

# Security of Payment Roundup

March 2009

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## INSIDE

### NEW SOUTH WALES

The references to 'NSW Act' in the following cases are to the *Building and Construction Industry Security of Payment Act 1999 (NSW)*.

#### Setting aside of a statutory demand – *BBB Constructions Pty Ltd v Frankipile Australia Pty Ltd [2008] NSWSC 982*

##### Joseph Hanna

Frankipile Australia Pty Ltd (Frankipile) served on BBB Constructions Pty Ltd (BBB) a creditor's statutory demand under the *Corporations Act 2001 (Cth)* for the amount due under a judgment of the District Court of NSW. The judgment had arisen as a result of the filing of an adjudication certificate in proceedings between the parties under the NSW Act. BBB sought to set aside the statutory demand on the grounds that it had a genuine offsetting claim for breaches of the piling contract.

BBB tendered a report from geotechnical engineers expressing opinions that the damage to the site and surrounding properties was a result of the piling operations being undertaken by Frankipile with inadequate skill, not in accordance with earlier geotechnical engineering advice and with inappropriate installation specifications.

The court accepted the fact that the statutory demand was founded on a debt arising pursuant to the NSW Act did not preclude the setting up of an offsetting claim. His Honour observed that to satisfy the court BBB had to prove a genuine dispute over the claim, and, in accordance with previous authority, the offsetting claim must be 'bona fide and a truly existing

*fact and not spurious, hypothetical, illusory or misconceived*'. This necessitates the plaintiff, in this case BBB, without proving the whole of its case, bringing forward enough evidence to demonstrate that there is a serious question to be tried, or in other words a genuine claim warranting further consideration.

Frankipile sought orders that the setting aside of the demand be made subject to BBB paying money into court. The court held that this was not an appropriate condition in the circumstances, but was prepared to order that the setting aside of the statutory demand be conditional on BBB instituting and diligently prosecuting its legal dispute.

#### Reasons for withholding payment incorporated by reference into a payment schedule may not be considered in any subsequent adjudication – *Perform (NSW) Pty Ltd v Mev-Aus Pty Ltd t/as Novatec Construction Systems & Anor [2008] NSWSC 858*

##### Rahul Mukherjee and Nick King

Perform (NSW) Pty Ltd (Perform) entered into three separate agreements with Mev-Aus Pty Ltd (Mev-Aus).

Mev-Aus served a payment claim on Perform under the NSW Act. In response, Perform provided a detailed payment schedule valuing the payment claim at nil.

Mev-Aus served another payment claim and Perform provided a second payment schedule. The second payment schedule did not physically append the first

payment schedule, but sought to incorporate the same reasons for withholding payment by stating: '[t]he Respondent also relies on the reasons for withholding payments as set out in [the first payment schedule]'].

Mev-Aus applied for adjudication under the NSW Act. Perform provided an adjudication response, including a copy of the first payment schedule.

The adjudicator determined in favour of Mev-Aus, concluding that:

- the first payment schedule did not form part of the second; and
- the NSW Act prevented Perform from including the first schedule in its adjudication response.

Perform commenced proceedings, claiming that the adjudicator:

- erred in his findings; and
- failed to comply with the NSW Act by not considering the copy of the first payment schedule included in the adjudication response. It should be noted that Justice Einstein concluded that the adjudicator was likely to have correctly determined that the NSW Act did not allow incorporation by reference.

In dismissing the proceedings, Justice Einstein concluded that it was within the power of the adjudicator to determine that the NSW Act did not allow for incorporation by reference, and to exclude from consideration the copy of the first payment schedule included in the Perform's adjudication response.

**Where a claimant has opted for adjudication, the court will not make findings properly for the determination of an adjudicator – *Bucklands Convalescent Hospital v Taylor Projects Group* [2007] NSWSC 1514**

#### **Karen Lang and Nick King**

Bucklands Convalescent Hospital (Bucklands) sought a declaration from the court that an adjudication application lodged by Taylor Projects Group (Taylor) was not properly made. Taylor had lodged its application outside the 10 business day period allowed from receipt of a payment schedule under section 17.3(c) of the NSW Act.

Taylor contended that the 10 business day period under section 17.3(c) of the NSW Act did not apply, as no valid payment schedule had been received. It argued that the purported payment schedule had been issued by the superintendent under the relevant contract, who Taylor claimed was not authorised to make or deliver payment schedules on behalf of Bucklands. Instead, Taylor wrote to Bucklands under section 17(a) requiring Bucklands to provide a payment

schedule within a further five business days. Although Bucklands complied with this request, it brought this proceeding in an attempt to avoid an adjudication.

