

JUDGMENT : Johnstone DCJ. District Court. New South Wales. 6th June 2007.

I will give an extempore judgment in these motions.

1. On 14 May 2001 QBE Insurance (Australia) Ltd entered into a construction contract with Quasar Constructions (NSW) Pty Ltd, for the refurbishment of QBE's premises at 82 Pitt Street, Sydney.
2. Disputes arose, particularly in respect of variations, which affected the adjusted contract sum, and QBE claimed that it had overpaid Quasar and alleged that some of the work done was defective. QBE commenced the substantive proceedings.
3. The court appointed a Referee, Mr B O'Mara, and referred the matters in dispute to him for inquiry and report: r 20.14 UCPR. The Referee inquired into the matters in dispute and made a written report dated 18 December 2006 ("the Report") to the court: r 20.23 UCPR. The Referee was of the opinion that QBE owes Quasar \$57,844.06.
4. Both parties then filed motions. QBE asks the court to reject the Report. Quasar asks the court to adopt the Report. In effect, however, the parties simply seek variation of certain parts of the Report: r 20.24(1)(a) UCPR.
5. QBE alleged that there were seven substantive errors made by the Referee in his report.

The First and Second Errors

6. The first error alleged was one of calculation, which resulted in an overstatement by the Referee of the amount owing by QBE of \$11,427.96. Quasar concedes this error.
7. The second error alleged related to Variation 16/09 and an arithmetical miscalculation, which resulted in an overstatement by the Referee of an amount owing by QBE of \$238. Quasar concedes this error.

The Third Error alleged

8. The third error alleged relates to Variation 16/18, in which Quasar made a claim of \$10,398.30 for door hardware. The Referee found the claim was justified.
9. QBE alleged that part of the claim, for an ED 200 electro/hydraulic operator, in an amount of \$4,990, had already been allowed and paid for as part of Variation 16/16. It contended that the Referee incorrectly found that the claim for \$4,990 was not included in the allowance for Variation 16/16.
10. QBE submitted that there was no evidence to support the Referee's finding, or alternatively that the Referee gave insufficient reasons for his conclusion.
11. I am satisfied that there was sufficient evidence to support the Referee's finding. There was documentary evidence and evidence from Mr Shore and Mr Finnane, which in my view is capable of supporting the Referee's finding.
12. The Referee simply preferred that evidence and it was not demonstrated that the Referee misapprehended the evidence, or made some perverse finding. His reasons are adequate to demonstrate his reasoning process and sufficient to exclude the possibility that he took into account any improper or inappropriate considerations.
13. For these reasons I adopt the report on this issue.

The Fourth Error Alleged

14. The fourth error alleged related to Variation 16/14 as amended in Revision B, in which Quasar made a claim for \$139,183 in respect of additional costs associated with a revised granite wall and floor stonework in the ground floor lobby.
15. QBE contended that Variation 16/14B was not maintainable because it had not been authorised in writing by the architect as required by clause 6.10.03 of the construction contract.
16. Quasar contended that QBE had not put this condition precedent in issue in the substantive proceedings, and should not be allowed to raise it at this late stage, unless the pleadings are amended.
17. A consideration of the pleadings and the correspondence relating to the further and better particulars sought and purported to be provided (Exhibit 1) make it clear that Quasar was never sufficiently put on notice that it was required to meet a case that Variation 16/14 had not been authorised in writing by the Architect and not therefore maintainable: rule 14.14 UCPR.
18. In my view therefore QBE is precluded from relying on any condition precedent to which clause 6.10.03 might give rise.
19. QBE next contended that Variation 16/14B was not a variation at all, because QBE was in any event entitled to the granite the subject of the variation, as part of the contract price.
20. The additional costs, the subject of Variation 16/14B arose because QBE required Quasar to change the tiling subcontractor. This issue required a consideration, in particular, of a letter dated 4 September 2003 from the Project Manager to QBE (see Exhibit D7 at 2.37). QBE argued that the tiling subcontractor was compulsorily dismissed pursuant to a direction by the Architect under clause 5.11 of the construction contract, for incompetence. That being the case, Quasar was required to bear any additional costs occasioned by replacement of the subcontractor.

