Security of Payment Roundup

A comprehensive review of cases in 2019

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National Overview

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In a year of further change for security of payment regimes around the country, major amendments to the New South Wales legislation commenced in October 2019. These changes should have positive cashflow implications for contractors as they are now entitled to make payment claims each named month for work performed during that named month, and the due date for subcontractor payment has been shortened to 20 business days. However, by reinstating the obligation to state that a payment claim is made under the NSW Act, New South Wales is now inconsistent with Queensland, which disposed of that requirement in the Qld BIF Act in 2018.

We will wait to see during 2020 the effect of new powers for authorised officers and investigators from State bodies to enforce compliance with the NSW Act and to require a person to produce documents and answer questions. The same goes for directors and managers of corporations, who can now be held liable for offences committed by their corporations.

In Queensland, the implementation of the Qld BIF Act continued, a review of the project bank accounts framework was conducted which will see changes to the Qld BIF Act in 2020 to allow for a new approach to be taken, and a new Bill for further legislative reform was drafted for debate in 2020.

In Western Australia, there were rumblings that the legislation may be overhauled so as to be more consistent with the NSW model, but no substantive reform has emerged yet.

In an otherwise quiet 2019 for Victoria, there were two important court decisions handed down; one which brought Victoria in line with an earlier New South Wales decision on the invalidity of prematurely served payment claims, and the second which found that an earlier suggestion that an amount claimed in a payment claim for previously-deducted liquidated damages is an 'excluded amount' under the Vic Act, was obiter.

In the Australian Capital Territory, the 'pay now, argue later' nature of the legislation was further entrenched by two decisions which found that to enliven the ACT Act it is sufficient to establish that a construction contract exists between the parties and that one party claims work was performed under it. Whether or not the work was actually performed under the construction contract does not affect a party's entitlement to serve a payment claim (and therefore does not affect an adjudicator's jurisdiction to determine the matter).

We hope you find our comprehensive analysis of the key 2019 security of payment developments useful. We would love to hear from you if you have any questions or feedback.

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New South Wales

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In this section, the *Building and Construction Industry Security of Payment Act 1999* (NSW) is referred to as the **NSW Act**.

New South Wales overview

EMERGING TRENDS

The amendments to the NSW Act and the *Building and Construction Industry Security of Payment Regulation 2008* (NSW) (**Regulation**) that commenced on 21 October 2019 apply to construction contracts entered into on and from 21 October 2019. Construction contracts entered into before this date are still governed by the old regime.

DEVELOPMENTS

The key amendments to the NSW Act are summarised as follows:

Payment terms: The time for payment from a head contractor to a subcontractor has been reduced from 30 business days to 20 business days. The time for payment from a principal to a head contractor is still 15 business days.

Payment claims: A payment claim must expressly state that it is made under the NSW Act. This requirement was previously removed from the NSW Act on 21 April 2014.

Reference dates: The definition of reference date has been removed from the NSW Act and has been replaced by a statutory entitlement to make a payment claim in a named month for work performed during that named month.

Claims after termination: There is now an express right to make a payment claim after termination irrespective of the terms of the relevant construction contract. This overcomes the NSW position followed since *Southern Han.*

Liquidation: A corporation in liquidation will not be able to serve payment claims or seek to enforce them by making an adjudication application. If a company makes an application prior to liquidation, it will be taken to be withdrawn on the date of liquidation. This overcomes the NSW decision of *Seymour Whyte v Ostwald Bros*. Interestingly, companies in receivership or administration will still be entitled to the benefits of the NSW Act.

Withdrawal of an adjudication application: A party can withdraw an adjudication application at any time before the appointment of an adjudicator. A respondent may object to the withdrawal if an adjudicator has already been appointed.

Jurisdictional error: The Supreme Court now has an express right to set aside part of an adjudication determination where that part is affected by jurisdictional error. This means that jurisdictional error may not invalidate the whole of an adjudicator's decision, altering the position that has been upheld in NSW since *Multiplex v Luikens.*

Penalties: The maximum penalty for a head contractors failing to issue a supporting statement with a payment claim has increased from 200 penalty units ($22,000) to 1,000 penalty units ($110,000). Directors and managers can now be held personally liable for certain offences committed by a company.

New enforcement powers: Authorised officers from the Department of Finance, Services and Innovation and Fair Trading NSW investigators are empowered to enforce compliance with the NSW Act and can require a person to produce information or records and answer questions.

FUTURE

We are likely to see an increase in SOP disputes in NSW as a result of these changes. For example, it is not clear how the removal of the definition of reference date and the introduction of a monthly entitlement to payment claims will affect contractual regimes for milestone payments.

In addition, there is ambiguity around the introduction of the right to withdraw adjudication applications. This raises the question as to whether a claimant, upon receipt of submissions objecting to the notice of withdrawal, can respond.

Further, the amended NSW Act makes no adjustment to express timeframes for making an adjudication application. If the act of withdrawal does not prevent a party from seeking determination of the matters the subject of that withdrawal, adjudicator shopping may arise.

A-Tech Australia Pty Ltd v Top Pacific Construction Aust Pty Ltd [2019] NSWSC 404

Where a party is claiming payment under the NSW Act, agreements about how proceedings are to be conducted are unlikely to be enforceable or prevent a party seeking to enforce a statutory debt under the NSW Act.

FACTS

Top Pacific Construction Pty Ltd (**head contractor**) and A-Tech Australia Pty Ltd (**subcontractor**) entered into a contract for the subcontractor to supply and install windows and sliding doors in a development being constructed by the head contractor.

The subcontractor had issued two invoices amounting to $466,120.88, which it argued constituted payment claims that were validly served and to which the head contractor failed to serve payment schedules in time. As is becoming more common, the subcontractor avoided agitating the matter through adjudication and sought to recover the amounts claimed as a debt due under section 15 of the NSW Act.

The head contractor cross-claimed, arguing that the work was defective such that it was entitled to damages for breach of contract and a set-off against any amount that it may be liable to pay in respect of the subcontractor's claim. The subcontractor relied on section 15(4) of the NSW Act in denying that such a cross-claim could be used as a defence to the claim.

The subcontractor applied for summary judgment. The application was resolved by agreement and the court made orders, by consent, that the head contractor was required to pay the amount claimed into court.

The hearing of the subcontractor's claim was separated from the cross-claim. However, the head contractor sought to argue that there was a contractual agreement between the parties which prevented the subcontractor from moving for judgment on its claim before the cross-claim was determined. This contractual agreement was said to have been made by the parties signing the consent orders earlier in the proceedings which provided an agreed resolution of the summary judgment application.

DECISION

The court found in favour of the subcontractor in confirming that:

- the subcontractor was entitled to pursue its claim under the NSW Act despite the consent orders;
- both invoices were valid payment claims under the NSW Act; and
- the head contractor did not respond to either invoice with a payment schedule within the allowable time period.

The court found that although an agreement between A and B for resolution of proceedings by means of consent order may sometimes satisfy the basic requirements of a contract, the court is never bound by such an agreement. Crucially, the court found that no promise was made by the subcontractor, express or implied, that its claim and the head contractor's cross-claim would be conducted together. Even if the subcontractor breached the contract, the claim for breach (if pursued) would not have affected the resolution of the subcontractor's claim for summary judgment under section 15 of the NSW Act.

The court reminded the parties that the *'no-contracting out'* provision in section 34 of the NSW Act would have nullified any otherwise enforceable agreement. The court commented that section 34 extends to render inoperative contracts which regulate the conduct of proceedings under section 15 of the NSW Act, not just the substantive claim.

A-Tech Australia Pty Ltd v Top Pacific Construction Aust Pty Ltd (No 2) [2019] NSWSC 624

Agreements that are made between parties to proceedings relating to claims made under the NSW Act may not be enforceable pursuant to section 34 of the NSW Act which prohibits 'contracting out'.

FACTS

This case follows on from the principal judgement in *A-Tech Australia Pty Ltd v Top Pacific Construction Aust Pty Ltd* [2019] NSWSC 404 summarised above.

In anticipation of an application for a stay of enforcement of the principal judgment by the head contractor, Parker J stood the proceedings over for a short time to allow such an application to be made, which led to the necessity for this second decision.

DECISION

Although the consent orders made contemplated that the subcontractor's claim for judgment and the head contractor's cross-claim would be dealt with together, all that the parties had actually agreed was the dismissal of the subcontractor's application for summary judgment in return for payment into court. There was no express agreement that the two claims be heard together or that the subcontractor would be unable to seek payment in the meantime, and, although in the form of a cross-claim, in substance the head contractor's claim was to be treated as separate proceedings.

The head contractor was solely to blame for the slow progress of its cross-claim and so, absent any positive reasons to the contrary, there was no reason why the subcontractor's claim should be stayed to allow the two to be heard together.

Boss Constructions (NSW) Pty Ltd v Rohrig (NSW) Pty Ltd [2019] NSWSC 374

The performance of significant work by one party and payment by the other of some claimed amounts may not be enough to confirm the existence of a binding legal contract. Establishing the existence of a contract requires evidence of communication of acceptance even where there have been protracted negotiations.

FACTS

Rohrig (NSW) Pty Ltd (**Rohrig**) was engaged by Penrith Anglican College as head contractor for the design and construction of a performing arts centre in Orchard Hills. On 9 November 2017, Rohrig accepted a tender submitted by Boss Constructions (NSW) Pty Ltd (**Boss**) for certain works, including the fabrication and supply of structural steel (**Works**) for the sum of $526,140 (excluding GST). However, Rohrig did not sign the quotation and terms and conditions provided by Boss as part of its tender response.

The parties then entered into lengthy negotiations and discussions as to the terms of the contract under which Boss would be engaged. On 15 November 2017, Boss provided Rohrig with a 'rough schedule' for the Works, with practical completion proposed to occur on 21 March 2018. On the same day, Rohrig emailed Boss to confirm its intent *'to enter into a contract agreement with Boss'* and that it would *'send through your works order and contractual documents by the end of next week'*.

The parties further exchanged formal contract documents, including Works Orders, terms and conditions attached to invoices and a Small Works Package on various occasions between November 2017 and July 2018 (inclusive). Neither party signed the contract documents.

Boss performed a significant part of the Works and Rohrig paid the sum of $535,583. The arrangement between the parties deteriorated, with Boss claiming for unpaid invoices and Rohrig claiming damages following its purported termination of Boss.

On 2 August 2018, Boss issued a notice of suspension of work to Rohrig pursuant to section 27 of the NSW Act resulting from an unpaid payment claim also issued under the NSW Act. Rohrig purported to terminate the contract and engaged a second contractor for the remaining Works.

Boss made a claim for breach of contract against Rohrig for *'outstanding monies owed… for the amount of $224,928.88 works carried out including GST, plus $200,000 for termination of the contract deed'*. Boss relied on 'Proposal 2' in a version of the 'Small Works Package', which was a Rohrig document that had been amended in mark-up by Boss. Proposal 2 offered the *'construction of all sections'* for $632,900.

Rohrig cross-claimed for breach of contract, including liquidated damages and loss of bargain damages, due to the alleged late completion of the Works by Boss and termination requiring the engagement of the second contractor. Rohrig relied upon an earlier 'Works Order' which contained a clause to the effect that the terms contained within would be deemed accepted if Boss performed the Works.

DECISION

Hammerschlag J found that, assessed objectively, neither party had established a binding contract. Accordingly, Boss' claim and Rohrig's cross-claim were dismissed. His Honour found (at [75]) that both of the parties had *'acted on the footing that one would be entered into, but never did'*.

Neither party had sufficiently signalled their acceptance of any document issued by the other. While the disposition of the case turned on its own facts, the following points are significant:

- it was not open to Rohrig to point to the Works Order when it *'itself did not act as if there was a contract in place'* because it continued to insist on Boss executing and returning other contract documents (at [94]);
- Rohrig could not rely on the deemed acceptance by performance clause in the Works Order (at [86] to [89]) because:
  - there was no evidence that the clause came to Boss' attention prior to commencing the Works; and
  - Rohrig's cover letter had insisted that Boss print, read and sign the relevant instruments, implicitly suggesting that there would be no agreement unless the document was signed; and
- it may be appropriate in some instances to infer the existence of a binding contract between parties where there has been lengthy negotiations, but there was no evidence in this case that either party bent to the other's will and there was no agreement in place based on the parties' continuing behaviour (at [103]).

Canterbury-Bankstown Council v Payce Communities Pty Ltd [2019] NSWSC 1419

The importance of giving reasons

When preparing a payment schedule under the NSW Act, you must include all reasons for withholding payment.

More specifically, in circumstances where you do not consider that a claimed variation should be assessed (for reasons such as the relevant work does not constitute a variation under the contract, or you did not direct the contractor to perform the relevant work), it is prudent to include an alternate position which assesses the claimed variation in accordance with the provisions of the contract. If the matter is referred to adjudication and you have not included an alternate position, there is a real risk that you will not be able to advance an alternate valuation, and will have to run an 'all or nothing' response.

Abuse of process – a 'heavy burden'

The decision also reiterated that the concurrent pursuit of a claim for payment in court proceedings and by adjudication under the NSW Act would not constitute an abuse of process. There would need to be an additional circumstance that could generate an abuse of process. The court confirmed that it was a 'heavy burden' to establish an abuse of process.

FACTS

Canterbury-Bankstown Council (**Council**) entered into a building contract with Payce Communities Pty Ltd (**builder**) for the fit out of a library and senior citizens community centre. A dispute arose between the parties as to the extent and cost of associated variations.

Adjudication Determination

In October 2019, the builder served a payment claim on the Council claiming the costs of the disputed variations (**PC 1**). The owner served a payment schedule, scheduling an amount of nil. The builder referred the matter to adjudication, where it was determined that the builder was not entitled any payment on the basis that no reference date was available for PC 1. However, the adjudicator did not deal with the merits of the claim for the disputed variations.

Supreme Court Proceedings

In April 2019, the builder commenced Supreme Court proceedings against the Council seeking payment for, amongst other things, the value of the disputed variations.

Whilst the Supreme Court proceedings were on foot, the final reference date arose under the contract. The builder served its final payment claim on the Council (**PC 2**), which claimed, amongst other things, the disputed variations. In support of PC 2, the builder referred to and relied on the evidence it had adduced for the Supreme Court proceedings.