Justice Hammerschlag dismissed Bucklands' summons, holding that it was for the adjudicator to determine whether, as a question of fact, the superintendent had authority to make and deliver a payment schedule.

His Honour expressed views (without intruding on the adjudicator's function) that, as a matter of law:

- a principal may clothe an agent with authority to provide a payment schedule on the principal's behalf; and
- a superintendent who has certifying functions is not prevented from being an agent of the principal for the purpose of responding to payment claims.

If the parties intend the Superintendent to have this power, ideally this will be expressly included in the superintendent's powers.

**There is no statutory predisposition requiring an adjudicator to accept material provided by a claimant – *David Hurst Constructions Pty Ltd v Durham* [2008] NSWSC 318**

#### **Karen Lang**

David Hurst Constructions Pty Ltd (David Hurst) submitted a payment claim to Durham pursuant to the NSW Act and Durham issued a payment schedule in reply for a significantly lesser amount. David Hurst sought adjudication and the adjudicator determined the adjudicated amount to be that specified in the payment schedule.

David Hurst challenged the adjudicator's determination, claiming that it was void for numerous reasons, including that:

- the adjudicator imposed an onus of proof on David Hurst that was inconsistent with the NSW Act by expressly stating that David Hurst had not satisfied the adjudicator that the claim should be valued at anything more than the amount specified in the payment schedule;
- the NSW Act contains a statutory 'predisposition' in favour of accepting a claimant's material which the adjudicator did not give effect to; and
- a failure by the adjudicator to implement any of the processes in section 21(4) of the NSW Act (i.e. requesting further submissions, holding a conference, etc) constituted jurisdictional error.

Justice McDougall rejected all grounds of David Hurst's challenge and held that:

- the role of the adjudicator is to evaluate competing materials put forward by the parties and reach a decision based on those materials in good faith, which the adjudicator did;
- there is no basis in the NSW Act for presuming that there was a statutory predisposition in favour of accepting a claimant's material; and
- section 21(4) processes are discretionary, not mandatory.

**Interest provisions that are penal may give rise to an entitlement to discretionary relief under the *Trade Practices Act 1974 (TPA) – Katherine Pty Ltd & Anor v The CCD Group Pty Ltd [2008] NSWSC 131***

#### **Karen Lang**

CCD Group Pty Ltd (CCD Group) undertook construction work for Katherine Pty Ltd & Anor (Katherine) pursuant to three contracts. CCD Group obtained an adjudication determination in respect of each contract, which included an amount of interest calculated at 9 per cent per month compound, equivalent to approximately 180 per cent per annum simple interest (contractual interest rate).

Katherine sought an order from the NSW Supreme Court staying judgments obtained in the District Court (based on the adjudication determinations) on the ground that the contractual interest rate was a penalty and enforcement of those judgments would be unconscionable.

CCD Group submitted that the contractual interest rate provided compensation for interest incurred on its overdraft account and encouraged prompt payment by its debtors. The court held that the contractual interest rate was so disproportionate to the foreseeable actual loss by CCD Group that it amounted to a penalty and unconscionable conduct, entitling Katherine to relief under the TPA.

“The information must be given in a form that is meaningful to the parties so that the work completed can be deduced by the parties.”

Justice McDougall permitted partial enforcement of the judgments but used the discretionary powers in Part VI of the TPA to recalculate the interest component payable by Katherine at the lower rate applying to CCD Group's overdraft account (17.8 per cent per annum).

**Application to a contract for architectural services; requirements of a payment claim; privity of contract in relation to an arbitrator's determination – *Peter's of Kensington v Seersucker Pty Ltd [2008] NSWSC 897***

#### **Simon Ralton and Stefanie Pope**

Under a contract for architectural services between a land owner and architect Seersucker Pty Ltd (Seersucker), Peter's of Kensington (Peter's), who was the tenant of the land owner and not a party to the contract, paid Seersucker's previous invoices for the work performed. Seersucker obtained an adjudicator's determination against Peter's for full payment of a payment claim. Peter's then obtained an interlocutory injunction restraining Seersucker from obtaining judgment on the determination.

The court considered whether:

- the work performed was construction work;
- the payment claim sufficiently described the related goods or services to which the claim related to satisfy section 13(2); and
- the adjudicator's determination was invalid because Peter's was not a party to the contract.

The court held that the NSW Act applies to architectural services provided in preparation for construction work, regardless of whether the actual construction work eventuates. Architectural services are not 'construction work' under section 5(1)(e) of the NSW Act, but architecture is a 'related service' under section 6(1)(b)(ii) of the NSW Act. The architectural services related to planning applications.

