

Subcontracting without consent – when performance gets personal

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Restrictions on a contractor's rights to subcontract works are common across industry forms of contract, and breach of these provisions can have significant consequences for a contractor. In a recent Australian case, the court considered whether a contractor who had subcontracted services, in breach of a restriction in the main contract, was still entitled to payment for those services.

Subcontracting restrictions - cleaning up the mess

A battle between two cleaning contractors in the New South Wales courts in *Advanced National Services Pty Ltd v Daintree Contractors Pty Ltd* [2019] NSWCA has resulted in judicial consideration of the consequences of a party entering into subcontracts, in breach of a restriction in the main contract.

Daintree Contractors Pty Ltd ("Daintree"), itself a cleaning contractor, entered into a contract with Advanced National Services Pty Ltd ("Advanced"), another cleaning company, in relation to the provision of cleaning services at a chain of supermarket stores and a chain of liquor stores, for which Daintree was responsible for providing cleaning services.

- The contract between Daintree and Advanced provided that Advanced was not entitled, without the prior written approval of Daintree, to assign or subcontract any portion of the contract to any other person or entity, and that should Advanced assign or subcontract the contract without Daintree's consent, Daintree would consider this a fundamental breach of the contract and be entitled to terminate. Advanced acknowledged that it had subcontracted approximately 90% of the services without the consent of Daintree. During the course of the contract, Advanced issued invoices to Daintree that totalled approximately AUD\$634,000, of which approximately AUD\$266,000 was paid and approximately AUD\$368,000 was unpaid.
- Daintree refused to pay the unpaid invoices, on the basis that Advanced had not itself, or through authorised subcontractors, carried out the services, therefore the performance required by the contract had not been provided, and accordingly no debt was due to Advanced under the contract (even though it was not contested that the cleaning itself had taken place).

In its decision, the Court of Appeal sided with Daintree, finding that Advanced, by having the services carried out by unauthorised subcontractors, had not discharged its obligations under the contract, and given the terms of the contract and the submissions of the parties, Advanced was not entitled to any payment from Daintree in relation to the services carried out by the unauthorised subcontractors. The court noted that while it was common ground between the parties that the performance of cleaning services did not require any particular skill, it did not follow that the parties were therefore indifferent to the persons engaged by Advanced to perform the work and on what conditions. Rather, the contract made clear that if Advanced had the services performed by another contractor without Daintree giving its approval, this would be a fundamental breach of

the contract, and the court found it was the intention of the parties that the services be personally performed by Advanced or an authorised subcontractor.

Prevalence of subcontracting restrictions in standard form contracts

While the provision in *Advanced v Daintree* was very restrictive on any subcontracting, and made clear that any breach of the provision was a fundamental breach, provisions limiting a contractor's right to subcontract works are not unusual, and are widespread in standard form contracts.

For example, all of the 2017 FIDIC Red, Yellow and Silver Books provide for the restriction of subcontracting above a set value, as well as for restrictions to be set on subcontracting specific parts of the works.¹ The 2017 Red and Yellow Books go as far as to restrict any subcontracting (except for subcontracts with suppliers of materials, or a subcontract for which the subcontractor is named in the contract), unless prior consent is obtained from the Engineer.²

The JCT Design and Build Contract 2016 also restricts the contractor from subcontracting the whole or any part of the works, or any part of the design, without the employer's consent,³ though the form of contract does allow for supplemental provisions to be used whereby the parties can insert named subcontractors at the time of signing, and the contractor may enter into subcontracts with those named subcontractors.⁴

Importance of complying with subcontracting restrictions

Contractual restrictions on subcontracting usually have an important role to play. One of their main purposes is to ensure that only suitable, trusted subcontractors are engaged on a project. While subcontracting restrictions may be widespread in the industry, *Advanced v Daintree* is a timely reminder to contractors of the legal risks associated with not complying with contractual restrictions on subcontracting.

Finally, we note that restrictions on subcontracting not only represent a risk area for main contractors themselves, but potentially also for directors of main contractors. In a [separate case earlier this year](#), the Singapore High Court found a director personally liable for failing to act in the best interests of a company by being actively involved in the award of a subcontract in breach of the main contract.

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¹ See Sub-Clause 4.4 of the Red Book 2017, Sub-Clause 5.1 of the Yellow Book 2017, and Sub-Clause 4.4 of the Silver Book 2017.

² See Sub-Clause 4.4 of the Red Book 2017, and Sub-Clause 5.1 of the Yellow Book 2017.

³ See clause 3.3 of the JCT Design and Build Contract 2016.

⁴ See Supplemental Provision 1.