

JCC B Amended - Head Contract or Construction Management Agreement - Subcontract or Trade Contract for Electrical Work

John Goss Projects Pty Ltd v Thiess Watkins White Constructions Ltd (In Liquidation) and Gunadin Pty Ltd, unreported, Court of Appeal, Supreme Court of Queensland, McPherson and Williams JJA, 28 April 1992

John Goss Projects Pty Ltd ("Goss") claimed the balance it alleged was owing to it for electrical work carried out at the Coolangatta Shopping Resort.

Thiess Watkins White Constructions Ltd ("TWW"), now insolvent, had agreed to enter into a JCC B Building Works Contract with the Proprietor, Gunadin Pty Ltd ("Gunadin"), but did not execute the contract until about a year after construction had commenced.

Goss' written contract with TWW was described as a subcontract; TWW was named as the "builder" and Goss as the "subcontractor". Nevertheless, Goss contended TWW had entered into this subcontract as agent for Gunadin and that Goss' contract was really with Gunadin. In this contention Goss relied upon special condition 15.02 of the JCC B head contract between TWW and Gunadin that required TWW to enter into "all Trade Contracts with Trade Contractors as the disclosed agent of the Principal". Special condition 15.02 also stated that it was "the intent" that "the appointed Builder shall carry out the role of Construction Manager". Goss contended that the amended JCC B contract between TWW and Gunadin was really a construction management agreement.

TWW's obligations as construction manager included the provision of construction management personnel and resources, consultation with and advice to Gunadin, the preparation of tender documents and administration of trade contracts, the supervision of construction, monthly reporting to Gunadin etc. TWW's remuneration was described as "reimbursement" and comprised a fixed lump sum of approximately \$3.7m for preliminaries, and a "profit margin" of approximately \$0.8m.

Goss claimed that its contract was entered into by TWW pursuant to TWW's obligations under the following terms of special condition 15.02:

"Using the Construction Manager's standard form of Sub-contract with appropriate special conditions, enter into all Trade Contracts with Trade Contractors as the disclosed agent of the Principal and provide the Principal with a copy of all Trade Contracts so entered into."

The Court of Appeal noted that the obligations imposed upon TWW by special condition 15.02 were typically those of a construction manager.

However, the Court of Appeal said:

"By itself, that feature is not enough to displace the expectation that relations between the three parties are of the traditional "three tier" character in which the lower two tiers are commonly, and reasonably accurately, termed the "contractor" and the "sub-

contractor". Provisions like those contained in cl.15.02 for obtaining quotations from and making payments to subcontractors are common in many head contracts, and it is equally common for a "contractor", which is a construction or project manager, to contract with a "subcontractor" as principal and not as an agent. Moreover, cl.15.02 must be read with other express provisions of the printed form contract imposing upon [TWW] as builder the duty to "proceed and to execute and complete the Works" (cl.1.02.02); and to "bring the Works to practical completion" (cl.1.02.03)...

It is clear that, by the force of these provisions, [TWW] expressly undertook to ensure that the construction work for the Shopping Resort was carried out. No doubt, as was contemplated by cl.15.02, the construction work was to be performed through the medium of trade contractors, although cl.15.02 itself contains a paragraph expressly obliging [TWW] to arrange for execution and completion of any part of the works that cannot be undertaken by trade contractors. There is nothing in these features that is necessarily inconsistent with the status of [TWW] as a head contractor or a trade contractor as a subcontractor. The circumstances that [TWW] is not to be paid the whole of the contract price, but only what is called "reimbursement" for preliminaries together with a profit margin does not serve to support a different conclusion."

On examining the terms of the subcontract, the Court of Appeal considered that it was intended to govern relations between Goss and TWW rather than between Goss and Gunadin. The obligations expressed in it were consistent with the normal three tier system. It recited the contract entered into between the "builder", TWW, and the "proprietor", which was expressly designated as the head contract. The Court of Appeal noted that the default provisions enabled the subcontractor to determine the subcontract after notice if the builder defaulted, became insolvent or abandoned the head contract. The Court of Appeal considered that this power could not be reconciled with the notion that Goss' contract was really with Gunadin, with TWW no more than an agent.

The Court of Appeal considered it more significant that TWW had not complied with the requirement of special condition 15.02 that trade contracts be entered into "as the disclosed agent of the Principal". At the time of

entering into the subcontract, Goss was unaware of the terms of the special condition's requirement about agency. Goss' attention was drawn to this provision of the head contract less than two months before the hearing which gave rise to this appeal. The Court of Appeal:

"... The circumstance that [TWW] was purporting to act as agent was therefore not disclosed to Goss, and the contract was not, as required by cl.15.02, entered into by [TWW] "as disclosed agent" of Gunadin. In making the subcontract with Goss, [TWW] thus appeared and acted in the role of principal and not of agent. In doing so, [TWW] accordingly went beyond or outside the confines of the authority conferred by cl.15.02. It was not the only authority possessed by [TWW] to enter into subcontracts. Clause 4.01 of the contract with Gunadin expressly authorised the subcontracting of part or parts, but not the whole, of the works; by cl.4.02, subcontracting part of the works was not to relieve the builder from any of its liabilities or obligations under the (head) contract."

The Court of Appeal rejected contentions that the typewritten special condition 15.02 should prevail to the extent of inconsistency over the printed cl.4.01 and 4.02 and that the words "as disclosed agent" should then be construed as directory only. The Court of Appeal considered these two contentions to be contradictory and self-defeating.

The Court of Appeal held that the subcontract between TWW and Goss had not been entered into by TWW as disclosed agent for Gunadin and that TWW was the principal party to that subcontract. Further, that the subcontract was not between Goss and Gunadin as undisclosed principal acting through TWW as undisclosed agent. Goss' appeal from the decision of de Jersey J to the same effect was dismissed with costs.

The Court of Appeal noted that it had not been pleaded or argued that Gunadin had ratified or acquiesced in or otherwise had become bound as principal to a subcontract entered into by TWW as agent for Gunadin as undisclosed principal.

Editorial Note

This case is illustrative of the inappropriateness of using a head contract for construction management, without sufficient modifications to make it suitable for the purpose. Those modifications are likely to be extensive. It is suggested that it is better to purpose prepare a construction management agreement.

There is also the question of the approach to be taken - "hard dollar" construction management or agency construction management for a fee and reimbursement.

Many of those who have tried the hard dollar approach based on say NPWC3 have become embroiled in disputes and regretted the decision. Often such contracts do not have the flexibility to deal with design and documentation development and change in the project without generating claims. For this reason, some principals who have suffered

this problem have later preferred the agency approach, which need not be without responsibility and potential liability.

The case is also illustrative of the need for construction managers to clearly enter into trade contracts as disclosed agent for the principal - if personal liability to the trade contractor is to be avoided by the construction manager (albeit, in this instance, Goss' motivation was recovery against the principal rather than the insolvent head contractor).

- John Tyrill