The court held that the arbitrator's determination was not invalid on the basis that Peter's was not a party to the contract. This is because Peter's had not previously raised this argument, including at the time of paying the previous tax invoices, issuing the payment schedule in response to the payment claim in issue or before the adjudicator.

We note that this decision was given extemporaneously and only after one hour of hearing time. We question whether it is correctly decided, as a party, who is not a party to the construction contract (whether or not it is raised in the adjudication process), would ordinarily not be liable in respect of the NSW Act. Perhaps this was to be decided in subsequent proceedings.

The court released the injunction, and transferred the proceedings to the District Court.

**Service of incomplete copy of adjudication application – denial of natural justice – *Richard Shorten & Anor v David Hurst Constructions Pty Limited & Anor; David Hurst Constructions v Richard William Shorten & Anor [2008] NSWSC 546***

**Melissa Hammett and Ronan MacSweeney**

Care must be taken in serving adjudication applications to ensure that the application is served properly on both the adjudicator and the respondent. Failure to serve a full copy on the respondent will not be effective service and may result in a void determination.

In this case Richard William Shorten (Shorten) engaged David Hurst Constructions Pty Limited (Hurst) in relation to a construction project in Wagga Wagga. Hurst's lawyer served an adjudication application on the adjudicator in Sydney and sent copies to the builder by email (in 40 PDF attachments). Hurst then served Shorten with a box containing print-outs of the PDF documents. The box did not contain all documents served on the adjudicator.

The determination was void because Shorten proved, on the balance of probabilities, that they had not been served a full copy of the adjudication application, so were denied natural justice.

Shorten also argued that the determination was void (on the basis of a breach of natural justice) because the adjudicator had wrongly assumed that a previous adjudication determination had been held by the Supreme Court to be void. As a consequence of this wrongful assumption, the adjudicator held he was not obliged to follow the valuation by the previous adjudicator as is required by section 22(4) of the NSW Act. Justice Einstein held that while it was not necessary to determine the point, it was likely that the determination by the first adjudicator would give rise to an issue estoppel.

**A principal intending to make payment directly to the subcontractor of a head contractor may still be liable to the head contractor pursuant to the NSW Act – *Plaza West Pty Ltd v Simon's Earthworks (NSW) Pty Ltd [2008] NSWSC 753***

**Rahul Mukherjee and Nick King**

Plaza West Pty Ltd (Plaza West) entered into a construction contract (head contract) with Simon's Earthworks (NSW) Pty Ltd (Simon's Earthworks) to carry out earthworks. Simon's Earthworks subcontracted certain of the works to Merrmac Pty Ltd (Merrmac).

Simon's Earthworks submitted a payment claim to Plaza West, more than half of which was referable to payments claimed by Merrmac. Plaza West provided a payment schedule indicating nil payable.

Plaza West subsequently took the work under the head contract out of the hands of Simon's Earthworks. Plaza West then entered into a separate agreement with Merrmac, under which Plaza West paid directly to Merrmac part of the moneys Merrmac had claimed from Simon's Earthworks. Simon's Earthworks was not a party to that arrangement. Plaza West's payments to Merrmac were not listed in the payment schedule as reasons for withholding payment to Simon's Earthworks.

Simon's Earthworks applied for adjudication of its payment claim. Simon's Earthworks submitted that under the terms of the head contract, the full amount of its payment claim had become payable. The adjudicator accepted this and determined in favour of Simon's Earthworks.

Plaza West appealed to the Supreme Court to have the adjudication determination declared void.

Justice Hammerschlag accepted that the adjudicator had made a bona fide attempt to exercise his powers and held that in the circumstances, the adjudicator's determination was not invalidated by what his Honour accepted were errors of law.

*Editorial note: An appeal filed by Plaza West was dismissed by the Court of Appeal. Clearly great care should be taken where payments are made direct to a sub-contractor. Ideally there will be a clear contractual right to do so with relevant releases or the act of payment must be appropriately documented.*

Whether the parties to a construction contract intended that a requirement to provide a payment schedule within 4 business days had the effect of shortening the 10 business day period – *Thiess Pty Ltd & Anor v Lane Cove Tunnel Nominee Company Pty Ltd & Anor [2008] NSWSC 729*

#### **Richard Crawford**

In 2003 Thiess Pty Ltd and John Holland Pty Ltd (Consortium) contracted as a joint venture with Lane Cove Tunnel Nominee Company Pty Ltd (Principal) for the construction of the Lane Cove Tunnel. The contract sum was over \$1 billion. On 30 April 2008 the Consortium made a progress claim number 53 for over \$9 million of which over \$8.3 million was a disputed early completion bonus.