21. The Referee found, however, that the change in subcontractor was not effected as a result of a direction, but that Quasar changed the subcontractor in compliance with clause 5.05 of the construction contract, thus giving rise to a justified Variation (paras 7.57 to 58 of the Report).
22. QBE submitted that the Referee misconstrued the letter of 4 September 2003. In my view it was open to the Referee to construe the letter in the way he did, having regard to other evidence.
23. I find therefore that the finding by the Referee that Variation 16/14 was a valid variation is not a matter calling for interference by this court and I adopt the Referee's Report in respect of this issue.
24. The next error contended by QBE, in respect of Variation 16/14B, related to the additional expenses claimed by Quasar for increased supervision and administration, and the provision of a site manager in lieu of a foreman, arising out of the increased complexity and detailing required by QBE for the revised lobby works. These additional costs were detailed in the Variation claim (see exhibit D7 at 2.24). The Referee allowed a claim for \$31,500 (\$27,400 plus 15%)(paragraphs 7.78 to 79 of the Report).
25. QBE disputed that these additional costs were in fact incurred, and contended that the claim was not proved. It says that the claim at 2.24 of exhibit D7 is a bald assertion, unsupported by any probative evidence, and the Referee's finding is therefore patently misapprehensive. Alternatively, it was submitted that the document was of such little weight that the Referee ought not to have relied upon it, and the finding should therefore be rejected.
26. In my view however, there was evidence upon which the Referee was entitled to find that the additional supervision and costs were in fact incurred and were appropriately claimed. The document at 2.24, as a project document, and a business record, was of itself sufficient to ground the finding. It was then open to test the veracity of the representations, and for the Referee to find as he did, that the veracity of the costs itemised was not successfully challenged.
27. I therefore adopt the Report in respect of this allowance.
28. The next contention by QBE in respect of Variation 16/14B was that the Referee was in error in allowing a claim totalling \$16,642 for granite work. It was QBE's position that Quasar had already been paid for this granite in Variations 16/01, 16/03, 16/05 and 16/09.
29. The Referee found that the earlier claims related to different granite, and Quasar had not, therefore, "double dipped" (paragraphs 7.80 to 81). QBE submitted that this finding was manifestly perverse, having regard in particular to admissions it says were made in evidence by Mr Ross, and also having regard to other documentary evidence (for example, exhibit D7 at 2.42).
30. It should first be observed that counsel for Quasar submitted that what Mr Ross said in evidence did not amount to any admission or concession, and I agree. So, presumably did the Referee. During the course of argument I was troubled that the Referee's reasons at paragraph 7.81 were insufficient to explain his reasoning process and exclude the possibility that he might have taken into account improper considerations, such that I might require from him an explanation by way of a supplementary report: rule 20.24(1)(b) of the UCPR. I was concerned, in particular, that the Referee had not turned his mind to the documentary material relied on by QBE to support its argument as to double payment. However, on reflection overnight and a closer examination of those documents and his reasons, it is apparent that he specifically turned his mind to those matters and those issues.
31. I am satisfied therefore that the Referee's reasons, albeit brief, make clear his reasoning process, and that there was evidence upon which it was open to him to make his findings. They are not perverse, nor do they result from some misapprehension of the evidence. I therefore adopt his Report on this issue.
32. Finally in respect of Variation 16/14B, it is agreed that the Referee incorrectly allowed a mark up of 15 % rather than 10%. Thus, there is an overstatement by the Referee of the amount owed by QBE of \$6,628.00.

The Fifth Error Alleged

33. The fifth error alleged relates to an alleged defect (Item 1), in respect of the Portal granite. Quasar was required to install a single piece of granite over the lifts, but instead installed it in three sections.
Notwithstanding this, the Referee found that there was no compensable defect (paragraphs 8.15 to 19).
34. QBE contended that this finding was manifestly unreasonable and resulted from a denial of natural justice. The allegation of natural justice was not clarified. The finding of the arbitrator was clearly open to him, particularly as he had a view of the site.
35. I adopt his findings in the Report on this issue.

The Sixth Error Alleged

36. The sixth error alleged by QBE was abandoned at the hearing.

The Seventh Error Alleged

37. The seventh error alleged related to another alleged defect (Item 24) in respect of access panels, in respect of which QBE claimed rectification costs of \$3,900. The Referee found in effect that there should be no award (paragraph 8.109).
38. QBE contended that the Referee failed to adequately deal with this issue and "impermissibly imposed an onus on QBE". I disagree. In my view there was evidence available to the Referee enabling him to form this conclusion.

39. I therefore adopt the referee's findings on this issue.

Reconciliation

40. The Report requires variation so as to make allowances for the following agreed errors:

- Error of calculation relating to the starting point: \$11,427.96
- Error relating to Variation 16/09: \$238.00
- Error relating to the mark up for Variation 16/14B: \$6,628.
- Total: \$18,293.96

41. The report is otherwise adopted.

42. The amount owned by QBE to Quasar is therefore \$39,550.10 (\$57,844.06 minus \$18,293.96).

Disposition:

43. I dismiss the motion of QBE and I dismiss the claim of QBE.

44. In respect of the motion by Quasar I vary the report as is specified above. In respect of the cross-claim by Quasar against QBE I enter a verdict of \$39,550.10 together with interest.

COUNSEL ADDRESSED ON COSTS

45. In respect of the motions, I order QBE to pay Quasar's costs up to the day of hearing as to two-thirds thereof. Thereafter QBE is to pay Quasar's costs of the motions, including a brief on hearing to counsel, as to a hundred per cent.

46. I order QBE pay the costs of Quasar in relation to the claim and the cross-claim, including the reference to the Referee.

AFTER A SHORT ADJOURNMENT COUNSEL ADDRESSED ON INTEREST

47. I make no order as to interest.

48. I will otherwise make the orders in the short minutes.