The Council responded to PC 2 by serving a payment schedule, which scheduled an amount of nil. The Council then sought to restrain the builder from invoking the adjudication regime under the NSW Act in respect of PC 2, on the basis that concurrently pursuing a claim for payment in court proceedings and by adjudication constituted an abuse of process.

DECISION

The Supreme Court found that the concurrent pursuit of a claim for payment in court proceedings and by adjudication under the NSW Act is not, in itself, an abuse of process. There must be some additional circumstance, such as an 'improper or illegitimate purpose' or the use of a process that is 'unjustifiably oppressive' in order to establish an abuse of process. The court determined that the Council had failed to establish that an abuse of process had occurred, leaving it open to the builder to refer the matter to adjudication under the NSW Act (whilst maintaining the existing Supreme Court proceedings).

The court also noted that there was 'real doubt' as to whether the Council could adduce detailed evidence concerning the disputed variations in the event that the builder referred PC 2 to adjudication, as the Council had neither set out detailed reasons for rejecting the variations nor provided an alternate assessment of the valuation of the variations in its corresponding payment schedule.

Canterbury-Bankstown Council v Payce Communities Pty Limited [2019] NSWSC 1803

The accepted principle that a payment claim made under the NSW Act may not be made in respect of more than one construction contract holds true. However, this principle does not apply to a situation where more than one contract governs the agreement for the work to be performed and the price payable for that work.

FACTS

Canterbury-Bankstown Council (**Council**) and Payce Communities Pty Ltd (**builder**) entered into an Umbrella Agreement on 12 September 2014 which provided options. The exercise of those options would result in the builder constructing a number of buildings owned by the New South Wales Land and Housing Corporation.

By the procedure set out in clause 9 of the Umbrella Agreement, if the conditions precedent to the Fit Out Agreement came into effect, the builder was also required to perform fitout works in accordance with the Fit Out Agreement which formed Schedule 2 of the Umbrella Agreement. While the conditions precedent were fulfilled, the parties did not follow the procedure for agreeing the scope of the fit out work, applicable designs and the price in accordance with clause 9 of the Umbrella Agreement. They instead came to an agreement on price via discussions and the exchange of correspondence.

A dispute arose between the parties as to variations and the builder's margin. On 19 September 2019, the builder served its final payment claim for the amount of $1,666,000 (including GST) on the Council pursuant to clause 37 of the Fit Out Agreement. The Council proposed to pay $Nil.

The builder proceeded to adjudication, leading to an adjudication determination that the Council was liable to pay the builder the sum of $1,414,226.11 (including GST) and an application by the Council to set it aside.

The Council contended that the adjudication determination was void for the following reasons:

- the payment claim was invalid because it was made in respect of more than one construction contract;
- due to the exclusion in section 7(2)(c), the NSW Act did not apply to the Umbrella Agreement and Fit Out Agreement because the consideration payable for the work carried out under the contracts was to be calculated other than by reference to the value of the work; and
- the Council was denied natural justice because the adjudicator determined the adjudication application on a basis that was not advanced by either party and failed to give adequate reasons.

DECISION

Ball J dismissed the Council's application on all grounds.

Ground 1 - Payment claim made in respect of more than one contract

Ball J held that, although there were a number of documents that composed the terms to which the builder was to carry out the fit out works, it was clear that there was a single price for the whole of the works.

Therefore, his Honour found that the application of the principle (espoused by McDougall J in *Rail Corporation of NSW v Nebax Constructions* [2012] NSWSC 6) by Douglas J in *Matrix Projects (Qld) Pty Ltd v Luscombe* [2013] QSC 4 (***Matrix***) did not apply in the circumstances. In *Matrix*, the builder had issued a single payment claim in respect of various properties and scopes of work governed by separate purchase orders, being a process which was not allowed under the NSW Act. The facts of the current matter were sufficiently distinguishable.

Ground 2 - Exclusion under section 7(2)(c) of the NSW Act

Ball J held that section 7(2)(c) of the NSW Act did not apply in the circumstances.

Once the Fit Out Agreement came into effect, clause 37.1 of the General Conditions provided for *'periodic payments to be calculated by reference to the value of "WUC done".'* That the scope of work was not agreed in accordance with the Umbrella Agreement procedure did not alter the fact that the parties had agreed on payment terms.

Ground 3 - Denial of natural justice

Ball J did not accept the Council's claim that it was denied natural justice.

The Council submitted that both parties had made their submissions on the basis of the Fit Out Agreement alone. However, Ball J noted that the builder had referred to clauses 9 and 10 of the Umbrella Agreement in its submissions. The relevance of those clauses had therefore been drawn to the adjudicator's attention and he was entitled to take them into account.

As to the Council's argument that the adjudicator failed to give reasons, his Honour held that the adjudicator had considered specific variations via a Scott Schedule which included the statement that he *'accepted the Claimant's submissions'* in respect of the variation. This is all that section 22(3) of the NSW Act requires.

Castle Constructions Pty Ltd v N & R Younis Plumbing Pty Ltd [2019] NSWSC 225

A valid reference date is crucial to enforce a progress claim under the NSW Act. Where a contract specifies a reference date and the contract is terminated before that date is reached, no further reference dates are available under the NSW Act. Any further claims issued will not be enforceable under the NSW Act. As always, this will depend on the facts and an exception may be where a contract explicitly specifies that a further claim will be made on a future date, for example, upon completion of the work under the contract.

FACTS

Castle Constructions Pty Ltd (**builder**) contracted N & R Younis Plumbing Pty Ltd (**contractor**) under three different contracts for works in relation to a building project. The contract in question in this matter covered the provision of hydraulic services (**Contract**).

The dispute concerned a payment claim issued by the contractor on 20 November 2018 for the completion of both works and variations (**Claim**). The Claim took the form of an invoice which stated in the description that the work was 'now complete' and that the invoice represented a payment claim for the purposes of the NSW Act.

The Claim was rejected by the builder, who in response issued a payment schedule to the contractor refusing to make any payment. The dispute was referred to adjudication and the adjudicator reduced the amount of the Claim and awarded the whole of the reduced amount in the contractor's favour.

Prior to the Claim being issued, on 3 October 2018, solicitors acting for the builder issued a letter to the contractor asserting that the contractor had failed to comply with the Contract and its staff had left the site amounting to repudiation of the Contract, and purported to accept the repudiation by terminating the Contract. The contractor responded asserting that the builder's purported termination was invalid. After negotiations between the parties, an agreement was reached on 29 October 2018 that the Contract was 'reinstated and on foot' (**Agreement Letter**). The Agreement Letter provided that a further claim would be made upon completion of the work under the Contract.

However, on 12 November 2018 the builder issued a second letter to the contractor referring to 98 separate allegedly incomplete aspects of the work, and purporting to terminate the Agreement Letter (**Termination Letter**). The contractor responded stating, among other things, that the matters raised by the builder were matters for adjudication.

The Claim was subsequently issued on 20 November 2018.

Valid reference date essential

Section 8 of the NSW Act provides that a contractor under a construction contract is not entitled to a progress claim unless there is an available reference date, which is defined in the NSW Act as either a date specified under the contract or the last day of the named month in which the construction work was first carried out under the contract and the last day of each subsequent named month. This section of the NSW Act has been reviewed by a number of recent decisions such as *All Seasons Air Pty Ltd v Regal Consulting Services Pty Ltd* [2017] NSWCA 289 (analysed in our Construction Law Update, November 2017 edition) which held that a payment claim predating a reference date was invalid.

The adjudication

The Contract provided that payment claims were to be made 'by the 28th day of the month'. The adjudicator interpreted this to indicate that a payment claim could be served prior to such a date, and that any works claimed were to be calculated to the reference date of the 28th day of any month.

The adjudicator was not satisfied that the builder was entitled to terminate the Contract but noted that, regardless of his finding in relation to valid termination, the contractor *'by default has a reference date of 31 October 2018 available to it under the Act'.*

Challenge of the adjudicator's decision

The builder challenged the adjudication on the basis that it terminated the Contract before the Claim was issued by the contractor.

Alternately, that if the Contract was not terminated, then the relevant reference date was 28 November 2018, and that the Claim (dated 20 November 2018) was invalid because it was issued before the relevant reference date.

The contractor disputed both arguments and in addition contended that the adjudicator had the power to resolve the issues so that there could be no jurisdictional error which would permit a court to intervene.

DECISION

Appeal allowed on basis of no valid reference date

The court upheld the builder's review and set aside the adjudicator's determination in favour of the contractor.

The court relied on *Abergeldie Contractors Pty Ltd v Fairfield City Council* [2017] NSWCA 113 (analysed in our Construction Law Update, September 2017 edition) in finding that the court had jurisdiction to consider for itself whether the Claim was supported by a valid reference date.

The contractor's Claim was invalid because it was lodged on 20 November, predating the reference date of 28 November. However, the court noted that the outcome may have been different had it been put to the court that the Claim was valid after the explicit agreement in the Agreement Letter that a further claim would be made upon completion of the work under the Contract.

The court did not decide on whether the Contract was terminated prior to the Claim being issued.

CC Builders (Aust) Pty Ltd v Milestone Civil Pty Ltd [2019] NSWSC 1251

In making a determination under section 22 of the NSW Act, if the adjudicator applies section 20(2B) to exclude a submission of the respondent on the ground that it included reasons that were not advanced in the payment schedule but there is clear evidence that they were, the courts can intervene on grounds of denial of natural justice and procedural unfairness. The nature of the order that may be made will depend upon the court's approach and discretion. The grant of relief may be made subject to conditions.

The case indicates the relevant considerations that may be taken into account by the court before intervening in the determinations made by adjudicators under the NSW Act. The court is usually reluctant to intervene, unless the determination is grossly unreasonable or irrational.

FACTS

The adjudicator determined that CC Builders (Aust) Pty Ltd (**head contractor**) owed an amount of $113,767.87 to Milestone Civil Pty Ltd (**subcontractor**) under various claims. The head contractor brought proceedings challenging the determination and seeking to set it aside on the following grounds:

- denial of natural justice and procedural unfairness;
- jurisdictional error in relation to a claim for carry over work; and
- erroneous allocation of adjudicator's fees.

Denial of natural justice and procedural unfairness

The subcontractor made two extension of time claims under the contract: one from 21 November 2018 to 22 February 2019 (**First EOT Claim**); and the second from 23 February 2019 to 24 April 2019 (**Second EOT Claim**). In the payment schedule, the head contractor stated that since the subcontractor abandoned the work on 23 February 2019, 47 business days were lost. Consequently, the subcontractor delayed the completion of the contract and the head contractor calculated delay costs of $70,500.

Referring to the Second EOT Claim and relying on section 20(2B) of the NSW Act, the adjudicator decided that the head contractor was not allowed to include this reason for withholding in its adjudication response as it did not provide the reason in its payment schedule.

The head contractor contended that the adjudicator's view was erroneous as the head contractor had referred to the Second EOT Claim in its payment schedule. On this basis, the head contractor stated that the adjudicator's failure to consider the head contractor's submission vis-à-vis the Second EOT Claim amounted to a failure of procedural fairness, resulting in a denial of natural justice. The subcontractor acknowledged that error but argued that the failure to take into account the head contractor's submission was not a violation of natural justice contemplated under the NSW Act.

Jurisdictional error in relation to a claim for carry over work

The head contractor alleged jurisdictional error in relation to the claims raised by the subcontractor for carry over work, which were allowed by the adjudicator. Before the adjudicator, both parties disagreed on the assessment of the amount claimed. The subcontractor's claim was that the head contractor had not paid to it all of the monies that had been assessed as due to the subcontractor under the contract.

Adjudicator's fees

The head contractor challenged the adjudicator's decision to direct the head contractor to pay all of his fees, even though the subcontractor did not recover the whole amount it claimed from the head contractor.

DECISION

Denial of natural justice and procedural unfairness

The court allowed the head contractor's claim in relation to denial of natural justice and procedural unfairness. The court noted that decisions on whether a submission is duly made is a matter for the adjudicator, not the courts, to determine. However, a decision that a submission was not duly made which is not reasonable or is without any foundation will not be immune from correction by the court. Justice Rein at [32] explained that the case involved the intersection of two important principles: first, the clear restriction of intervention by the court in adjudication under the NSW Act; and second, the need for the measure of natural justice that the NSW Act requires to be given and adherence to the requirements of section 22.

When the adjudicator finds that a submission is not duly made for reasons that are reasonable (albeit erroneous), it is not for the court to determine whether or not the adjudicator was correct to so conclude and the adjudicator's decision would not constitute a denial of procedural fairness. However, if the adjudicator does not explain how he had arrived to exclude the submission, when evidence shows that such submission was raised in the payment schedule, then there is lack of reasonableness and rationality. The decision to exclude the submission amounts to procedural unfairness establishing jurisdictional error. In this case, the failure to consider the submissions on the issue of the Second EOT Claim, duly made, constituted jurisdictional error.

Jurisdictional error in relation to a claim for carry over work

The court rejected the head contractor's claim that there was a jurisdictional error in relation to the claim for carry over work. The court relied on an assessment of claim produced by the head contractor, which constituted an admission identified by the adjudicator. The adjudicator relied on this document to resolve the dispute on the carry over claim. There was no jurisdictional error.

Adjudicator's fees

The court noted that the question of fees is a matter of discretion. While there have been no cases on the question of award of an adjudicator's fees under the NSW Act, there have been cases where the successful party has recovered all of its costs, even on matters on which it was unsuccessful[1]. Given that the head contractor was successful in its claim for procedural unfairness and the subcontractor was successful in the claim relating to carry over work, the court directed the head contractor to accept liability for 50% of the adjudicator's fees, in accordance with section 29 of the NSW Act.

Consequences

While the court agreed with the head contractor on its claim, it did not set aside the entire determination. The court relied on Justice McDougall's approach in *Emergency Services Superannuation Board v Davenport* [2004] NSWSC 697 where the plaintiff succeeded on two of its challenges but failed on the third. Justice McDougall said at [71] that *'the grant of relief in the nature of the prerogative relief is discretionary'*. Given that the effect of the successful challenges would have been to set aside the entire determination, thereby depriving the claimant of the benefit of those parts of the determination that were not challenged, Justice McDougall made it a condition on the grant of relief that the respondent pay the unaffected amount of the determination.

Using this approach, the court granted the head contractor the relief it sought but on condition that it would not re-agitate the carry over work claim in any further adjudication application or seek to recover the carry over amount from the subcontractor other than at a final hearing pursuant to section 32 of the NSW Act.