The contract provided that the Principal was to provide a payment schedule within 4 business days of receipt of the progress claim. The Principal did not provide a payment schedule within this time limit but did provide a payment schedule (that complied with the provisions of the NSW Act) before the expiry of the 10 business day period for providing payment schedules in section 14(4)(b)(ii) of the NSW Act.

The Consortium sought judgement on the basis that the contractual period of 4 business days had displaced the period in the NSW Act and therefore the Principal had failed to comply with the NSW Act.

Justice Hammerschlag held that the payment mechanism in the contract, which included the Principal being limited in the amount it may dispute and the provisions including for a resolution of such dispute (which were different to the statutory adjudication mechanism) meant that the parties had intended that the period in the contract for the provision of the payment schedule related to a contractual mechanism and was not intended to shorten the period for delivery of payment schedules in response to payment claims made under the NSW Act.

*Editorial Note: The consortium has appealed this decision. It should also be noted that the Principal defended these proceedings on the basis that the manner in which the consortium prepared progress claim number 53 was misleading and deceptive contrary to section 52 of the Trade Practices Act. Depending on the outcome of the appeal this issue may come for determination at a later date.*

Whether an insurance policy between a builder and an insurer constitutes a 'construction contract' for the purposes of the NSW Act – *Zurich Specialties London Ltd & Anor v Thiess Pty Ltd & Anor [2008] NSWSC 1010*

#### **Rahul Mukherjee and Nick King**

Zurich Specialties London Limited and SR International SE (insurers) were the insurers of a Thiess/John Holland joint venture (consortium) under a construction risks insurance policy pursuant to which the consortium was indemnified for certain aspects of the work to be conducted on the Lane Cove Tunnel Project.

The consortium attempted to make a payment claim under the NSW Act against the insurers, seeking payment for reinstatement work following the collapse of a section of the tunnel, and subsequent delay in settling an insurance claim.

The consortium argued that provisions of the policy requiring them to take reasonable precautions to prevent damage to the subject matter insured were capable of operating as a construction contract between themselves and the insurers for the purposes of the NSW Act, and so the NSW Act applied to the policy.

The court held that the relevant provisions were not a construction contract, as defined in the NSW Act, and the NSW Act did not apply to the policy. The policy's commercial purpose was to provide indemnity for the insured, not an agreement by the consortium to carry out construction work for the insurers. In carrying out the work for the principals/owners, the consortium had to take reasonable precautions in order to qualify for indemnity.

*Editorial note: The consortium has appealed this decision.*

### **Incorrect contracting name invalidating adjudication – *Berem Interiors Pty Ltd v Shaya Constructions (NSW) Pty Ltd [2007] NSWSC 1340***

#### **Eren Myers**

In this decision, the court held that the identification of a construction contract remains one of the basic and essential requirements for a valid adjudication determination. A court will adopt a more principled approach in determining if a construction contract exists, rather than a flexible, commercial approach.

Shaya Constructions (NSW) Pty Ltd (Shaya) tendered for works in response to an invitation to tender issued by Berem Constructions Pty Ltd (Berem Constructions). During the course of the works, Shaya addressed its progress claims to Berem Interiors Pty Ltd (Berem Interiors) and the progress claims were paid by Berem Constructions. The final payment claim issued by Shaya was the subject of an adjudication determination under the NSW Act, in which Berem Interiors was the respondent, rather than Berem Constructions. Based on the payment of invoices addressed to Berem Interiors, the adjudicator held that Berem Interiors was the contracting party and found in favour of Shaya Constructions. Berem Interiors challenged the adjudication determination on the ground that no construction contract existed.

The court held that in determining whether a contract existed, payment claims that are addressed to the wrong member of a company group, despite payment by another member of the same group, will not establish an 'arrangement' within the meaning of the NSW Act with the entity to which they are addressed. It is clearly essential to identify the correct contracting entity/entities, and to ensure strict compliance with the NSW Act.

### **Whether a declaration that an adjudication is void can be made conditional upon part of the moneys in court being paid out to the unsuccessful claimant under the void adjudication – *Trysams Pty Ltd v Club Constructions (NSW) Pty Ltd [2007] NSWSC 1298***

#### **Nikki Miller**

Trysams Pty Ltd (Trysams) had entered into a building contract with Club Constructions (NSW) Pty Ltd (Club Constructions) which was responsible for renovations and additions to a hotel. The work was completed, albeit delayed, and there was a dispute over the final payment claim. The claim was referred to adjudication where a determination was in favour of Club Constructions for an amount nearing \$400,000.

