

Time Bars, Waiver and the Superintendent's Role

Clarke Energy (Australia) Pty Ltd v Alinta Energy Transmission (Roy Hill) Pty Ltd [2026] NSWSC 1124

Executive Summary

In *Clarke Energy v Alinta*, the NSW Supreme Court considered competing claims arising from delay to the construction of a $78 million gas-fired power station. Clarke sought extensions of time and delay costs for late site access, COVID-19 workforce restrictions, incomplete electrical isolations and the unavailability of the electricity network during commissioning. Alinta resisted those claims and sought liquidated damages.

A central issue was Clarke's failure to give its first EOT claim and earlier delay notices to the superintendent, despite giving them to Alinta on time. Clarke promptly corrected the mistake, but Alinta maintained that the claim was time-barred. Rees J held that Alinta waived the notice requirements by later having the claim determined on its merits, after the contractual EOT process had substantially broken down. Her Honour also found that, because Alinta caused the delay, the prevention principle would have required it to exercise its discretionary power to extend time.

The Court largely found for Clarke, awarding 142 days of EOTs—although not every day claimed—and associated delay costs where sought. Practical completion was found to have occurred on 10 November 2022, reducing Clarke's liquidated damages to approximately $2.5 million. Judgment was entered for Clarke for approximately $7.19 million, subject to further calculations and interest. The decision also addresses site-readiness obligations, ownership and treatment of program float, recoverable delay costs, variation formalities, practical completion and superintendent independence. Clarke's negligence claims against the superintendents personally failed.

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, however 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 optimised 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 negligence claims against the superintendents. 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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