[1] See *Waters v P C Henderson (Aust) Pty Ltd* (unreported CA (NSW), *Kirby P, Mahoney and Priestley JJA*, 6 July 1994) cited in *James v Surf Road Nominees Pty Ltd [No 2]* [2005] NSWCA 296.

Galileo Miranda Nominee Pty Ltd v Duffy Kennedy Pty Ltd [2019] NSWSC 1157

Contractors should carefully consider the nature of claimed amounts before issuing suspension notices.

Under section 27(1) of the NSW Act, a claimant is able to suspend the works if it has not been paid the scheduled amount under section 16 of the NSW Act, being the amount of a progress payment as set out in a payment schedule. The court found that non-payment of interest on an overdue progress payment does not entitle a contractor to suspend work under the NSW Act.

FACTS

Galileo Miranda Nominee Pty Ltd (**principal**) engaged Duffy Kennedy Pty Ltd (**contractor**), under a design and construct contract (**contract**), as the builder for two residential tower blocks containing 197 units. A critical remaining step to achieving practical completion was for the contractor to obtain an occupation certificate. The principal certifier required the contractor to attend to the following before it would issue the occupation certificate:

- provide a penetration schedule, indicating where pipes, wires or other services penetrated through structural walls; and
- increase the height of balcony balustrades to comply with Building Code of Australia (**BCA**).

The contractor argued that it had provided the relevant information regarding the penetration tests to the principal certifier and that the balustrades were compliant with BCA regulation.

As date for practical completion was not reached, the principal exercised its right to impose liquidated damages on the contractor.

The contractor proceeded to issue the principal with a notice suspending the works on the grounds that a progress payment had not been made pursuant to the NSW Act. This occurred as the principal made a late progress payment to the contractor, which accrued interest. When making the progress payment, the principal failed to pay the amount of accrued interest. The amount of interest was not large, being a few hundred dollars.

The principal subsequently issued a default notice on the grounds that, amongst other alleged breaches, the contractor had failed to complete the works in a competent manner (**default notice**). The principal suspended the works and sought to take the works out of the contractor's hands (**take out notice**).

The main issues for determination by the court were:

- whether the contractor had:
  - a statutory entitlement to suspend the works at any time when there was unpaid interest; or
  - the right to rely on the provisions of the contract in suspending performance for a 'reasonable cause';
- whether the interest payable on the late progress payment was considered to form part of the scheduled amount; and
- whether the principal validly issued the default notice and take out notice to the contractor.

DECISION

The NSW Supreme Court found in favour of the principal.

The contractor was in breach of its obligation to proceed with the works in a diligent manner, as it was refusing to comply with the requirements of the principal certifier for the issue of the occupation certificate.

The court also found that the non-payment of the interest portion, however frustrating to the contractor, did not leave the contractor without a remedy. On a proper construction of section 27(2) (which entitles the contractor to suspend in the case of non-payment), the 'amount that is payable' under the NSW Act is the amount specified in the payment schedule. This does not include interest and does not include the interest entitlement under section 11.

The court considered that the meaning of 'reasonable cause' should be construed in a commercial manner. Accordingly, the failure of the principal to pay the interest amount was disproportionate to suspending the works and did not constitute 'reasonable cause'.

The principal validly issued the default notice and take out notice to the contractor.

Grandview Ausbuilder Pty Ltd v Budget Demolitions Pty Ltd [2019] NSWCA 60

In this case, the New South Wales Court of Appeal considered an appeal from the New South Wales Supreme Court for the dismissal of an application to set aside a statutory demand under section 459 of the *Corporations Act 2001* (Cth).

This case reiterates the importance of acting quickly to establish whether you have an offsetting claim when facing a statutory demand and confirms that an offsetting claim must be 'genuine' within the meaning of the Corporations Act for the court to consider it. It cannot be *'manufactured or got up simply for the purpose of defeating the demand made against the company'*.

FACTS

MinterEllison covered the case before the Supreme Court in our December 2018 – February 2019 Construction Law Update, but for ease of reference we summarise the facts again here.

Budget Demolitions Pty Ltd's (**subcontractor**) served a statutory demand on Grandview Ausbuilder Pty Ltd (**head contractor**) in respect of two unpaid progress claims made under the NSW Act. The head contractor sought to set aside the statutory demand under section 459G of the Corporations Act. The head contractor issued a payment schedule for the first payment claim, providing for payment of the full amount claimed, but never made payment. The head contractor did not respond to the second payment claim within the ten-day period allowed under section 14(4) of the NSW Act.

Despite the head contractor's admission that the subcontractor was owed the sums contained within the payment claims, the subcontractor did not seek judgement against the head contractor (although it was open to the subcontractor to do so under section15(2)(a)(i) of the NSW Act).

At first instance, the head contractor maintained that it had three separate offsetting claims cumulatively exceeding the amount of the statutory demand, being:

- the Liquidated Damages Claim for delay in completion (said by the head contractor to be valued at $330,000);
- the Milestone Damages Claim for failure to perform certain works at certain times (said by the head contractor to be valued at $3.816 million); and
- the Loss of Bargain Damages Claim for the cost to complete the works to put the head contractor in the position it would have been in if the subcontract had completed (said by the head contractor to be valued at $1.1 million).

In the Supreme Court, Parker J accepted that the head contractor had established an offsetting claim of $220,000 in respect of the Liquidated Damages Claim; that finding was not challenged in these proceedings. However, Parker J also held that neither the Milestone Damages Claim nor the Loss of Bargain Damages Claim had been established to the requisite level. In the appeal, the head contractor sought to challenge Parker J's conclusions that these two heads were not available to it as offsetting claims within the meaning of section 459H(1)(b) of the Corporations Act.

DECISION

Leave to appeal was granted but the appeal was be dismissed with costs.

Milestone Damages Claim

In reaching the decision that the Milestone Damages Claim failed, Parker J relied on the 'Graywinter Principle', taken from *Graywinter Properties Pty Ltd v Gas & Fuel Corp Superannuation Fund* (1996) 70 FCR 452 which provides that a plaintiff cannot rely on a new ground at hearing to set aside a statutory demand that had not been set out in the affidavit provided with the application under section 459G of the Corporations Act. The new ground was that rectification of the subcontract between the parties was required to correct the fact that no rate of liquidated damages for failing to meet the milestone completion dates had been included in the subcontract. When this was pointed out at the initial hearing, counsel for the head contractor said that the intention was to rely on the rectification principle. The affidavit submitted with the application to set aside the statutory demand did not set out any material facts that could sustain a claim to rectify the subcontract.

In the Court of Appeal, counsel for the head contractor attempted to shift the focus away from the argument that rectification was required but instead towards an argument that the subcontract could in fact be construed so as to allow the Milestone Damages to be quantified. The Court of Appeal rejected this argument and held that Parker's J application of the Graywinter Principle was correct and there was no viable Milestone Damages Claim that could be offset.

Loss of Bargain Damages Claim

Section 459H(5) of the Corporations Act provides that a company may apply to the court for an order setting aside a statutory demand provided that there is a ***genuine dispute*** between the company and the respondent about the existence or amount of a debt to which the demand relates.

At first instance, Parker J did not consider the application of section 459H(5) in detail because he found that the Loss of Bargain Damages amounted to a negative figure and therefore that the head contractor had failed to establish any claim under this head. The Court of Appeal disagreed with this and found that, on the face of the facts, the head contractor appeared to have raised an offsetting claim for the Loss of Bargain Damages which exceeded the arguable value of the statutory demand, meaning a basis for setting it aside appeared to have been made out.

However, the Court of Appeal went on to look at the case law surrounding the definition of the word 'genuine' in the context of an 'offsetting claim' in section 459H(5) of the Corporations Act. The Court of Appeal relied on *Ozone Manufacturing Pty Ltd v Deputy Commissioner of Taxation* [2006] SASC 91 where it was said that the test of whether an offsetting claim exists is the *'same as for a genuine dispute, that is to say, the claim must be bona fide and truly existing in fact and that the ground for alleging the existence of the dispute are real and not spurious, hypothetical, illusory or misconceived'*. The Court of Appeal also referred to *JJMMR Pty Ltd v LG International Corporation* [2003] QCA 519 in which it was said that *'the claim to set off against the debt demanded must not have been manufactured or got up simply for the purpose of defeating the demand made against the company. It must have an existence that is objectively demonstrable independently of the exigencies of the demand that evoked it'*.

The Court of Appeal found on this basis that the relatively low threshold to be satisfied to establish an offsetting claim had not been met by the head contractor. On the facts of the case, the head contractor relied on an argument that non-completion of the works by 12 December 2017 amounted to a breach of contract and that the subcontract had terminated at that point. The Court of Appeal, however, found that the head contractor's actions and statements were *'wholly inconsistent with any intention to terminate the Sub-Contract'*. When the subcontractor did not meet the date for practical completion, there had been no complaint from the head contractor, and the head contractor instead confirmed that it looked forward to the subcontractor resuming its work after the shutdown period imposed by the head contractor. As such, the head contractor's contention that it had a 'plausible' claim for Loss of Bargain Damages could not be accepted as the head contractor had affirmed the subcontract (and so it was still open for the head contractor to seek specific performance of the subcontract and secure the bargain).

Hanson Construction Materials Pty Ltd v Brolton Group Pty Limited [2019] NSWSC 1641

It is not within an adjudicator's jurisdiction to determine an alternate reference date to the reference date proposed by the parties, unless the adjudicator gives the parties the opportunity to make submissions on the matter.

It may have previously been understood from earlier decisions of the court that a claim for payment should only be made for work performed up to the relevant reference date. Obiter comments in this decision support a contrary position that, subject to the terms of the contract, a claim for payment supported by a reference date could include claims for work performed after the reference date.

FACTS

Hanson Construction Materials Pty Ltd (**principal**) engaged Brolton Group Pty Limited (**contractor**) to build a quarry processing plant for a guaranteed maximum price of $85M. The principal terminated the contract on 3 October 2018.

Reference dates under the contract accrued on the last Tuesday of each month. On 28 August 2019, the contractor submitted a payment claim for $6.3M which comprised a number of previous claims, a number of subcontractor invoices for work performed during the period 25 September 2018 to 10 October 2018, and a claim for interest for delayed payment up to 28 August 2019.

The principal served a payment schedule stating the amount it intended to pay as 'nil', following which the contractor lodged an adjudication application for the claimed amount. In its adjudication response, the principal identified the appropriate reference date as being 25 September 2018, but argued that the adjudicator did not have jurisdiction to adjudicate the claim as the amounts claimed were not supported by that reference date (given that some of the amounts claimed were in relation to works performed after the reference date and could not be supported by any later reference date as no further reference dates arose under the contract following termination).

The adjudicator came to an alternate conclusion that the reference date arose on 23 October 2018 as, in his (erroneous) belief, the contract expressly provided for a reference date after termination.

The principal sought a declaration that the adjudication determination was void. In the Supreme Court of New South Wales, the contractor initially argued that the adjudicator was entitled to select a reference date of 23 October 2018; however, the contractor conceded that this was incorrect during the course of the hearing. As such, during the course of the hearing, both parties agreed that the adjudicator had erred and the proper reference date for the claim was 25 September 2018, although the contractor said that this was not a reviewable error.

DECISION

The court held that the determination was void as it was not open to the adjudicator to determine an alternate reference date when the parties were in agreement as to the relevant reference date.

Further, the court affirmed that there will be a denial of natural justice where an adjudicator determines a dispute on a basis for which neither party has contended without giving the parties an opportunity to make submissions on the matter. In this case, the court found that it was not open in the circumstances for the adjudicator to choose a reference date of 23 October 2018 without giving the parties an opportunity to make submissions on that choice.

No conditional relief

The court held that the error that the adjudicator made went to the heart of the payment claim and altered the lens through which the payment claim was assessed. In order to 'sever' the adjudicator's determination in a way that could provide conditional relief would mean that the court would have to decide various matters on the merits of each party's submissions, which was not part of the court's jurisdiction in this matter. Therefore, no conditional relief was granted.

Claims for work performed after the reference date

In obiter, the court suggested that there is nothing in the Building and Construction Industry Security of Payment Act 1999 (NSW) or *Southern Han* which requires that, for a payment claim to be valid, it must only relate to work done before the reference date in respect of which the payment claim was served.

Icon Co (NSW) Pty Ltd v AMA Glass Facades Pty Ltd [2019] NSWSC 250

Contractors: This decision in is a stark reminder to contractors seeking judicial review of an unfavourable adjudication determination to ensure that they bring proceedings within the three month period prescribed by r 59.10 of the *Uniform Civil Procedure Rules 2005* (NSW) (UCPR) or otherwise risk being statute barred.

Adjudicators: This decision also suggests that the NSW Act requires adjudicators to follow the contractual interpretation adopted by earlier adjudicators in respect of later claims arising from clauses previously interpreted over the course of the same project, regardless of whether that contractual interpretation is erroneous. A failure to do so may constitute grounds to invalidate the determination if it can be shown that it gives rise to an issue estoppel.

FACTS

In December 2015, Icon Co (NSW) Pty Ltd (**head contractor**) and AMA Glass Facades Pty Ltd (**subcontractor**) entered into a construction contract for the installation of a façade and associated works (**Works**) on the Opal Tower in Sydney. During the course of the Works, the head contractor orally directed the subcontractor to perform a series of variations, but did not confirm these directions in writing.

In three separate adjudications concerning variations (heard by 2 separate adjudicators), the adjudicators were required to determine:

1. the subcontractor's rights to payment for the orally-directed variation works; and
2. the head contractor's rights to set off liquidated damages against the subcontractor's payment claims.

First adjudication

In March 2018, the adjudicator determined that in respect of variations 2 to 24:

- the subcontractor was entitled to have the contract sum adjusted;
- the head contractor was not entitled to set off liquidated damages as the works had not achieved practical completion; and
- the adjudicated amount was $1.9 million.

Second adjudication

In August 2018, a different adjudicator determined that in respect of variations 26 to 31:

- the subcontractor was not entitled to have the contract sum adjusted, as the variation directions were neither in writing nor confirmed in writing;
- the head contractor was entitled to set off liquidated damages against the subcontractor's payment claims; and
- the adjudicated amount was $nil.