The court followed the reasoning in *Brodyn Pty Ltd v Davenport (2004) 61 NSWLR 421* and held that an adjudication determination which fails to meet the applicable requirements is void and not voidable. The appropriate remedy was therefore a declaration that the adjudicator's determination was invalid. As there is no such thing as partial invalidity, Club Constructions had no entitlement to the 'unaffected amount'.

Additionally, the court noted that even if it were able to allow prerogative relief in the form of payment to Club Constructions from the court moneys, the 'unaffected amount' could not be calculated as the adjudication from which Club Constructions had determined it had been declared void.

## VICTORIA

The references to 'Vic Act' in the following cases are to the *Building and Construction Industry Security of Payment Act 2002 (Vic)*.

### Proceedings under the Vic Act may go ahead even if related litigation is on foot – *Total Development Supplies Pty Ltd v GRD Building Pty Ltd [2007] FCA 2032*

#### Dima Pudiel

This case confirms that appeal proceedings under the Vic Act may go ahead even if the parties are already involved in related litigation in another court. The key requirement is that the relevant party has something to gain via the security of payment proceedings that it cannot achieve in the other litigation.

The adjudicator dismissed the claim of GRD Building Pty Ltd (GRD Building), concluding that it had not been made within the time limits under the Vic Act. GRD Building lodged an appeal in a Local Court against the adjudicator's decision.

Before GRD Building lodged its appeal, Total Development Supplies Pty Ltd (TDS) had also commenced proceedings in the Federal Court, claiming GRD Building had made misleading or deceptive representations about the program of works (matters which were related to the parties' payment dispute).

Given TDS's proceedings in the Federal Court were on foot before GRD Building's appeal, TDS sought to terminate the Local Court appeal for being vexatious or oppressive.

Under the Vic Act, GRD Building was entitled to obtain a review of the adjudicator's decision in the Local Court only. Therefore, GRD Building had something to gain in its Local Court appeal proceedings, which it could not achieve in the Federal Court proceedings. As such, it was held that the Local Court proceedings were not vexatious or oppressive to TDS, and were allowed to go ahead.

### Payment claim must sufficiently identify the construction work claimed – *Protectavale Pty Ltd v K2K Pty Ltd & Ors [2008] FCA 1248*

#### Eren Myers

Protectavale Pty Ltd (Protectavale) and K2K Pty Ltd (K2K), the first respondent, were joint venturers in a residential and retail development. They engaged Lorne Bay Pty Ltd (Lorne Bay), the second respondent, to carry out the construction work. Protectavale was not satisfied with how the work had been performed and commenced an action claiming damages from K2K and Lorne Bay. In the meantime, the Lorne Bay sent an invoice to Protectavale and K2K for more than \$635,000, which it said represented the amount due to it under the construction contract.

Protectavale sought summary judgment on the cross-claim based on the invoice. The claim for summary judgment asserted that the invoice was a valid payment claim under the Vic Act (as in force before the amendments made by the Act No 42 of 2006).

The application was dismissed and no summary judgment was granted for Protectavale. Lorne Bay's invoice failed to satisfy the Vic Act (section 14) because it did not specify the completed work; and the invoice was intended as a final payment claim despite the claim for only a partial contractual amount.

“Claims under the Act must be made strictly in accordance with the relevant Act.”

## QUEENSLAND

The references to 'Qld Act' in the following cases are to the *Building and Construction Industry Payments Act 2004 (Qld)*.

**An adjudicator's decision not to read and consider every part of a voluminous claim when making a determination is not a denial of natural justice – *Hitachi Ltd v O'Donnell Griffin P/L and Ors [2008] QSC 135***

### Jennifer McVeigh and Helen Miller

O'Donnell Griffin P/L (ODG) served a payment claim on Hitachi Ltd (Hitachi) for approximately \$16 million. In its payment schedule, Hitachi claimed it owed nothing to ODG and in fact ODG owed Hitachi \$2 million. The matter went to adjudication and the adjudicator determined that Hitachi owed ODG \$4,400,000. In determining this amount, he decided the payment claim was too voluminous to properly examine each separate claim in the time allowed. He took a selection of the highest value claims (12 out of 113) and examined these in detail. He did not state that the sum was a valuation of all claims in the payment claim.

Hitachi sought to have the adjudicator's decision declared void and unenforceable on a number of grounds including failure to consider the payment schedule and submissions properly made in the adjudication response as required by section 26(2)(d) of the Qld Act.

