



You Can't Have Your Contract and Eat It Too: How Alinta Waived Its Own Time Bar

Case Note: *Clarke Energy (Australia) Pty Ltd v Alinta Energy Transmission (Roy Hill) Pty Ltd* [

Executive Summary

A principal's administration of an extension of time (EOT) regime can undermine its reliance on contractual time bars. In *Clarke Energy v Alinta*, Clarke Energy submitted an EOT to Alinta on time but inadvertently omitted the superintendent from the claim and earlier delay notices. Although Clarke Energy promptly corrected the omission, Alinta relied on the failure to comply with the notice to claim conditions precedent. Rees J held that Alinta had waived those requirements through its conduct.

The Court found substantially in favor for Clarke finding that Clarke was entitled to the extensions of time and delay costs it claimed. The judgment also speaks to the broader significance for project participants

Facts

Alinta engaged Clarke Energy as head contractor under an engineering, procurement and construction contract for a gas-fired power station at Newman in remote Western Australia. The dispute arose following unsuccessful claims by Clarke Energy for variations, EOTs and time-related costs, and Alinta's imposition of liquidated damages.

The four EOT claims in issue concerned delays to bulk earthworks arising from the removal of underground services (EOT 1), COVID-19 border restrictions and quarantine (EOT 4), electrical isolation works on a relay panel (EOT 11), and network availability during commissioning (EOT 12).

Clarke Energy commenced proceedings against Alinta, with the claims and counterclaims involving approximately

\$7.8 million. In addition to its claims against Alinta, Clarke Energy pursued negligence claims against several superintendents personally.

Issue

The Court was asked to determine the following issues:

- Was Clarke entitled to the four EOTs and were the delays Alinta's responsibility, and had Alinta waived the conditions precedent (or was it bound by the prevention principle)?
- Who owns the float, and when was practical completion achieved?
- What delay costs, variation entitlement (VO 05) and liquidated damages followed?
- Did the superintendents owe Clarke a duty of care?

Supreme Court Decision

Clarke Energy largely succeeded, obtaining judgment for \$7.19 million after a substantial reduction in liquidated damages, but its personal negligence claims against the superintendents failed.

Reasoning

Rees J applied the contract's allocation of responsibility for delay. Her Honour found that Alinta's failure to provide the required site access and cooperation, together with qualifying COVID-19 restrictions, supported Clarke Energy's EOT claims to the extent they delayed practical completion.

Her Honour held that Alinta could no longer reject EOT 1 because Clarke Energy had failed to send the claim and delay notices to the superintendent on time. Alinta had not ensured timely, fair determinations under the EOT regime and later arranged for EOT 1 to be assessed on its merits. The superintendent assessed the claim without applying the time bar, and his conduct as Alinta's agent counted against Alinta. Viewed together, this conduct amounted to waiver despite Alinta's earlier reservations of rights and the clause requiring written waivers.

Her Honour concluded that Alinta's "absolute discretion" to extend time did not exclude the prevention principle. Under this contract, Alinta remained obliged to consider the power honestly and fairly especially where its own breach caused delay and would have bound Alinta to grant an extension.

Whilst Clarke Energy, as the contractor, owned the float (a scheduling allowance for project delays) the contract did not provide EOTs or delay costs for the purpose of restoring the float once consumed. Recovery of the float was conditional upon an assessment of delay to practical completion. The delay-cost provisions permitted usual margin and overheads, subject to the contractual exclusions and no double recovery.

Her Honour found further that Alinta had induced Clarke Energy to expect that the additional work would be dealt with through the variation process. Clarke Energy relied on that expectation in undertaking the work. Promissory estoppel therefore prevented Alinta from denying payment solely

because no compliant Variation Order had been issued.

The agreed completion criteria did not mandate a defect-free or a fully optimized plant. The required tests had been passed and the results provided, with only minor defects remaining. Because the superintendent's determinations were open to challenge, the Court could assess completion retrospectively. Its earlier completion finding, combined with the EOTs, reduced the period attracting liquidated damages.

Her Honour rejected the personal negligence claims against the superintendents personally. Clarke Energy had negotiated contractual protections and could challenge determinations or pursue Alinta. Where sophisticated parties such as Clarke Energy had the capacity to negotiate terms allowing it recourse to superintendents directly, the contract instead required Alinta to ensure that the Superintendent acted 'honestly, fairly and reasonably and arrives at reasonable determinations. Thus, Her Honour declined Clarke Energy's claim against the Superintendents as it lacked the necessary 'vulnerability' such that no duty of care was owed by them.

Key Takeaways

Administer the EOT regime consistently. Departing from the process, or having a late claim decided on its merits, may waive the time bar despite a "no waiver" clause. A discretion to extend time will not exclude the prevention principle unless the contract expressly says the principal need not consider exercising it.

Respect the superintendent's independence. Private communications with the superintendent, or replacing one to avoid a decision, can count against the principal. Contractors' recourse lies against the principal, not the superintendent. Suing the superintendent risks an adverse costs order.

Know what an EOT covers. Extensions and delay costs cover delay to practical completion, not lost activity float. Delay costs include margin unless clear words exclude it.

More information

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