Third adjudication

In October 2018, the first adjudicator was asked to consider a payment claim that was indistinguishable from the payment claim the subject of the second adjudication. The adjudicator determined that:

- the subcontractor was not barred from claiming for the variations;
- the head contractor was not entitled to set off liquidated damages against the subcontractor's payment claims; and

- the adjudicated amount was $660,000.

These adjudication determinations gave rise to the following issues:

1. whether the subcontractor was out of time to pursue judicial review of the unfavourable second adjudication determination pursuant to r 59.10 of the UCPR;
2. whether the payment claim the subject of the third adjudication amounted to an abuse of process on the basis that it was indistinguishable from the payment claim the subject of the second adjudication; and
3. whether adjudicators are required to follow the contractual interpretation adopted by earlier adjudicators in respect of later claims made in relation to the same project.

DECISION

Time Barred

As the second and third adjudication determinations dealt with an identical payment claim, it was found that if the second determination was valid, then the third determination must be invalid. Because the subcontractor did not challenge the second determination within the time prescribed by r 59.10 of the UCPR, the second determination was valid.

Abuse of process

The decision reaffirmed that the repetitious re-agitation of a payment claim will amount to an abuse of the processes of the NSW Act.

Binding expressions of opinion

In obiter, Steven J stated that:

> *"…it was not appropriate for an adjudicator to, in effect, dissent from earlier adjudicative expressions of opinion in relation to the same provisions of the same contract between the same parties in adjudications arising from the same project."*

In support of this statement, Steven J referred to the intended operation of the NSW Act, finding that such behaviour was inconsistent with:

1. the objective of the NSW Act, which is to *'establish [a] coherent, expeditious and self-contained scheme, designed to act quickly and achieve the result that each party knows precisely where they stand at any point of time'*; and
2. the intention of s 22(4), which should not be read as an exhaustive statement of the matters determined by an earlier adjudication that are binding on a subsequent adjudicator.

Steven J went on to opine that a failure to follow the contractual interpretation adopted by earlier adjudicators in respect of later claims will constitute grounds to invalidate a determination if it gives rise to an issue estoppel. He noted that an issue estoppel will arise in circumstances where the contractual interpretation of the disputed provision is 'fundamental' in the sense that it is 'legally indispensable to the conclusion'. We consider that in most instances, the contractual interpretation of a disputed provision will be 'fundamental' to the determination.

However, these comments were made in obiter, and whilst they are persuasive, they do not constitute binding precedent.

Impero Pacific Group Pty Ltd v Bonheur Holdings Pty Ltd [2019] NSWSC 286

In circumstances where a principal terminates a contract for convenience, contractors have until recently been unable to rely on the provisions of the NSW Act to submit a progress claim for any works performed between the last accrued reference date under the contract and the date of termination, on the basis that no reference date has accrued for those works. However, this decision overturns that position such that, depending on the terms of the contract, termination for convenience will generally give rise to a 'fresh' reference date which triggers the contractor's entitlement to claim for these works.

Significance: This decision has significant practical implications in circumstances where a principal terminates a contract for convenience under the unamended NSW Act.

Contractors: Contractors should submit a progress claim for works performed between the last accrued reference date under the contract and the date of termination. If the termination for convenience clause does not expressly provide a reference date, contractors should rely on section 8(2)(b) which provides the reference date will be the last day of the relevant month.

Principals: Principals should expect to receive a progress claim for works performed by the contractor between the last accrued reference date under the contract and the date of termination. Principals should check that the progress claim does not claim any amounts that are beyond the scope of the NSW Act (including costs for the removal of labour and plant from site). If these items are claimed, the principal should raise this in its payment schedule.

However, both contractors and principals should be aware that upon the commencement of the amendments to the NSW Act made by the *Building and Construction Industry Security of Payment Amendment Act 2018* (NSW), termination of a construction contract by whatever means will entitle the contractor to a progress claim for work done up to the date of termination.

FACTS

Bonheur Holdings Pty Ltd (**principal**) entered into a construction contract with Impero Pacific Group Pty Ltd (**contractor**) in relation to the construction of a residential building. The construction contract was similar to the Australian Standard AS4902-2000.

On 29 October 2018, the principal exercised its right to terminate the contract for convenience pursuant to clause 39A of the contract.

On 27 November 2018, the contractor issued a progress claim in respect of works performed between the last accrued reference date under the contract (being 25 October 2018) and the date of termination (being either 29 or 30 October 2018). The principal did not serve a payment schedule within the time prescribed by the NSW Act. Accordingly, the contractor sought judgment for the claimed amount in the NSW Supreme Court.

The principal resisted the entry of the judgment under the NSW Act on the basis that:

- there was no available reference date for the progress claim pursuant to section 8 of the NSW Act; and
- even if the contractor did have a right to a progress claim, the right was limited to only part of the amount claimed because the contractor had claimed for items beyond the scope of the NSW Act. On this basis, it was contended that no judgment could be obtained for the full claimed amount.

DECISION

Reference Dates for Termination for Convenience

Prior to the decision in *Impero Pacific Group Pty Ltd v Bonheur Holdings Pty Ltd*, the position at law was that a contract does not, after termination, continue to provide reference dates in respect of construction work carried out under the contract prior to its termination (see for example the decisions of Ball J in *Patrick Stevedores* and Dark J in *Omega House*).

This general position has been clarified, and now the termination of a contract for convenience will generally give rise to a 'fresh' reference date for the purposes of the NSW Act on the basis that:

- the clear intent of clause 39A (and presumably similar clauses) was that the contractor would be entitled to payment for the period up to termination in the same manner as it was entitled to progress payments; and
- the obligation under clause 39A.2 to pay costs associated with termination for convenience survives the termination, which means that the parties remain in contractual relations with each other, even though building work ceases. Therefore, reference dates continue to accrue.

Costs payable to the contractor following termination for convenience

The decision in *Impero Pacific Group Pty Ltd v Bonheur Holdings Pty Ltd* confirmed that a contractor may only claim for items that are within the scope of the NSW Act, namely items that represent payment for construction work or the supply of related goods or services under the contract. Items that fall outside of this scope include costs of removing labour and plant from site, costs of plant or material that have been ordered but not supplied and damages for breach of contract.

If a matter proceeds to adjudication under the NSW Act, and in the course of determining the amount of the progress payment to which the claimant is entitled, the adjudicator makes an error in interpreting the progress claim, the contract or in applying the NSW Act, and erroneously awards amounts for items outside the scope of the NSW Act, this error will not be jurisdictional and therefore cannot be used to invalidate the determination.

Iskra v MMIR Pty Limited [2019] NSWCA 126

The issue in this case was whether an adjudicator failed to value the work having regard to the terms of the contract. An adjudicator's construction of the terms of a contract or assessment of the value claimed in a payment claim is solely within the adjudicator's jurisdiction. They are not matters which are open for judicial review, so any such error in considering these matters will not constitute jurisdictional error and cannot form a basis upon which an adjudication can be quashed.

FACTS

In 2016, MMIR Pty Limited (**principal**) engaged Mr Iskra (**builder**) to perform construction works at its restaurant and function centre in Wollongong. In September 2018, the builder issued a payment claim in accordance with the NSW Act to the principal for payment for works performed by himself and by subcontractors on a 'do and charge' basis and for a 6% project management fee. The principal served a payment schedule in response, in which it denied that any amount was owed on the basis that the amounts claimed did not relate to the building works and were grossly excessive. The builder applied for adjudication of the payment claim.

Adjudication

In its adjudication response, the principal asserted that the builder, in making the claim, had either fraudulently claimed, inflated the claim or was negligent in carrying out the works.

The adjudicator determined that the builder was entitled to payment as set out in the payment claim and in accordance with the contract. There was ample evidence that *'the works as claimed were undertaken'* and that the builder had provided sufficient information and methodology as to how he arrived at the amount claimed. The adjudicator made reference to the communications between the parties, the statutory declaration provided by the builder and supporting documentation, including an index cross-referencing the underlying subcontractor invoices for all works on the project. In contrast, the adjudicator stated that the principal had not provided any evidence, submissions or information to support its assertions and to justify the withholding of payment.

The principal appealed to the Supreme Court seeking a declaration that the determination was void on the basis that the adjudicator had failed to perform his statutory function and to consider whether the work the subject of the claim had been performed and, if so, to assess the value of the work considered to be performed. The principal argued that the adjudicator had:

- concluded that there was nothing to support the principal's contentions in its adjudication response and that, on this basis, the adjudicator had proceeded to automatically award the builder the full amount claimed; and
- failed to make any rational analysis of whether the amount claimed was justified.

Supreme Court agrees with the principal

- Parker J quashed the adjudication determination and held that the adjudicator did not consider:
- the value of the work undertaken by the builder having regard to the terms of the contract and the reasonable value of the works undertaken; and
- the reasonableness of the charges made by the builder for work done himself or the 6% project management fee.

The primary judge held that the adjudicator committed jurisdictional error by failing to form a view as to what was properly payable by having regard to the true construction of the contract and the true merits of the claim, as required by section 22(2) of the NSW Act.

Here is a link to our March 2019 report of the first instance decision (also see our note below on *MMIR Pty Limited v Iskra* [2019] NSWSC 35).

The builder appealed to the Court of Appeal. The key issues on appeal were whether the primary judge erred:

- in finding that the adjudicator failed to consider the validity and merits of the claim;
- in finding that the adjudicator had failed to form a view as to what was properly payable in relation to the progress claim because the adjudicator had not had regard to the true construction of the contract and the true merits of the payment claim; and
- in concluding that the adjudicator had committed jurisdictional error.

DECISION

The court allowed the appeal, set aside the primary judge's decision and held that the adjudicator's determination was valid, resulting in an order that the principal pay the amount claimed in the payment claim.

Jurisdictional error

The court held that even if the adjudicator's construction of the contract was erroneous, it would not constitute jurisdictional error. Recognition was given to the fact that most adjudicators are not lawyers, and it is not necessary for them to use legal language.

The court held that the adjudicator had engaged in a process of evaluation sufficient to satisfy section 22 of the NSW Act by having regard to the matters specified in the NSW Act in the context of assessing the value of the work carried out.

In coming to this conclusion, the court held that:

- the adjudicator had expressly stated in the determination that he considered all of the principal's materials and subsequently rejected all of the principal's contentions, including that the amount claimed was *'grossly excessive'*; and
- having rejected the principal's contentions disputing the amount claimed, the adjudicator did not simply allow the claim in full automatically. Rather, the adjudicator expressly directed his attention to the matters required by the NSW Act by referring in the determination to the materials that were considered, such as submissions, statutory declarations and correspondence between the parties.

The court reiterated that it was not part of the court's function to determine whether the adjudicator's assessment of the *'reasonable value'* of the works was erroneous.

Lendlease Engineering Pty Ltd v Timecon Pty Ltd [2019] NSWSC 685

An 'other arrangement' within the meaning of 'construction contract' as defined in section 4 of the NSW Act, must be an arrangement that gives rise to a legally binding obligation, although it need not be contractual in nature.

This decision does not follow earlier NSWSC decisions that an 'other arrangement' is not required to be a legally enforceable arrangement in order to fall within the ambit of the NSW Act. The decision provides a greater degree of certainty to parties who enter into negotiations but do not conclude them by the formal execution of a contract. Care is however still required when seeking to make arrangements for the undertaking of construction work, so that the parties are aware of the rights and obligations that such arrangements may confer under the NSW Act.

FACTS

The unincorporated joint venture formed by Lendlease Engineering Pty Ltd and Bouygues Construction Australia Pty Ltd (**head contractor**) is the head contractor on the NorthConnex Project.

The head contractor was the respondent to an adjudication application made by Timecon Pty Ltd (**Timecon**) relating to the disposal of tunnel spoil to a site in Somersby, NSW.

The adjudicator made an adjudication determination in favour of Timecon.

The head contractor commenced proceedings to have the adjudication determination set aside on the basis of jurisdictional error. The head contractor contended that there was no 'contract or other arrangement' between it and Timecon, and if there was a 'contract or other arrangement', it was not one under which Timecon undertook to carry out construction work or to supply related goods and services for the head contractor.

DECISION

An arrangement must give rise to a legally binding obligation but need not be contractual in nature

Ball J considered and did not follow the relevant authorities below in which the respective courts took the view that the 'arrangement' need not be legally binding:

- *Okaroo Pty Ltd v Vos Construction and Joinery Pty Ltd* [2005] NSWSC 45 (per Nicholas J);
- *Machkevitch v Andrew Building Constructions* [2012] NSWSC 546 (per McDougall J); and
- *IWD No 2 Pty Ltd v Level Orange Pty Ltd* [2012] NSWSC 1439 (per Stevenson J).

In any event, his Honour found that the facts of each of the above cases suggested that the relevant arrangement in each case was in fact a legally binding arrangement.

None of the above cases had considered the effect of section 32 of the NSW Act on the issue. This section renders ultimately returnable any payment made resulting from the adjudication of a payment claim where the claimant is found, in civil proceedings, to have no underlying right to be paid. His Honour held that in light of section 32, it makes no sense to interpret the NSW Act as creating a right to a progress claim where the claimant has no underlying right to be paid any amount at any time, as the purpose of the NSW Act would not be advanced by such an interpretation.

On the facts of the case, his Honour decided that there was no contract or other arrangement between the head contractor and Timecon for the disposal of tunnel spoil from the NorthConnex Project. Consequently, the adjudication determination was declared void.

His Honour also found, in obiter, that even if he had concluded that there was a contract or other arrangement between Timecon and the head contractor, he would not have concluded that the contract or other arrangement was for construction work at the Somersby site, or for the supply of related goods and services in relation to construction work carried on as part of the NorthConnex Project.

Note: MinterEllison acted for the head contractor.

MMIR Pty Limited v Iskra [2019] NSWSC 35

An adjudication application must be determined on the merits of the claim set out in the payment claim. The adjudicator must be satisfied that the claimant has proved its assertions in the payment claim before the adjudicator needs to consider whether the respondent has proved the assertions set out in the payment schedule.

FACTS

The plaintiff, MMIR Pty Ltd (**owner**) contracted the first defendant, Ganni John Iskra (**builder**) to carry out works in relation to the upgrading and refurbishment of a restaurant and fitness centre under an oral 'do and charge' contract.

The builder submitted a payment claim to the owner dated 4 September 2018, which included an amount for work carried out together with an amount for a 6% 'project management fee'. The payment claim was accompanied by various subcontractor invoices totalling a portion of the total amount claimed under the payment claim, with the remainder representing work carried out by the builder himself and the project management fee.