The application was dismissed. Justice Skoien held that the methodology used by the adjudicator was legitimate (i.e. carried out fairly), and that section 26(2) does not require every separate claim in a voluminous progress claim to be considered in full detail before a decision could be determined. The judge held that adjudicators have a great deal of latitude in carrying out their functions when there is a bona fide attempt to carry them out. A bona fide attempt involves acting fairly to both parties and in compliance with section 26 of the Qld Act. As the adjudicator did not overlook a submission of striking importance to the claims as a whole he acted reasonably. Additionally, in narrowing the claims to be considered he did not deny Hitachi natural justice. Any moneys owing from the claims not considered could still be claimed and responded to at a later date.

**To advance an argument in a second adjudication that is the opposite of an argument advanced in respect of the first adjudication between the same parties is an abuse of process – *O'Donnell Griffin P/L v Hitachi Ltd and Ors [2008] QSC 135***

### Jennifer McVeigh and Helen Miller

This application by O'Donnell Griffin P/L (ODG) was heard with Hitachi Ltd's (Hitachi) claim made in *Hitachi Ltd v O'Donnell Griffin P/L and Ors*.

ODG submitted a second payment claim which comprised, in part, a claim for variations. The variation claims included 75 variations which had been submitted as part of the previous payment claim. ODG contended that the variation claims had not been valued in the first adjudication as the adjudicator had considered them insufficient to establish an entitlement. ODG reformulated the claims and incorporated additional information.

In the corresponding payment schedule Hitachi proposed to pay ODG nil and alleged ODG owed Hitachi more than \$5 million. The second adjudicator decided that the first had valued the variation claims and as a result he was bound by section 27 to adopt the valuation of the first adjudicator.

The second adjudicator's decision was declared void and set aside. One of the reasons was the inconsistent approach by Hitachi in arguing in court that the first adjudicator had valued some of the claims while submitting to the second adjudicator that the first adjudication had considered all claims in his adjudication. This was found to be a material abuse of process in the second adjudication which led to a denial of natural justice. Justice Skoien held that the substantial change in Hitachi's submissions was a classic case of approbation and reprobation and therefore was an abuse of process.

Parties must adopt consistent positions if they wish to avail themselves of the benefits of adjudication and litigation processes.

“Justice Skoien held that the substantial change in Hitachi's submissions was a classic case of approbation and reprobation and therefore was an abuse of process.”

Parties to a second adjudication application on the same project should ensure they inform the second adjudicator of previous decisions – *Bezzina Developers Pty Ltd v Deemah Stone (Qld) Pty Ltd [2008] QCA 213*

### Jennifer McVeigh

Disputes arose between the parties concerning two payment claims and each claim was referred to adjudication, but to different adjudicators. The second claim included the amount claimed in the first payment claim.

On 28 March 2007, Deemah Stone (Qld) Pty Ltd (Deemah) made an adjudication application for the second claim to the second adjudicator. On 29 March 2007, the parties were advised that the adjudication decision in the first claim was ready for release, pending payment of the first adjudicator's costs. The parties did not obtain the decision until 13 April 2007, by which time the adjudication of the second claim had been made by the second adjudicator on 4 April 2007.

Neither party informed the second adjudicator that a first decision had been made.

In deciding the second claim, the second adjudicator valued the previous claim at an amount higher than the first adjudicator. Section 27(2) requires a second adjudicator to adopt the valuation of a prior adjudication. *Bezzina Developers Pty Ltd's* (Bezzina) application for judicial review in the Supreme Court was successful at first instance.<sup>1</sup>

Deemah successfully appealed to the Queensland Court of Appeal. It was held that an adjudication is 'decided' within the meaning of section 27, notwithstanding that the decision has not been communicated to the parties. However, the Court of Appeal held that section 27(2) only applied where the adjudicator was actually informed of an earlier adjudication decision. The second adjudicator knew of the first adjudication application but was not aware if it had been decided. The second adjudicator was not obliged to make inquiries or obtain a copy of the decision. The Court of Appeal noted that it was open to both parties to inform the second adjudicator of the previous decision once it had been made.

