reassess the 'approved' variations.

Facts

Kaloriziko Pty Ltd as trustee for Ryde Combined Unit Trust (the **Developer**) engaged Calibre Construction Group Pty Ltd (the **Builder**) under an AS 4902-2000 contract to construct a multi-tower apartment complex.

The Builder claimed unpaid variations, return of retention, and damages. The Developer counterclaimed credits for amounts wrongly paid as variations, liquidated damages for delay, and reductions reflecting benefits received by the builder under a settlement deed.

During the proceedings, freezing orders were replaced with mortgages over properties owned by entities associated with the Developer's principals.

The Builder later entered into a deed of settlement with certain mortgagors (**related parties**), resulting in the transfer of three Arncliffe properties to a company associated with the Builder for $5 million, allegedly below market value.

The Supreme Court awarded the builder over $2.1 million plus interest. The developer appealed.

Issues to be Determined

On appeal, the Court considered five broad issues:

- Whether the developer could recover payments made for purported variations later found not to be variations.
- Whether consultancy fees fell within the contract sum or were payable as a variation.

- Whether the date for practical completion had been varied from 20 April 2020 to 23 May 2020.
- Whether the deed releasing co-mortgagors reduced the developer's liability by reason of the equitable principles of contribution and the prohibition on double recovery.
- The true market value of the Arncliffe properties and the degree of undervalue.

Court of Appeal Court Decision

The Court of Appeal allowed the appeal and held that no amount was owing from the developer to the builder, after applying reductions totalling $3,243,175.

Legal Reasoning

The contract Substation works, included a specific clause stating that "excluded items" do not form part of the contract sum and must be paid separately. Sydney Water upgrades and street lighting upgrades all fell within "excluded items" under the contract. These items were previously and mistakenly 'approved' as variations agreed between the parties. Nonetheless, the Court held that they were payable in any event as they were excluded items from the contract, meaning the builder had a substantive entitlement to payment irrespective of how the claims were processed.

Consultancy fees formed part of the Works Under the Contract (**WUC**), were not excluded items, and therefore were included in the contract sum. Approval of a purported variation cannot override the contract. Pre-contract discussions were irrelevant due to the entire agreement clause. Additionally, the builder failed to respond with any evidence supporting the existence of an oral agreement. Therefore, the Developer was entitled to a credit of $133,175.

No valid variation of the practical completion date occurred. A change required a written instrument executed by both parties, which was not made out. In the absence of evidence supporting a change for the date of practical completion, the Court held that the Developer was entitled to $210,000 in liquidated damages.

The mortgagors had provided security to the builder for the same debt as the developer, meaning they were responsible for the same potential judgment. When the builder later agreed, under the deed, to release Ninth Campsie and Ms Tran from that liability, it received value in exchange for giving up claims against parties who were liable for the same obligation as the developer. The law does not permit the builder to recover the same loss twice. If the builder wished to argue that any part of the benefit it received related to something other than the release of that shared liability, it bore the burden of proving this. As it failed to do so, the developer was entitled to a reduction reflecting the benefit the builder obtained.

The primary judge erred in declining to determine market value despite extensive evidence the Developer's valuer was preferred. The Builder's valuer wrongly disregarded earlier sale prices and suggested an unexplained 28% market decline. Therefore, the properties were valued at $7.9 million and an undervalue of $2.9 million was credited to the Developer.

Key Takeaways

Developer clients are reminded that if there are express contractual provisions allowing payments 'on account', it is possible for variations to be reassessed until it is a 'final payment' in accordance with the contract. For the avoidance of doubt, if the contract provides that the payments are final, there would not have been recourse.

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