The owner issued a payment schedule for a nil balance and the claimant subsequently filed an adjudication application in respect of the payment claim.

In the adjudication application the owner claimed that it had not had the opportunity to analyse and verify the builder's payment claim and that the owner believed the builder had either made fraudulent claims, inflated its claim or acted negligently in carrying out the building works.

In the determination, the Adjudicator noted:

- that a party who makes an assertion has the onus of proof in proving such an assertion;
- as the owner had provided no evidence in relation to its assertions or to any amounts previously paid, the owner failed to discharge its onus of proof in withholding the claimed amount; and
- the builder had demonstrated an entitlement under the contract together with sufficient information and methodology as to how it arrived at the amount claimed.

The Adjudicator awarded the builder the full amount claimed in the payment claim.

The owner applied to set aside the Adjudicator's determination.

DECISION

Parker J allowed the owner's application and quashed the Adjudicator's determination on the basis of jurisdictional error. Parker J concluded that the Adjudicator incorrectly determined the application on the basis of whether the owner could prove the assertions set out in the payment schedule rather than considering the validity of the claim made in the payment claim itself. Parker J noted that the time spent by the Adjudicator considering the application was not evidence that the Adjudicator had properly considered the validity of the builder's claim and even if the Adjudicator had considered each individual invoice attached to the application, this would not be enough.

There was no evidence or inference that the Adjudicator considered the reasonableness of the claims made by the builder for the work done by the builder himself or the reasonableness of the 6% project management fee. For these reasons, the Adjudicator failed to form a view of what was properly payable having regard to the true construction of the contract and the true merits of the claim.

The builder was subsequently successful in its appeal of the decision (see our note on *Iskra v MMIR Pty Limited* [2019] NSWCA 126 above).

MN Builders Pty Ltd v MMM Cement Rendering Pty Ltd [2019] NSWDC 734

Summary judgment will be granted to a party where the other party has not issued a payment schedule in response to a tax invoice constituting a 'payment claim' for the purposes of the NSW Act and there are no triable issues.

Once it has been accepted that a respondent has actually received a payment claim, compliance with section 31 of the NSW Act, regarding service of the payment claim, becomes redundant.

FACTS

MN Builders Pty Ltd (**builder**) and MMM Cement Rendering Pty Ltd (**subcontractor**) entered into a subcontract for rendering services in connection with building works at Liverpool, NSW.

The subcontractor issued seven tax invoices for the work performed pursuant to the subcontract and all but the last invoice was paid by the builder. The builder alleged that in accordance with a quote from the subcontractor, the price was calculated per square metre and the subcontractor had been overpaid.

The subcontractor claimed that it charged on a lineal basis rather than a per square metre basis in accordance with a verbal agreement with the builder's foreman since most of the surfaces were less than $1m^2$.

The subcontractor contended that its invoice constituted a 'payment claim' for the purposes of the NSW Act. As the builder did not serve a payment schedule within 10 business days, the subcontractor said that the builder was liable to pay the full amount claimed in the 7^{th} invoice as a debt due.

The builder denied liability on the basis that no such oral agreement had been entered into and that in any event its foreman did not have authority to enter into such an agreement on behalf of the builder. For this reason, the builder said that it was not party to a 'construction contract' for the purposes of the NSW Act.

The builder also denied that the payment claim had been validly served. The subcontract stipulated that claims were to be served by email to the builder's accounts section. The builder said that the claim had been provided by hand to the builder's foreman who was not the 'person' who could be served with the claim under section 31 of the NSW Act. But it was accepted that the builder's foreman had forwarded a copy to the builder's accounts section.

As such, the builder argued that the subcontractor's application for summary judgment must fail on the basis of two triable issues:

- what was the 'construction contract' for the purposes of the NSW Act; and
- whether and how the payment claim was served.

DECISION

The District Court granted summary judgment for the subcontractor pursuant to the NSW Act. In coming to its decision, the court did not accept that any triable issues existed. In particular:

- although there was a dispute about the verbal agreement as to the method for calculating payment, the underlying 'construction contract' entitled the subcontractor to make a claim under the NSW Act; and
- taking into account the statutory purpose of the NSW Act, once it is accepted that the claim had actually been received by the respondent, questions about compliance with the facultative regime in section 31 of the NSW Act become redundant.

Modog Pty Ltd v ZS Constructions (Queenscliff) Pty Ltd [2019] NSWSC 1743

A payment claim made under the NSW Act can be constituted by seven emails attaching invoices in relation to project management services and third party trades.

FACTS

Wyndora 36 Pty Limited (**owner**) engaged Modog Pty Limited (**head contractor**) to design and construct apartments in Freshwater, NSW. To assist in the performance of the works, the head contractor contracted ZS Constructions (Queenscliff) Pty Ltd (**subcontractor**). The subcontractor developed the process of submitting payment summary sheets *'listing invoices and amounts due and payable in respect of construction management and procurement services'.*

On 11 September 2019, the subcontractor issued an email to the head contractor attaching a payment summary sheet. Subsequent to the initial 11 September 2019 email, on the same day, the subcontractor issued to the head contractor a further six emails attaching invoices in relation to project management services and third party trades. On 13 September 2019, the head contractor terminated the subcontractor subcontract.

In response to the subcontractor's 11 September 2019 emails, the head contractor issued multiple payment schedules which assessed the amount payable in relation to the payment claims as zero.

The matter proceeded to adjudication, where the adjudicator held that four of the subcontractor's five project management invoices and all invoices in relation to third party trades were suitable for payment by the head contractor. The adjudicator determined the amounts payable by the head contractor to the subcontractor totalled $57,488.66 (**Adjudicated Amount**).

The head contractor applied to set aside the adjudication determination in the Supreme Court of NSW as it challenged, amongst other things, whether the 11 September 2019 email was a payment claim within the meaning of section 13(1) of the Act as it did not expressly seek payment and whether the adjudicator committed a jurisdictional error because there was no jurisdiction to determine multiple payment claims in respect of a single reference date.

DECISION

Henry J held that the adjudication determination was valid as the head contractor had failed to establish any jurisdictional error for the following reasons:

- *'when read in the context of the past dealings between the parties'*, the emails and attachments can be read together to constitute a *'claim by a party who is or claims to be entitled to payment'*;
- the subcontractor submitted one payment claim *'when viewed as a matter of substance rather than form'*;
- the head contractor's choice to respond to the emails in the form of multiple payment schedules cannot alter the objective character of the subcontractor's emails;
- jurisdictional error does not arise simply because the *'document which a party purports to be a payment claim'* may lead to confusion because it is open to different interpretations; and
- it is not open to the court to invalidate an adjudication determination on the basis that the adjudicator made *'an error in interpreting a payment claim for the purpose of determining the amount to which a claimant is entitled by way of progress payment'* as this is not a jurisdictional error.

Rhomberg Rail Australia Pty Ltd v Concrete Evidence Pty Limited [2019] NSWSC 755

Even though only every other page of a variations register relied upon by a claimant was included in its adjudication application, the presence of other relevant supporting material meant that a respondent was not denied procedural fairness when a determination was made in respect of variations that it had not addressed in its responsive submissions.

Parties must read adjudication documents 'reasonably carefully', and must anticipate possible findings and make submissions on potential findings in relation to which that party received express notice, or should reasonably have anticipated. A party cannot rely on an unaddressed inconsistency by the adjudicator as grounds for failure to afford natural justice where a person acting reasonably in the circumstances would have at least appreciated that there was an inconsistency and anticipated potential findings in its submissions.

FACTS

Concrete Evidence Pty Ltd (**subcontractor**) served a final progress claim under a subcontract with Rhomberg Rail Australia Pty Ltd (**contractor**) claiming the amount of $37,110 for the balance of the contract works, together with the amount of $1,206,754 claimed in respect of 119 variations.

In an adjudication determination made under the NSW Act, the adjudicator determined an adjudicated amount of $1,061,800.

In its adjudication application submissions, the subcontractor stated that *'CE has created a further Variations Register for the purposes of this adjudication which records the variation claims that remain outstanding and in respect of which CE wishes to pursue. The variations register is at Tab 7'* and *'At Tab 8 of the application are supporting documents in respect of each of the remaining variations'*.

The variations register at Tab 7 was incomplete in that only every other page of the register was included behind Tab 7. However, Tab 8 contained supporting documents for all variations claimed by the subcontractor, including in relation to those referred to in the pages missing from Tab 7.

In its adjudication response, the contractor submitted that *'Given the Claimant's withdrawal of all variations which do not appear in Tab 7, the Respondent has not addressed those variations in this Adjudication Response'*. The adjudicator dealt with that submission by stating that '*The adjudication application is to be read as a whole' and 'I have assessed the variations included in tab 8 as these variations are included in the payment claim and the Claimant has provided submissions for these variations in the adjudication application'*.

In subsequent judicial review proceedings, the contractor submitted that the adjudicator ought to have exercised his power under section 21(4)(a) of the NSW Act to request further written submissions from either party and the failure to do so had denied the contractor procedural fairness because the adjudicator proceeded to deal with the variations without giving the contractor an opportunity to make submissions in relation to them.

DECISION

The proceedings were dismissed.

The court held that 'anyone reading Tab 7 reasonably carefully would have appreciated that the document was incomplete because a comment on the foot of at least one page (of a table that was only four pages in length) was obviously incomplete'. The court further noted that a person acting reasonably would at least have appreciated that there was an inconsistency between Tab 7 and Tab 8, and therefore appreciated that there was at least a risk that the adjudicator would proceed with his adjudication by reference to Tab 8 rather than Tab 7.

In obiter, the court referred to the following purported reason for withholding set out in the payment schedule: *'Assessment to follow'*. The court stated that this is not a reason at all; it is a statement that reasons will be provided later. The contractor would not be able to rely on those reasons in its adjudication response.

Seymour Whyte Constructions Pty Ltd v Ostwald Bros Pty Ltd (In liquidation) [2019] NSWCA 11

The failure to recover pursuant to an invalid adjudication application under section 16(2)(a)(ii) of the NSW Act does not preclude a claimant from recovering an unpaid scheduled amount under section 16(2)(a)(i). The recovery mechanisms in section 16(2)(a) of the NSW Act operate as alternative recovery mechanisms, and while section 16(2)(a) requires claimants to choose a recovery mechanism, claimants who do not make a valid adjudication application will still be entitled to recovery under section 16(2)(a)(i).

The NSW Act is capable of operating for the benefit of a builder or subcontractor in liquidation. The entitlement to a progress payment arises under the NSW Act by reference to a contractual undertaking and not to the physical performance of work. Claims can be made even after a contract has expired, for example, in relation to final payments.

The finding that builders or subcontractors in liquidation may receive the benefit of the NSW Act is contrary to the Victorian Court of Appeal's decision in *Façade Treatment Engineering Pty Ltd (in liq) v Brookfield Multiplex Constructions Pty Ltd* [2016] VSCA 247 (*Façade*). The NSW Court of Appeal held that Façade is *'plainly wrong and should not be followed'*, creating a disparity between the NSW and Victorian positions.

Note, however, that recent amendments to the NSW Act expressly provide that a corporation in liquidation cannot serve a payment claim on a person or take action to enforce a payment claim (including making an adjudication application) (section 32B).

FACTS

Seymour Whyte Constructions Pty Ltd (**contractor**) appealed the decision in *Seymour Whyte Constructions Pty Ltd v Ostwald Bros Pty Ltd (in liq)* [2018] NSWSC 412 which concerned a claim for a progress payment made under a contract with Ostwald Bros Pty Ltd (**subcontractor**).

The subcontractor served a payment claim for $6,351,066 and the contractor in return served a payment schedule for $2,505,237.58. The subcontractor subsequently went into administration and was wound up, after which it submitted an adjudication application pursuant to section 16(2)(a)(ii) for $5,074,218.27. The contractor contended that the application was invalid as it was served outside the time limit in the NSW Act, being 20 business days from the due date of payment.

The subcontractor contended that the application was not made out of time due to a contractual error and asked the court to rectify the contract by altering the due date for payment. In the alternative, the subcontractor sought recovery of the scheduled amount as a statutory debt under section 16(2)(a)(i). The primary judge held that the contract could be rectified and validated the adjudication application. The primary judge also held that if the adjudication application was invalid, the subcontractor would be permitted to pursue a claim under section 16(2)(a)(i).

The contractor contended that by the subcontractor's election to serve an adjudication application, the subcontractor was precluded from seeking to recover the scheduled amount as a debt pursuant to section 16(2)(a)(i), even if the adjudication application was invalid.

The contractor further submitted that the reasoning in *Façade* should be followed in holding that the NSW Act does not apply to a company in liquidation. It contended that this is contrary to the fundamental purpose of the NSW Act, which is to ensure the financial survival of builders.

The three issues on appeal were:

- whether the primary judge erred in rectifying the works contract by altering the payment due date;
- if found in the affirmative, whether the subcontractor was then precluded from recovering the payment schedule amount as a statutory debt under section 16(2)(a)(i); and
- if the subcontractor is not precluded, whether a builder or subcontractor in liquidation has the benefit of the NSW Act as was held in *Façade*.

DECISION

The NSW Court of Appeal held that:

- the primary judge erred in rectifying the contract;
- the adjudication application was served out of time;
- the subcontractor was permitted to pursue the scheduled amount as a statutory debt under section 16(2)(a)(i) as section 16(2)(a)(ii) was not utilised; and
- builders and subcontractors in liquidation are entitled to receive the benefit of the NSW Act.

Rectification

The court held the contract could not be rectified by construction under common law as, although there was arguably an inconsistency in the drafting, it could not be construed that the adjudication application was made in time. Rectification in equity was also not possible as there was no common intention between parties to allow for the extended time period. The adjudication application was made out of time and was therefore invalid.

Recovering the scheduled amount – section 16(2)(a)

Section 16(2)(a) provides claimants with two mutually exclusive alternatives for recovery when there has been a failure to pay a the scheduled amount. Claimants may choose to recover the unpaid portion as a debt or as an adjudication application, but not both. The court, however, held that a claimant will only be taken to have 'made' an adjudication application when complying with the requirements of section 17(3)(d), which include submitting the adjudication application on time. A claimant who has not met the requirements will not have utilised the provision and is still entitled to recovery under section 16(2)(a)(i).