*Editorial note: A second adjudicator is bound to follow the decision of a first adjudicator under s27 of the Qld Act, but this will not apply if the second adjudicator has not been advised of the existence and contents of the first adjudicator's decision.*

A claimant who is a party to an unenforceable contract cannot take advantage of the Qld Act – *Gemini Nominees Pty Ltd v Queensland Property Partners Pty Ltd ATF The Keith Batt Family Trust [2008] 1 Qd R 139*

### Jennifer McVeigh and Helen Miller

Gemini Nominees Pty Ltd (Gemini), a builder and *Queensland Property Partners Pty Ltd ATF The Keith Batt Family Trust* (Qld Property Partners), a non-resident owner entered into a written QMBA Cost Plus (Residential) Standard Form contract. The parties agreed the contract was a 'cost plus contract' for the purpose of section 55 of the *Domestic Building Contracts Act 2000* (Qld) (DBCA). Item 6 of the contract required an insertion of the estimated total costs of the works, however, the words 'not applicable' were inserted.

Gemini submitted a payment claim. When Qld Property Partners failed to pay or serve a payment schedule Gemini commenced proceedings under section 19 of the Qld Act. Qld Property Partners claimed the Qld Act was not applicable because the contract contravened section 55(1) and (2) of the DBCA and as a result was unenforceable.

Justice Mullins held that as section 55(3) of the DBCA prohibited Gemini from enforcing the contract, it was not a contract to which the provisions of the Qld Act applied, therefore Gemini could not claim to be entitled to progress payments under the Qld Act.

This decision follows and adopts the reasoning of the Queensland Court of Appeal in *Cant Contracting Pty Ltd v Casella [2006] QCA 538*.

<sup>1</sup> note that judicial review of security of payment decisions is no longer available in Queensland after 27 September 2007 when the *Justice and Other Legislation Amendment Act 2007* (Qld) came into force.

**Section 3(3)(c)(ii) of the Qld Act applies where a contractor guarantees to pay a sub-subcontractor in the event of default by the subcontractor – *Walton Construction (Qld) Pty Ltd v Robert Salce & Ors [2008] QSC 235***

**Jennifer McVeigh and Helen Miller**

Although an undertaking given by a contractor to a sub-subcontractor was a 'construction contract' for the purposes of the Qld Act, it was also a guarantee given by the contractor to the sub-subcontractor that came within section 3(3)(c)(ii) of the Qld Act. That section excludes the operation of the Qld Act from a construction contract to the extent that it contains an undertaking to guarantee an amount owing.

In this case, Walton Construction (Qld) Pty Ltd (contractor) made a subcontract with Eastwing Contracting Pty Ltd (sub-contractor) and in turn, the sub-contractor subcontracted the work to Robert Salce (sub-subcontractor). The contractor had guaranteed to pay the sub-subcontractor in the event of default by the subcontractor. Accordingly, the adjudicator did not have jurisdiction and the decision was void.

Justice McMurdo noted that his conclusion was consistent with the objects of the Qld Act. If the undertaking came within the operation of the Qld Act, the sub-subcontractor would be entitled to both progress payments, and the benefit of the adjudication regime under the Qld Act. These could be exercised against different parties and under different construction contracts but for the same work.

**Obtaining a stay of a judgment based on an adjudication certificate is not impossible, but it was not granted in this case – *RJ Neller Building Pty Ltd v Ainsworth [2008] QDC 129***

**Jennifer McVeigh and Helen Miller**

An application to stay an enforcement warrant issued to enforce a Qld Act judgment was dismissed. Justice Dodds held that in principle the execution of a judgment based on adjudication could be stayed even though the policy of the Qld Act is for progress payments with minimum delay and court involvement.

The party seeking the stay must persuade the court of the existence of discretionary factors in favour of the stay sufficient to overcome the policy of the Qld Act. It was held that the principal's concern that he may not recover the money paid, if successful in his application, because of the financial position of the contractor, did not establish sufficient harm.

**SOUTH AUSTRALIA**

**Security of Payment in South Australia?**

**Christopher Darby and Eleni Psevdos**

The Building and Construction Industry Security of Payment Bill was introduced to the South Australian Legislative Council in September 2007 by former Independent Member Nick Xenophon. The Bill adopts the model currently used in Victoria, New South Wales and Queensland.

Under the Bill, contractors have a statutory right to receive progress payments where the relevant construction contract fails to provide a right to progress payments.

The Bill also establishes procedures for:

- making a payment claim;
- the provision of a payment schedule by the person by whom the payment is payable;
- referral of a disputed claim to an adjudicator for determination;
- the payment of a progress payment determined by an adjudicator; and
- recovery of a progress payment in the event of a failure to pay.

In addition, the Bill provides contractors with the right to suspend work if payment is not made in accordance with its provisions.

