



Book Review

Construction Claims

Philip Davenport and Helen Durham, 2013, Federation Press, 3rd ed, ppi-xiv, 1-338, index, case table, legislation table, glossary of terms, ISBN978-1-86287-912-6, Price AUD85.00

Construction Claims is the third edition of a well-established book by Philip Davenport directed at building contractors and consultants and law students. It is clear and easy to read and extremely well-informed not only about the framework of law which covers the issues raised by construction claims, but also about the issues which are most likely to be difficult. This is clearly a reflection of the authors' (now including Helen Durham) experience in the field.

The book begins with what might be regarded as the general principles for this area of law, so that after a short introduction Chapters 2 and 3 are concerned with the categorisation of claims and the importance of having a clear idea of how the claims are likely to be dealt with at law. This means the authors have had to persuade the reader of how important it is to understand the categories before one can know the risks involved. Chapter 4 shifts from categorising claims to categorising remedies. Expectation damages, reliance damages and restitution are explained, linking them to the legal category of claim. Economic loss arising from latent defects is discussed and the possible resiling from *Bryan v Maloney* which is suggested by the existence of legislation like the *Home Building Act 1989 (NSW)* which by providing for warranties from builders may negate the need for such a duty of care. Specific performance, injunction and declaration are also discussed; and the very important topic of contribution between wrongdoers. Rectification, nominal damages, payment on account and various other remedies are all given their place here.

After chapter 4 the emphasis of the book shifts to matters more specific to construction claims. So chapter 5 discusses what appears to be the very vexed issue about what is to happen with variation claims. It seems that contractors may not be aware that contracts will not necessarily allow variation claims and that if they do not the contractor will be forced to the more difficult claim in unjust enrichment or some other legal category. Determining what is a variation is not as obvious as it may seem, and the chapter spends some time illustrating the difficulties which may arise.

Chapter 6 considers the difference between various types of claims for interest, distinguishing between Hungerfords damages (which is really a claim for foregone interest as an actual loss) and interest on payment of damages and the various other aspects of interest; a useful discussion of claiming interest in adjudications and different jurisdictions' requirements is also to be found here. Chapter 7, 'Time-related claims' considers liability to the owner for delay. It discusses the 'prevention principle' which has been applied where the owner causes part of the delay and the contractor the remainder, so that the owner has no entitlement to liquidated damages at all. The authors make a strong case for rejecting this and following the US law rather than the Australian and UK law. They note that with the demise of the prevention principle, contractors have sought to attack the validity of the liquidated damages clauses in their contracts by arguing that it is a penalty rather than a genuine estimate. Such attacks are not always successful as long as the amounts are proportionate. The 'Hudson formula' for dealing with the contractor's loss from an extended contract is used because otherwise loss must be proved, and the authors convincingly argue that the better view is that the formulas should not be used, rather the contractor should explore the question of how any loss can be proved. The chapter then considers the common misconception that 'global claim' defence create an all or nothing situation. Again they convincingly argue that this is as flawed as the prevention principle. Finally the authors

suggest that contracts should not include a date for practical completion but rather have a contract price which reduces by a fixed percentage for every day's delay.

Chapter 8 covers quantum meruit claims, which are particularly important in the construction industry. This includes two types of situation – first, where the contract has agreed on the work but not the price, the contractor can claim a quantum meruit after the work is completed; the second claim is made in restitution for unjust enrichment. In relation to the first category the authors observe that Australian courts are now accepting that this claim is independent of contract. They discuss total cost claims as a version of quantum meruit claims and the possibility of sub-contractors making a claim in unjust enrichment against a principal. In Australia, *Pavey & Matthews Pty Ltd v Paul* (1986) 162 CLR 221 held restitution was available for the builder from the owner where the owner had avoided the contract by the fact that a statutory bar on contractors suing in the absence of a written contract. The distinction between contractual (required for adjudication) and restitutionary quantum meruit is well-covered.

The next chapter explains frustration of contract and what to do about payment for work after frustration. If work continues with the permission of the owner, restitution may be available. If work continues without the permission of the owner the contractor is in a risky situation. Entitlement for payment for work done before frustration may depend on the existence of a Frustrated Contracts Act. Or claims under adjudication legislation may be made, depending on the security of payment in construction legislation of the jurisdiction. The remaining chapters 10 to 14 are mostly short, as they raise less complex issues of law. These chapters cover the limits on defective work claims, licensing, a large number of defences, claims after termination and the penalty doctrine. The latter, which is one of the most significant changes in Australian construction law in the recent past is covered in Chapter 14. The authors discuss *Andrews v Australia and New Zealand Banking Group* [2012] HCA 30 in some detail since the High Court held that a contractual provision can be void as a penalty even though there is no breach of contract. The intricacies of the rule are teased out clearly and then, to drive the point home, the authors consider a range of common penalty provisions in contracts which after *Andrews* might not be allowed, for example time bar clauses.

The index would benefit from more detailed cross-referencing: for example there are entries under 'breach of contract' but the entry for 'contract' does not include 'breach of contract' with a cross reference to the breach of contract entry. This is a pity as this book appears to be intended not only for lawyers who may know various terms for a concept but also for contractors and students who may not. The glossary is a welcome addition for the latter.

This book is a significant work in this area. The experience of the authors as lawyers and adjudicators in this area shows in its mastery not only of the law but of the practical details which interact with the law. It should be on the bookshelf of all construction lawyers and construction contractors as it represents the distillation of considerable scholarship and experience into a very valuable contribution to the prevention and resolution of construction claims.

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