As the subcontractor's adjudication application was invalid, it was entitled to recovery of the statutory debt under section 16(2)(a)(i).

Claimants in liquidation

Section 8 of the NSW Act establishes the right of persons to make a progress payment. The court held that the language of section 8(1), when read in the light of the analysis of *Southern Han Breakfast Point Pty Ltd (in liq) v Lewence Construction Pty Ltd* (2016) 260 CLR, created an entitlement to a progress payment on satisfaction of two conditions, being that:

- the person has undertaken to carry out construction work under the contract; and
- a reference date under the contract has arisen.

The court held there was nothing in the NSW Act to imply that a progress payment could not arise unless the builder continued to carry out construction work. The entitlement is a reference to a contractual undertaking and not to the physical performance of work. Reference dates are also dates set by contractual force and can arise regardless of whether the claimant is actually carrying out work on that particular date. The subcontractor's entitlement to a progress payment was therefore unaffected by its liquidation.

The court held that the conclusion in *Façade*, being that the payment regime of the NSW Act is not available to companies in liquidation since such companies cannot carry out construction work and thus do not satisfy the requirements for 'a claimant', *'was plainly wrong and should not be followed'*.

Sought After Investments Pty Ltd v Unicus Homes Pty Ltd [2019] NSWSC 600

Objective reasoning is important in determining whether or not multiple payment claims have been submitted under the NSW Act in respect of one reference date. In this case the court held that the form of the claim(s) is relevant to the question, but just because a document states that it is a payment claim, this is not necessarily determinative.

FACTS

Sought After Investments Pty Limited (**principal**) contracted with Unicus Homes Pty Ltd (**contractor**) to construct a childcare centre in Horsley, NSW. On 15 February 2019, the contractor served a letter dated 14 February 2019. The letter stated that it attached four 'payment claims' issued pursuant to the NSW Act and noted that three of the invoices had been previously issued on the date of each invoice. Each 'payment claim' was accompanied by a supporting statement in the prescribed form, attaching a schedule setting out a list of the subcontractors whose work was covered by the claim and whether or not they had been paid, as required by section 13(7) of the NSW Act.

In response, the principal served four payment schedules, each dated 22 February 2019 and each certifying the amount payable in respect of the payment claims as zero because, *'the Builder is not entitled to submit more than 1 payment claim per reference period'*.

On 7 March 2019, the builder lodged an adjudication application. The adjudicator determined the application on the basis that the claimant had only served one payment claim. The principal sought a declaration that the adjudication determination was void on the following grounds:

- the builder served four payment claims in respect of one reference date, contrary to section 13(5) of the NSW Act;
- if it was held that the builder only served one payment claim, it did not comply with section 13(7) of the NSW Act because the builder issued multiple supporting statements in respect of that claim; and
- if the documents served by the builder did constitute four separate payment claims but were nonetheless valid, the first claim did not comply with section 13(7) of the NSW Act because the supporting statement in respect of that claim was not a valid supporting statement.

DECISION

Ball J found in favour of the builder and upheld the adjudicator's determination.

Ball J identified the two main issues:

- Was there more than one payment claim?
- Can multiple supporting statements be issued for a payment claim?

Issue 1 – Was there more than one payment claim?

Ball J held that only one payment claim was issued by the builder and emphasised that this was an issue of substance to be resolved objectively, *'taking into account the terms of the documents, any covering letter and the surrounding circumstances known to both parties'*. In having regard to the letter issued by the builder to the principal attaching the *'payment claims'*, Ball J noted that the letter used the words *'payment claim'* and *'invoice'* interchangeably and that although the letter made reference to multiple *'claims'*, the letter also stated that the builder awaited receipt of *'payment in full'* or *'your payment schedule'*, using the singular form of the words *'payment'* and *'schedule'*.

Ball J also had regard to the purpose of section 13(5), which was to *'prevent a principal from being vexed by having to deal with more than one progress claim (including any associated adjudication application) during the period between reference dates'*. By issuing the letter dated 14 February 2019, which made a single demand for payment of the enclosed invoices, objectively, a recipient of the material issued by the builder *'must have understood that a single claim was being made for payment of the full amount of the four invoices, all of which were presented at the same time'*. The fact that the principal chose to issue four separate payment schedules was given little weight as the principal was alive to the issue and would benefit from the claims being treated as separate payment claims.

Issue 2 – Can multiple supporting statements be issued for a payment claim?

Ball J rejected the principal's argument that, if the builder did only serve one payment claim, the payment claim did not comply with section 13(7) of the NSW Act as multiple accompanying supporting statements had been provided with the payment claim. In his reasoning, Ball J had regard to the *Interpretation Act 1987* (NSW) noting that section 8(b) provides that in any statute 'a reference to a word or expression in the singular form includes a reference to the word or expression in the plural form' unless the relevant statue provides otherwise. Accordingly, although section 13(7) of the NSW Act provides that a head contractor must not serve a payment claim on a principal unless it is accompanied by 'a supporting statement', the NSW Act does not state that a claimant can only serve one supporting statement, and therefore the reference to the singular 'a supporting statement' in the NSW Act can also include the plural.

Ball J also acknowledged that, as a supporting statement must be signed by the person who is *'in a position to know the truth of the matters that are contained in this supporting statement'*, there may be circumstances where multiple supporting statements must be provided in respect of different subcontractors.

In response to the principal's point that a number of the dates of the *'Date of payment claim (head contractor claim)'* post-dated the date of the invoices, Ball J noted that the supporting statement was dated the same date as the payment claim and confirmed that the supporting statement met the form requirements of the NSW Act by stating the *'Contract number/identifier'*.

Style Timber Floor Pty Ltd v Krivosudsky [2019] NSWCA 171

For a payment schedule to be valid in accordance with section 14 of the NSW Act, it must indicate the reasons for withholding payment with 'sufficient particularity' so that the claimant is aware of the real issues in dispute and the nature of the case it will have to meet in an adjudication. It is not enough for a payment schedule to merely reject payment, make vague statements or seek to incorporate other documents by general reference.

FACTS

Style Timber Floor Pty Ltd (**Style Timber**) engaged Mr Krivosudsky (trading as RK Grinding) to carry out floor grinding and topping works at various sites in Sydney. Mr Krivosudsky served a payment claim on Style Timber relating to seven invoices and five sites for a total amount of $106,166.50.

Mr Wang of Style Timber responded to the payment claim by email stating that *'…I will show you the working agreement between Style timber and RK grinding, many emails, photos, videos, back charges from builders and other trades, complaints from my clients. You will understand why I can't pay you. The damages you have done is more than what you claimed. Then it's up to you what you want to do next.'*

District Court

In the NSW District Court, Mr Krivosudsky sought the claimed amount and filed a motion seeking summary judgment. Style Timber contended that its email, when read in conjunction with other correspondence preceding the payment claim, was a valid payment schedule under the Act. His Honour Justice Leeming rejected that defence and granted summary judgment in favour of Mr Krivosudsky.

Style Timber sought leave to appeal to the NSW Court of Appeal.

DECISION

The Court of Appeal held that Style Timber's email was not a valid payment schedule under section 14 of the Act.

A payment schedule must indicate the reasons for withholding payment with 'sufficient particularity' to enable the claimant to:

- understand the real issues in dispute between the parties so that it can make an informed decision as to whether or not to proceed to an adjudication; and
- know the nature of the respondent's case which it will have to meet if it pursues an adjudication.

There is no requirement for the reasons to completely particularise the respondent's case, however, reasons in a payment schedule must be readily ascertainable.

Style Timber's email did not:

- provide any reasons for withholding payment in accordance with section 14(3) of the Act;
- identify the payment claim to which it related nor did it identify the sites to which Style Timber had allegedly incurred damage; and
- adequately specify and incorporate the 'many emails' and other documents upon which Style Timber relied.

Accordingly, Style Timber's email was so general that it was impossible to determine the scope of the dispute and failed to satisfy the requirements of a valid payment schedule under section 14 of the Act.

Vannella Pty Limited atf Capitalist Family Trust v TFM Epping Land Pty Ltd; Decon Australia Pty Limited v TFM Epping Land Pty Ltd; Vannella Pty Limited v TFM Epping Land Pty Ltd [2019] NSWSC 1379

Whilst a payment schedule need not be a formal document (and could be an email), principals should always be alert to the requirements of sections 14(2) and 14(3) of the NSW Act. Factual and legal matters that ought to be, but are not, raised in a payment schedule cannot be used as grounds for resisting summary judgment.

A substantial reduction in a company's liquid assets will not necessarily persuade a court to order security for costs, particularly if there are other assets which can be liquidated. A personal undertaking may be sufficient for a company to avoid an order for security for costs.

FACTS

Decon Australia Pty Limited (**Decon**), as the builder, entered into a design and construct contract with TFM Epping Land Pty Limited (**TFM**) and Katoomba Residents Investment Pty Limited (together, the **defendants**) in respect of a residential apartment building in Epping known as the Juniper Development (**contract**). Vannella Pty Limited as trustee for the Capitalist Family Trust (**Vannella**) and TFM were parties to a joint venture arrangement relating to the development (**JVA**).

The decision concerns four notices of motion filed in three separate proceedings relating to the development; one notice filed by Decon seeking summary judgement in relation to a payment claim and a payment schedule that was sent via email (**Decon proceedings**) and three notices filed by the defendants seeking security for costs from Decon and Vannella in each of the three proceedings.

Decon proceedings

Decon served a progress claim on the defendants on 3 June 2019 claiming an amount of $6,355,352, which included amounts for work done within the original contract sum, variations claimed under the contract, and for interest on overdue progress claims.

On 14 June 2019, the defendants sent an email to Decon's solicitor indicating (in a section headed 'Your clients' claims') that the variations claimed were not agreed (**14 June email**). The defendants subsequently claimed that the 14 June email constituted a payment schedule.

Decon submitted that the 14 June email did not meet the requirements of section 14(2) of the NSW Act (because it did not identify the progress claim, indicate the amount that the defendants proposed to pay or provide reasons for any difference). As a result, Decon claimed that the defendants had failed to provide a payment schedule within the time required under section 14(4) of the NSW Act and therefore had become liable to pay the full claimed amount. Decon sought summary judgment in the proceedings.

The defendants submitted that the progress claim was not valid for the following reasons:

- including interest in the progress claim made it invalid, as interest does not form part of the price for contract works and is akin to a claim for damages;
- it did not identify the work to which the progress claim related (other than the variations). The defendants asserted, amongst other things, that the progress claim was ambiguous (including because it failed to state that it included a claim for the release of retention monies); and
- the variations claimed did not form part of the work under the contract, because they were not the subject of directions and had not been valued in accordance with the contract. Therefore, claiming them was not a claim for construction work under the NSW Act.

The defendants asserted that the 14 June email constituted a payment schedule on the basis that the heading 'Your clients' claims' was a sufficient identification of the progress claim, it stated the amount intended to be paid (nothing) and provided reasons for non-payment (including that the variations were not agreed).

The main issues before the court were whether:

- the defendants had become liable to Decon to pay the claimed amount as a consequence of having failed to provide a payment schedule within the time required and failed to pay the claimed amount; and
- Decon had shown that the matters raised by the defendants could not succeed and did not involve any substantial questions to be tried (in order to meet the threshold for summary judgment).

Security for costs

The defendants submitted that Decon and Vannella did not have the financial ability to meet any adverse costs orders on the basis that both were limited liability companies with nominal paid up capital, no real property and both were subject to various PPSR charges. Decon and Vannella asserted that:

- paid up capital is not a true measure of ability to satisfy costs orders in circumstances where the evidence shows that each company has a trading history and ongoing construction projects;
- registration of charges on the PPSR is an ordinary incident of trading; and
- the orders were unnecessary as the sole director of each company (Saab) had given a personal undertaking to be jointly and severally liable for any adverse costs order made in any of the proceedings.

DECISION

Decon proceedings

The court granted Decon summary judgment against the defendants in the amount claimed.

Relevantly, the court was satisfied that the matters raised by the defendants could not succeed, finding that:

- interest can be claimed in a progress claim (per the Court of Appeal in *Coordinated Constructions*), as it is an amount that a construction contract requires to be paid as part of the total price;
- a progress claim does not fail to meet the NSW Act requirements if it does not successfully identify all of the construction work for which payment is claimed;
- section 13(3)(b) of the NSW Act cannot be relied upon to assert that a progress claim must expressly state that it seeks the release of retention monies; and
- factual and legal matters as to whether the variations were proper claims under the contract or whether Decon was entitled to claim the release of retention monies were not grounds for resisting summary judgement. These are matters which should have been raised in a payment schedule, and the defendants had not done so.

While a payment schedule does not need to be a formal document, the 14 June email did not constitute a payment schedule because it did not:

- identify the payment claim to which it related. The reference in the 14 June email to 'Your clients' claims' was general and could have related to any prior payment claim submitted by Decon or the claims made in the other proceedings between the parties;
- indicate an amount that the defendants proposed to pay instead of the claimed amount;
- specify reasons for withholding payment (other than general observations regarding variations, loss and damage); and
- specify areas of dispute with respect to the claim.

Security for costs

It was not necessary for the court to consider the applications against Decon, as the defendants had stated these would not be pressed if the court granted summary judgment. However, the court stated it would not have ordered security for costs in any event. Whilst Decon's liquid assets had reduced substantially over the previous two years, the court was not satisfied this meant there was a real risk that Decon would be unable to pay and had regard to Decon's ability to liquidate or have recourse to other assets.

Vannella's financial position was different, and the court was not satisfied that the evidence provided was sufficient. Nor did the court have a detailed picture of Saab's financial position. However, the court was satisfied with the undertaking from Saab and therefore declined to order that Vannella provide security for costs for the following reasons:

- Saab was the sole shareholder, sole director and a substantial creditor of Decon (which the court had already established had a significant net asset and equity position);
- the court felt that the threat of bankruptcy against Saab and the consequences of failing to comply with an undertaking given to the court would be a deterrent against not fulfilling the undertaking (which should be a comfort to the defendants);
- the undertaking would put the defendants in a no more disadvantageous position than if Saab had commenced the proceedings to which Vannella was a party in person; and
- the value of security sought was not sufficiently high for the court to exercise its discretion.

Queensland

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In this section, the *Building Industry Fairness (Security of Payment) Act 2017* (Qld) is referred to as the **Qld BIF Act**

and

the *Building and Construction Industry Payments Act 2004* (Qld) is referred to as the **Qld Act**.