Debate over the Bill was adjourned following its second reading and former Independent Member Nick Xenophon's resignation from the Legislative Council. Sponsorship of the Bill has been taken up by The Hon. I. K. Hunter and the Legislative Council's Notice Paper now has the second reading debate scheduled for 4 February 2009. Minter Ellison is currently considering submissions to be made to the Bill, reflecting on the experience in Victoria, New South Wales and Queensland, and would be happy to incorporate any suggestions you have.

<sup>2</sup> note that judicial review of security of payment decisions is no longer available in Queensland after 27 September 2007 when the *Justice and Other Legislation Amendment Act 2007* (Qld) came into force.

## NORTHERN TERRITORY

The references to 'NT Act' in the following case are to the *Construction Contract (Security of Payments) Act 2004 (NT)*.

**An adjudicator will have jurisdiction under the NT Act to determine whether a valid adjudication application has been made. Even if that decision is incorrect, the decision is not void – *Independent Fire Sprinklers (NT) Pty Ltd v Sunbuild Pty Ltd [2008] NTSC 46***

A dispute arose between the subcontractor, Independent Fire Sprinklers (NT) Pty Ltd (IFS), and the builder Sunbuild Pty Ltd. IFS refused to carry out variations without design drawings first being provided by Sunbuild. Sunbuild arranged for the work to be carried out by other contractors and claimed from IFS, under the contract, the increased costs of completing the works. IFS refused payment and Sunbuild made an adjudication application with respect to four unpaid invoices.

The adjudicator dismissed the application with respect to three of the invoices as the application was not made within 90 days after the dispute arose as required by section 28 of the NT Act. The adjudicator decided that the fourth invoice was made within the time period and found in favour of Sunbuild for \$321,649.16. IFS argued in the Northern Territory Supreme Court that the adjudicator had no jurisdiction to make the determination because the application was in fact made outside of the 90 day time period.

It was held that the application was in fact made within the 90 day time period and that the adjudicator had jurisdiction to determine whether or not there had been compliance with time limits. Furthermore, it was held that the adjudication determination would not be void, even if the application was made outside the 90 day time period.

Justice Mildren also affirmed the comments of *Hodgson JA in Brodyn Pty Ltd t/as Time Cost and Quality v Davenport & Anor (2004) 61 NSWLR 421* that an adjudicator's decision would be void if there was a denial of natural justice or if the adjudicator did not make an honest attempt to decide whether the application should be dismissed.

## WESTERN AUSTRALIA

The references to 'WA Act' in the following case are to the *Construction Contracts Act 2004 (WA)*.

**It will be very difficult for a party to resist the enforcement of an adjudication determination – *O'Donnell Griffin Pty Ltd v John Holland Pty Ltd [2008] WASC 58***

The defendants (RLJV) were joint venturers and main contractors for part of the work undertaken for the South West Metropolitan Railway. The plaintiff (ODG) was a sub-contractor on the construction

work. There was a sub-contract dated 14 February 2005 between the parties for a lump sum payment of \$89,796,679. The sub-contract also provided for monthly progress payments and monthly progress claims to be made by ODG, following which payment certificates would be issued by the Subcontract Superintendent for RLJV (the Superintendent).

On 25 October 2007, ODG submitted a progress claim for the month of October for approximately \$22.5 million, excluding GST. The Superintendent issued a payment certificate to the amount of \$589,533. ODG applied for an adjudication of the October payment, and in December 2007, the adjudicator determined that RLJV was liable to pay the ODG \$14,515,018 plus interest accrued on the sum from 29 November 2007.

On 4 March 2008, ODG commenced proceedings against the RLJV pursuant to section 43 of the Act to enforce the determination in the same manner as a judgment of the court.

As this was the first decision regarding the WA Act, Justice Beech provided an overview of what he saw as the 'salient features of the Act'. His Honour acknowledged that the purpose of an adjudication of a payment dispute was to determine the dispute in the fairest but efficient and inexpensive means possible.

The court accepted that the operation of section 43(2) was similar to section 33 of the *Commercial Arbitration Act 1985 (WA)*. Justice Beech referred to Justice Rolf's decision in *Cockatoo Dockyard Pty Ltd v Commonwealth (1994) 35 NSWLR 689* for guidance to the powers of the court to grant leave to enforce an adjudicator's determination. It was held in that case that an arbitration award referred to the courts did not grant the court power to judicially reconsider the award and the burden fell on the defendant to provide evidence as to why the award should not be enforced.

Justice Beech held that the WA Act did not expressly identify the matters relevant to whether leave should be granted and therefore in deciding whether to exercise the power regard must be had to the context, objectives, purpose and policy of the legislation.

Ultimately, the court found that RLJV did not provide sufficient evidence to warrant a decline to grant leave to enforce the adjudication determination.



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