

Article Information

Authors: Gemma Twemlow, Denise Burloff

Service: Projects & Construction

Sector: Infrastructure

Counter-offers are not enough. Why you need a building contract

Although it is common practice for parties to commence construction works whilst the contract terms are still being negotiated, this presents significant risks, for both contractors and subcontractors. The recent decision of the Supreme Court of New South Wales in *Boss Constructions (NSW) Pty Ltd v Rohrig (NSW) Pty Ltd* [2019] NSWSC 374 reinforces the importance of having a binding contract in place prior to commencing any works.

Although it is common practice for parties to commence construction works whilst the contract terms are still being negotiated, this presents significant risks, for both contractors and subcontractors. The recent decision of the Supreme Court of New South Wales in *Boss Constructions (NSW) Pty Ltd v Rohrig (NSW) Pty Ltd* [2019] NSWSC 374 reinforces the importance of having a binding contract in place prior to commencing any works.

It is important that a valid and binding contract be in place prior to the parties commencing any works, failing which:

- there is uncertainty as to the rights and obligations of each party;
- there is a heightened risk of a dispute arising between the parties;
- the parties may be prevented from being able to make claims in contract; and
- contractors / subcontractors may be prevented from utilising the security of payment legislation.

At a minimum, works (even on a preliminary or Letter of Intent basis) should not be commenced an agreement is signed which addresses the agreed scope, duration of the arrangement and maximum cost.

Rohrig (NSW) Pty Ltd (**Rohrig**) was the design and construction contractor in respect of a performing arts centre at Penrith Anglican College in Orchard Hills, NSW. Boss Constructions Pty Ltd (**Boss**) undertook fabrication and supply of structural steel to Rohrig.

Over a period five months after acceptance of Boss' tender, the parties negotiated the proposed terms of the contract, without executing a contract or indicating their acceptance of any of the various versions of terms which passed between them.

Notwithstanding that there was no executed contract, Boss supplied steel and submitted several payment claims to Rohrig. Some of these claims were paid.

Adjudication

Boss issued a payment claim pursuant to the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**Act**) for materials, acceleration costs and for extra steel tonnage. In response, Rohrig provided a payment schedule, scheduling \$Nil to be paid to Boss. Boss made an adjudication application under the Act and was awarded a portion of the amount claimed, the adjudicator having found that the terms governing the relationship was a "Small Works Package" document issued by Boss.

Prior to the adjudication determination, Rohrig purported to terminate the contract.

Court Proceedings

Boss then commenced proceeding in the Supreme Court of New South Wales to recover the outstanding monies for works carried out and a termination fee of \$200,000. Rohrig counterclaimed for breach of contract and claimed liquidated damages for Boss' delay and loss of bargain damages in respect of the cost of engaging a third party to complete the contract. Each of Boss' and Rohrig's claims were made pursuant to different versions of the many contractual documents exchanged (yet unsigned) between the parties.

The Court determined that there was no contract between the parties at any point, that neither party had accepted any amendments or contractual document proffered by the other, and that neither party had acted as if there was a contract in place. As such, both parties' claims were dismissed. Whilst both parties had alternative claims available to them, those claims were not prosecuted and therefore could not be considered by the Court.

This decision serves as a timely reminder of the importance of having a valid and binding contract in existence prior to commencing any works. Whilst negotiations may lead to a binding contract at some point in the future, that will not always be the case. The absence of a contract between the parties will likely lead to a dispute in relation to issues such as payment and variations which can be avoided by having contractual terms in place that govern those issues.

Whereas there is an exception to a construction contract having to be in writing,^[i] at the very least there ought to be evidence of an offer, acceptance of that offer, and the passing of consideration (often monetary consideration) from one party to the other. Given the nature of construction projects, it is preferable for a contract to be wholly recorded in writing and properly executed to provide certainty to both parties as to the terms that govern the relationship between them. Whilst not ideal (nor without its own risks, particularly if agreed scope, term or value are exceeded) a properly drafted letter of intent (itself a contract) can provide some certainty where early works prior to conclusion of a complete contract, cannot be avoided.

^[i] There are exceptions to this rule, for example in the *Queensland Building and Construction Commission Act*, s 67G, which applies to contracts for "building works".