Queensland overview

EMERGING TRENDS

The roll out of the *Building Industry Fairness Act (Security of Payment) Act 2017* (**Qld BIF Act**) continued in 2019 with the introduction of new provisions related to progress payments, retention monies and adjudications aimed at streamlining Queensland's security of payment regime. This trend is set to continue with the *Building Industry Fairness (Security of Payment) and Other Legislation Amendment Bill 2020* tabled in February 2020.

DEVELOPMENTS

The Queensland Building and Construction Commission reported that the total number of adjudication applications increased from 523 in 2017-2018 to 572 in 2018-2019. However, as the 2018-2019 reporting period represents applications made under both the old Qld Act and the Qld BIF Act, the full effect of the new Act's 'subcontractor friendly' regime will be not seen until the release of the 2019-2020 report later this year.

A review of Queensland's Project Bank Accounts (**PBA**) framework, which was conducted in 2019, will see changes to the Qld BIF Act to allow for a new approach to be taken. Under the new model, head contractors will set up only one trust account for each project and a retention trust account for all cash retentions held.

Some key takeaways from cases in 2019 include:

- if a payment claim does not clearly identify the construction work to which it relates, it will not be a 'payment claim' under the Qld BIF Act and will therefore not enliven the jurisdiction of an adjudicator (see *KDV Sport Pty Ltd v Muggeridge Constructions Pty Ltd & Ors* [2019] QSC 178);
- the court will not always find on a technicality that a claimant's service of an adjudication application is invalid in circumstances where it is reasonable to find that the documents served contained all the information needed (see *National Management Group Pty Ltd v Biriel Industries Pty Ltd trading as Master Steel & Ors* [2019] QSC 219); and
- a claimant in an adjudication proceeding must serve the respondent with its adjudication application as soon as possible. Failure to do so may result in an adjudicator not having the jurisdiction to determine the application (see *Niclin Constructions Pty Ltd v SHA Premier Constructions Pty Ltd & Anor* [2019] QSC 91).

FUTURE

The PBA framework is to be expanded through a phased approach:

- From 1 July 2020, Project Trusts will apply to eligible government and Health and Hospital Services' building contracts of $1 million or more.
- From 1 July 2021, Project Trust Accounts will be extended to the private sector and local government for eligible building contracts valued at $10 million or more.
- From 1 January 2022, project trust accounts will cover eligible building contracts worth $3 million or more.
- On 1 July 2022, trusts will be required for all eligible building contracts valued at $1 million or more.

Given that preparation for the new phases will require additional administrative requirements, it will be crucial for head contractors to be properly prepared.

As we reported last year, respondents will need to remain vigilant in responding to payment claims as:

- there is no requirement to endorse a payment claim to utilise the Qld BIF Act;
- no new reasons are permitted in an adjudication response; and
- there are no second chances if a respondent fails to give a payment schedule within required statutory timeframe.

ABC Glass & Aluminium Pty Ltd v Nik Nominees Pty Ltd & Anor [2019] QSC 171

An adjudicator will not necessarily be in breach of natural justice by relying on a case authority to which neither party has referred to the adjudicator, failing to provide the parties with an opportunity to make additional submissions in respect of the case authority, and misstating the effect of the authority. These circumstances will not impact the adjudicator's decision where the adjudicator's consideration of the case authority does not impact the finding on the evidence that resolves the issue.

FACTS

The second respondent, Robert Douglas Sundercombe (**adjudicator**), determined that the first respondent, Nik Nominees Pty Ltd (**Nik Nominees**), was entitled to a progress payment in relation to a construction contract within the meaning of the Qld Act. The applicant, ABC Glass & Aluminium Pty Ltd (**ABC**), sought a declaration that the adjudication decision was void and an injunction restraining Nik Nominees from seeking to enforce the decision. The dispute between Nik Nominees and ABC arose out of refurbishment works at the Hamilton Island Yacht Club Villas. Nik Nominees fabricates aluminium products and fabricated and supplied the shutters that were installed on the project by ABC.

ABC served a payment schedule in response to the payment claim in which it stated the amount of the payment that it proposed to make was nil. ABC asserted that there was no construction contract within the definition under the Qld Act, as the agreement between the parties *'was a cooperative enterprise… for the specific purpose of the Project whereby the parties shared resources including staff, management responsibility and profit'*. ABC relied on the fact that ABC and Nik Nominees had a direct relationship with the head contractor and Nik Nominees had received payment from the head contractor. ABC also asserted that, even if it was a construction contract, section 3(2)(c) of the Qld Act excluded the contract because the arrangement was for profit share.

The adjudicator addressed the issue of jurisdiction by reference to the matters raised by ABC. When considering jurisdiction, the adjudicator noted that the parties had not provided any case law that supported their various positions and identified four judgments relevant to section 3(2)(c) of the Qld Act, including the decision in *Eddelbrand Pty Ltd v H M Australia Holdings Pty Ltd* [2012] NSWCA 31.

ABC sought relief on the basis that the adjudicator made two jurisdictional errors, namely:

- a breach of natural justice by making a decision on ABC's submission that there was no construction contract within the meaning of section 3(2)(c) of the Qld Act based on a view of the law for which neither party contended and in respect of which the adjudicator provided no opportunity to the parties to make submissions concerning his view of the law; and
- failing to discharge his function under the Qld Act by considering material which was not permitted by section 26(2) of the Qld Act, providing a determination without foundation, failing to intellectually engage with the issues, and not deciding his jurisdiction properly under section 25(3) of the Qld Act.

DECISION

The court held that the adjudicator had not made a jurisdictional error on either ground raised by ABC.

Was the adjudicator bound to ask for submissions on *Eddelbrand*?

The court considered that it was common ground for both parties that the relevant critical issue before the adjudicator was whether the agreement between the parties was a profit share arrangement. The court held that the adjudicator's consideration of *Eddelbrand* did not make any difference to the conclusion which he reached on the evidence before him. ABC could not show that the conduct of the adjudicator in not seeking submissions on *Eddelbrand* was a substantial denial of natural justice in the circumstances or even a denial of natural justice. The court also considered that the adjudicator's use of *Eddelbrand* did not constitute a failure to follow the procedure anticipated by section 25(3) of the Qld Act. ABC's reliance on section 25(3) as a means by which the adjudicator could have sought further written submissions did not assist ABC in overcoming the conclusion that the adjudicator's failure to seek submissions on *Eddelbrand* did not amount to a substantial denial of natural justice.

Did the adjudicator consider material outside of section 26(2) of the Qld Act?

ABC argued that by referring to case law which the parties had not provided to the adjudicator, the adjudicator was looking outside the matters which he was permitted to consider under section 26(2) of the Qld Act. The court considered that Nik Nominees correctly submitted that section 26(2) of the Qld Act deals with what the adjudicator can consider in deciding an adjudication application after determining that jurisdiction exists. Section 26(2) applies to the consideration of the subject matter itself and not jurisdiction. Therefore, the court held there was no substance in ABC's reliance on section 26(2) to challenge the adjudication decision.

Did the adjudicator provide a determination without foundation?

ABC argued that the adjudicator could not consider whether the agreement between the parties was an excluded contract within section 3(2)(c) of the Qld Act, unless the adjudicator first identified the terms of the agreement. The court disagreed with this submission stating that the submission was based on an interpretation of section 3(2)(c) which did not reflect the wording of the section.

Was there engagement by the adjudicator?

ABC submitted that the adjudicator was required to engage in an 'active process of intellectual engagement' in considering the matters referred to in section 26(2) of the Qld Act. Specifically, ABC claimed the adjudicator failed in his duty to engage intellectually in respect of the terms of the agreement, including timing of progress payments and the relationship between the compensation payable, as sought in the invoices, and the goods supplied to Nik Nominees. The court held that ABC could not succeed on this argument, as ABC's assertion of what was required of the adjudicator did not reflect relevant provisions of the Qld Act.

Australian Building Insurance Services Pty Ltd v CGU Insurance Limited [2019] QDC 18

When a contract is novated, a right to issue invoices for work performed prior to the novation may accrue. This does not give rise to a right to claim penalty interest for the late payment of an invoice issued in respect of such work. Penalty interest can only be claimed by the party that was the contracted party at the time the work was performed.

FACTS

Australian Building Insurance Services Pty Ltd (**ABIS**) purchased a building insurance claims repair work business from IW & CA Price Constructions Pty Ltd (**Price Constructions**). The business supplied various insurance-related services, under a preferred supplier agreement, to CGU Insurance Limited (**CGU**).

At the time of settlement, there were insurance repair works that Price Constructions had commenced but not completed. ABIS completed those works as well as other new works. CGU paid all invoices issued for these works; however, some payments were delayed until the Supreme Court declared that ABIS was entitled to the payments for the work done by Price Constructions.

ABIS then brought a claim for interest on the late progress payments pursuant to section 67P of the *Queensland Building Services Authority Act 1991* (Qld) (**QBSA Act**) (now section 67P of the *Queensland Building and Construction Commission Act 1991* (Qld)). Section 67P requires a contracting party for a building contract to pay the contracted party interest at a penalty rate of 10% plus the Reserve Bank's 90-day bill rate on unpaid progress payments.

There were four issues in dispute:

- whether the supplier agreement was a contract or other arrangement for carrying out building work;
- whether the relevant payment time had passed at the time that the payments were made in accordance with section 67P(1)(c) of the QBSA Act;
- whether the sale of the business and consent by all parties to the assignment of Price Construction's rights and obligations under the supplier agreement to ABIS effected a novation of the supplier agreement; and
- whether, by reason of the novation, ABIS was entitled to interest at the penalty rate in accordance with section 67P of the QBSA Act.

DECISION

The court dismissed ABIS's claim for interest at the penalty rate.

The court held that the contract was a contract or other arrangement for carrying out building work and that the relevant payment time had passed. CGU conceded that a novation had been effected; however, the court held that ABIS was not entitled to interest as the amount claimed was in respect of work which was done by Price Constructions when it was the contracted party. The fact that Price Constructions had novated the right to payment for those works to ABIS did not mean that ABIS was entitled to penalty interest. ABIS's entitlement to deliver invoices for the work did not retrospectively make it the contracted party for the purposes of the Act.

While some of ABIS's claim did relate to work done after the novation (to which they might be entitled to interest at the penalty rate), the quantum of that work could not be determined on the evidence available. Accordingly, ABIS's claim failed.

Forbes Building Group Pty Ltd v Minogue [2019] QCATA 62

Termination of a construction contract by one party does not give the other party a right to progress payments except where those payments have accrued for proper performance under the contract.

FACTS

On 1 December 2014, Forbes Building Group Pty Ltd (**contractor**) subcontracted with Daniel Minogue, trading as CBS (**subcontractor**), for works on a childcare centre in Mackay. The subcontract was partly written but mainly oral. Nothing turned on the validity of this form of contract. On 7 and 13 January 2015, the subcontractor issued the contractor with two invoices for progress payments which the contractor contested.

On 19 January 2015, the subcontractor suspended works because the contractor had not paid for the invoices. The contractor later made part payment, though it still claimed that the invoices were not strictly payable because the applicable milestones had not been achieved. On 21 January 2015, the contractor took over the site and purported to terminate the contract. The subcontractor claimed that it gave the contractor a third invoice on 27 January 2015.

At First Instance

On 14 November 2017, the subcontractor commenced proceedings in the Queensland Civil and Administrative Tribunal (**tribunal**) claiming, as a debt, the amount it claimed it was owed before termination. The contractor filed a counterclaim claiming that the works were not carried out in a proper and workmanlike manner before termination and claimed the costs of rectifying and completing the works.

The tribunal found that the key issue was whether the contractor had a right to terminate the contract. The tribunal held that the contractor had no such right because the subcontractor did not seriously breach or repudiate the contract. The subcontractor's suspension of works was held to be merely an *'enforcement action in a pay[ment] dispute'*. The tribunal ordered the contractor to make part of the alleged payment to the subcontractor and dismissed the contractor's counterclaim.

The contractor filed an appeal with the appeal tribunal. The question on appeal was whether the tribunal's decision at first instance was legally correct and whether it was *'fair and equitable'* under section 13 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld). This section provides that *'In a proceeding for a minor civil dispute, the tribunal must make orders that it considers fair and equitable to the parties to the proceeding in order to resolve the dispute…'*

DECISION ON APPEAL

Carmody J allowed the appeal and set aside the initial orders. His Honour remitted the matter for a reconsideration by the tribunal.

His Honour stated that the tribunal at first instance erred in basing the subcontractor's right to payment on the validity of the contractor's termination and not on the subcontractor's right to payment before the termination. His Honour held that by failing to address the contractor's *'clear'* reasons for claiming that the subcontractor was not entitled to payment and for counterclaiming for a set-off, the tribunal lost sight of the real issues in the dispute and therefore *'failed to exercise its adjudicative function'*.

His Honour restated the position that *'the contract price of a construction contract is not recoverable as a debt under the general law until it is earned by full and faithful performance of the contract'*. The tribunal at first instance did not consider whether the subcontractor had properly performed under the contract and as a result was entitled to the claimed progress payment.

His Honour also cited the position that where a builder terminates performance of a building contract because of the other party's repudiation, the builder will be entitled to any accrued progress payments but otherwise will be restricted to the recovery of damages or restitution. For the latest High Court authority on builders' right to payment upon repudiation, see the summary of *Mann v Paterson Constructions Pty Ltd* [2019] HCA 32 in the October 2019 edition of our Construction Law Update.

His Honour found that the decision of the tribunal was not a fair and equitable solution to the dispute between the parties. This called for intervention by the appeal tribunal *'to set things right'*.

Fulton Hogan Construction Pty Ltd v QH & M Birt Pty Ltd & Ors [2019] QSC 23

An adjudicator appointed under the Qld Act is now less likely to fall into jurisdictional error where he or she determines a claim which is not expressly itemised in a payment claim but is otherwise mathematically apparent. This decision provides support for the view that an adjudicator is empowered to determine the scope of the payment claim, and a reasonable but erroneous determination of this nature is not be reviewable by a court and will not amount to jurisdictional error. It is also authority for the proposition that an adjudicator may not determine an applicable rate for works otherwise than as submitted by the parties in the absence of clear explanation as to how the rate forming the basis of such a valuation is derived.

Claimants can breathe easier with the knowledge that adjudicators will feel more comfortable determining claims which are evident from a payment claim or arise for determination as a function of the payment claim and payment schedule, even if such claims are not individually itemised. This is particularly relevant to the adjudication of disputes over backcharges and set-offs where the value of such set-offs are not expressly claimed in the payment claim but, rather, are put into issue in the payment schedule.

FACTS

Fulton Hogan Construction Pty Ltd (**Fulton Hogan**) engaged QH & M Birt Pty Ltd (**QBirt**) to undertake construction work within the meaning of the Qld Act.

On 2 March 2018, QBirt submitted a payment claim in the amount of $2,873,141.98 in accordance with the relevant construction contract (**January payment claim**). In the prior payment schedule of December 2017 (**December 2017 payment schedule**), Fulton Hogan had applied a number of set-offs in the amount of $426,362. Responding with its payment schedule to the January payment claim, Fulton Hogan expressly maintained those set-offs (**January payment schedule**). The January payment claim, which did not expressly refer to those set-off amounts, was ultimately referred to adjudication under the Qld Act.

The parties were in dispute as to whether the January payment claim took into account those set-off amounts. Fulton Hogan argued that the set-offs were outside the scope of the adjudication, as they were not items claimed in the January payment claim or the January payment schedule and therefore not subject for determination by the adjudicator. QBirt argued that its rejection of those set-off amounts was mathematically evident from the amount claimed in the January payment claim and Fulton Hogan's express reference to those set-off amounts in the January payment schedule.

On 30 July 2018, the adjudicator delivered a decision which held that 'by extension of the mathematics' he was satisfied that both parties were aware that the set-offs were disputed. The adjudicator reversed the set-offs and required Fulton Hogan to pay QBirt a total of $1,300,608.14 including GST.

Fulton Hogan commenced proceedings to challenge the adjudication decision. One of the arguments advanced by Fulton Hogan was that an adjudicator was required to determine the value of the payment claim and that the adjudicator had exceeded his jurisdiction by determining the set-offs because they were not included as claimed items in the payment claim.

Fulton Hogan also argued that the adjudicator erred in the application of a corrected amount paid and in applying a rate to certain works which was not contended by either party without giving sufficient reasons for taking that course.

DECISION

Ryan J found in favour of QBirt in relation to both the application of the amount previously paid and the set-offs but invalidated the part of the adjudication determination that applied the rate which was not contended for by either party.

Her Honour held that the adjudicator was empowered to determine whether the set-offs were disputed in the January payment claim.

In doing so, her Honour confirmed that the interpretation of a payment claim is a matter for the adjudicator and that it is *'for the adjudicator to determine the scope of claim and his decision in that regard in this case cannot be reviewed'*. It follows that there was no jurisdictional error and the adjudicator's decision was valid.

It seems likely that the same principles will apply where it is argued that an adjudicator has awarded more than the amount claimed or where it is argued that a claim 'has not been made at all'.

Notably, her Honour left open the possibility that these principles may not apply to a case with sufficiently distinguishable facts.

Her Honour held that the adjudicator had acted beyond the scope of his jurisdiction in applying a rate not contended for by either party without sufficient explanation in the decision as well as in failing to afford the opportunity to the parties to make submissions on the rate that was applied and invalidated the relevant part of the decision infected by that error.

J.R. & L.M. Trackson Pty Ltd (ACN 088 333 831) v NCP Contracting Pty Ltd (ACN 121 915 017) & Ors [2019] QSC 201

This decision makes a number of key points:

- **An email containing three attached invoices referring to the same date and work under one contract could be reasonably understood as a single payment claim and was valid under the Qld Act.**
- **If a claimant lodges two adjudication applications in relation to one payment claim, the second adjudication application will be invalid; however, the first adjudication application lodged will not be invalidated.**
- **An adjudicator may call a conference during which he or she permits the involvement of witnesses who are not parties to the application.**
- **An adjudicator may accept oral submissions made at a conference. The definition of 'submission' is to be considered broadly encompassing written and oral statement on both issues of law and fact.**

FACTS

NCP Contacting Pty Ltd (**NCP**) entered into a construction contract with JR & LM Trackson Pty Ltd (**Trackson**) for sewage works. NCP submitted monthly progress payment claims which Trackson ceased paying.

NCP served a payment claim in the form of a single cover email attaching three invoices each bearing the same date and comprising the total outstanding costs of work done. Trackson proposed a payment of $NIL. NCP lodged two simultaneous adjudication applications for two of the three invoices attached to the email. The adjudicator proceeded to determine the first adjudication application lodged and in doing so called a conference of the parties. The conference was attended by witnesses who were not parties to the application but nonetheless proceeded to give oral submissions. The adjudicator subsequently determined the matter in favour of NCP.

Trackson commenced proceedings alleging jurisdictional error on a number of grounds.

DECISION

One or three payment claims?

Trackson argued that NCP submitted three separate payment claims. The court found, however, that the invoices were sent together in one email bearing the same date and referring to work under one contract. As such, they should have been reasonably understood to constitute a single payment claim for the total of the invoice amounts. As such, the court found that the payment claim was valid, stating that in assessing a claim one must focus on substance over form as the wording of the Qld Act does not demand a high level of particularisation.

A second adjudication application will not invalidate the first

The court also considered whether the fact that NCP lodged two adjudication applications for separate invoices, which were in fact part of the same payment claim, rendered the entire decision invalid.

NCP was only entitled to lodge one adjudication application and the adjudicator did not make a determination on the second application. In the absence of any contrary authority, the court accepted that the lodgement of the second application did not invalidate the first adjudication application or the decision made in relation to it.

An adjudicator may receive 'witnesses' at a conference

The court held that the attendance of witnesses at a conference will not result in jurisdictional error.

The court accepted the purpose of the Qld Act is to provide speedy resolution of payment disputes. Adjudicators may require further submissions, inspections or conferences to establish questions of fact in service of that purpose. Those in attendance must be able to quickly provide information in response to an adjudicator. The understanding of an individual, such as a director, will frequently be informed by other professionals such as surveyors or supervisors. To interpret the meaning of section 25(3)(d) to limit a conference of the parties only to the parties to the contract would deprive the conference of its utility and thus be contrary to the nature of the Qld Act. For a conference to have utility, witnesses with relevant expertise or factual knowledge necessary to provide the adjudicator with quick access to relevant information are to be permitted to attend.

An adjudicator can consider 'submissions' made during the conference

The court went on to clarify what constitutes a submission capable of being made at conference. The wording of section 26(2) of the Qld Act allows the adjudicator to consider all properly made submissions in support of the claim or schedule. The court noted that it would be nonsensible to permit an adjudicator to seek further information and also prohibit them from considering that information.

Further, the inconsistency of language present in the Act suggests submissions are not restricted to legal arguments. Section 24 of the Qld Act permits the respondent to an adjudication application to include relevant submissions in its response. Conversely, section 24B relating to the claimant's reply omits the term submission. It would be similarly nonsensible to imply that submissions of legal character are only available to one party.

It flows that a general definition of submissions should be preferred over a more narrowly construed legal definition. A logical and appropriately broad definition would therefore include oral responses by witnesses to the adjudicator's questions of fact or law.

KDV Sport Pty Ltd v Muggeridge Constructions Pty Ltd & Ors [2019] QSC 178

A payment claim that does not reasonably identify the construction work the subject of the claim will not satisfy the requirements of section 17(2)(a) of the Qld Act and therefore will not enliven the jurisdiction of an adjudicator.

The consequence of failing to comply with section 17(2)(a) of the Qld Act may result in an adjudicator's decision being declared void in its entirety where the adjudicator has incorrectly concluded his or her jurisdiction is enlivened. Whether a payment claim adequately identifies the work the subject of the claim under section 17(2)(a) of the Qld Act is an objective test that involves consideration of the background knowledge of both parties which can be derived from their previous dealings. It is not enough to simply provide the categories of work. A valid payment claim must clearly identify the construction work to which it relates and be reasonably comprehensible to the principal. Given that the current security of payment regime in Queensland contains a near identical provision to section 17(2)(a) of the Qld Act (contained in section 68(1)(a) of the *Building Industry Fairness (Security of Payment) Act 2017* (Qld)), this decision will be relevant to the current regime.

FACTS

On 14 August 2017, KDV Sport Pty Ltd (**principal**) and Muggeridge Constructions Pty Ltd (**contractor**) entered into a contract in relation to the construction of student accommodation. The contract was a lump sum contract for $10.627 million.

The contractor served a payment claim on the principal in the amount of $2,365,432 on approximately 20 August 2018. The claim was a one page document that made reference to the Trade Breakdown Schedule (**Schedule**) which was a separate document required under the tender that formed part of the agreement. The Schedule set out various categories of work and attributed a portion of the contract price to each category. The payment claim provided no meaningful information of the work performed. It only identified the category of work and the percentage value claimed by reference to the Schedule.

The principal's solicitors wrote to the contractor contending that the purported payment claim was invalid because it did not meet the requirements of section 17(2) of the Qld Act. While reserving its primary position, the principal served a payment schedule under the Qld Act which provided for a payment of nil. Subsequently, the contractor applied for adjudication. On 4 December 2018, the adjudicator issued a decision which determined that the principal owed the contractor $802,198.59 plus interest.

The principal contended that the adjudicator's decision was affected by jurisdictional error. The principal raised three issues for determination, which were:

- the payment claim failed to identify the construction work for which payment was claimed and therefore did not satisfy the requirements of section 17(2)(a) of the Qld Act;
- the decision was void because the adjudicator did not comply with section 26(2) of the Qld Act by failing to provide the required level of natural justice to the parties and failing to adequately set out in his reasons the process by which he came to and justified the valuation of the construction work; and
- the adjudicator failed to take into account submissions as to the requirements imposed on the principal to withhold amounts for subcontractors' charges pursuant to the *Subcontractors' Charges Act 1974* (Qld) and thereby did not comply with section 26(2) of the Qld Act.

DECISION

The court found that the principal was successful on its first ground by establishing a jurisdictional error on the basis that there was not a valid payment claim for the purposes of the Qld Act. Consequently, the court was not required to consider the remaining two issues. The court held that the description of construction work divided by category was not sufficient to identify the actual construction work claimed and did not satisfy the requirement of section 17(2)(a) of the Qld Act.

Section 17(2)(a) of the Qld Act requires that a payment claim must reasonably identify the construction work to which it relates, such that the basis of the claim is reasonably comprehensible to the principal or sufficient to enable the principal to understand the basis. The court held that if a principal is unable to ascertain with sufficient certainty the work to which the claim relates, it will not be possible to provide an informed and meaningful payment schedule.

The court considered that the overall purpose of the Qld Act is to provide speedy and efficient means of ensuring progress payments are made without intervention of a court. Whilst it is possible that the principal may have been able to determine what part of the work was being claimed out of the percentage by engaging in a process of reconstruction based on previous claims and amounts paid, the court considered this would be contrary to the intention of the Qld Act. The court held that the intention of the Qld Act is not to require the principal to engage in forensic analysis of previous payment claims to assess the current claim in circumstances where a payment schedule is required within 10 business days of receipt of the claim.

As the payment claim did not meet the requirements of section 17(2)(a) of the Qld Act, the court held the adjudicator's jurisdiction had not been enlivened. Consequently, the entirety of the adjudicator's decision was void.

Melaleuca View Pty Ltd v Sutton Constructions Pty Ltd & Ors [2019] QSC 226

Although the court will not adopt an overly technical approach in assessing a payment schedule, the document must still meet the minimum requirements of the Qld BIF Act in order to be valid. This includes referencing the correct payment claim and stating an amount to paid. Where a contract provides for two reference dates, the Court will honour a valid payment claim made in respect of either reference date.

FACTS

Melaleuca View Pty Ltd (**principal**) entered into a contract with Sutton Constructions Pty Ltd (**contractor**) in March 2018 for the construction of 16 townhouses. The contract provided that the contractor could submit monthly progress claims to the principal in addition to a claim upon achievement of Practical Completion of the works.

The contractor sent a payment claim to the principal on 5 February 2019 which (the principal alleged, but did not establish), included claims for work done up to 1 February 2019 (**first payment claim**) and a second payment claim on 15 February 2019 (**second payment claim**) following the agreed date of practical completion.

On 19 February 2019, the principal sent a letter to the contractor *'in response to its communication dated February 15, 2019'*. That letter did not:

- identify the second payment claim as the payment claim to which it related; or
- identify an amount of payment that the principal proposed to make.

When the contractor lodged its adjudication application on 1 April 2019, it submitted that the principal failed to serve a payment schedule. The principal contended that:

- the first payment claim utilised the only available reference date at the time, being the practical completion reference date, such that the second payment claim was invalid for want of an available reference date under the contract; and
- its 19 February correspondence was a payment schedule for the purpose of the Qld BIF Act.

The adjudicator determined that the principal had not provided a payment schedule as required by section 69 of the Qld BIF Act because it failed to state the payment that it proposed to make and did not identify the correct payment claim (the second payment claim). The adjudicator declined to consider the principal's adjudication response as a consequence of its failure to provide a payment schedule as required by the Qld BIF Act and decided the adjudication in favour of the contractor.

The principal applied to the Supreme Court alleging jurisdictional error on the following grounds:

- that the contractor served two payment claims in respect of the second reference date in contravention of section 75(4) of the Qld BIF Act. As the first payment claim contained claims for works carried out after 21 January 2019, it could not have been in respect of that reference date; and
- that the adjudicator incorrectly decided that the principal's response to the contractor was not a payment schedule under the Qld BIF Act.

DECISION

The court dismissed the principal's application and rejected the principal's submissions on the basis that:

- even if the first payment claim was invalid (which was not established), the second payment claim the subject of the adjudication application was not; and
- the principal did not identify the correct payment claim and did not identify the proposed amount to be paid, both of which were required in order to satisfy sections 69(a) and 69(b) of the Qld BIF Act.

National Management Group Pty Ltd v Biriel Industries Pty Ltd trading as Master Steel & Ors [2019] QSC 219

It is important that claimants diligently observe security of payment and adjudication procedures as a failure to do so might be fatal to their claim. At the same time, the court will not allow respondents to be unreasonably opportunistic.

The court is unlikely to simply accept that a repeat payment claim, in respect of the same reference date, was made to fix up a minor error. Once a payment claim is submitted, it might be safer for the claimant to leave in minor errors than submit a new payment claim.

Respondents should be aware that the court will not always find on a technicality that a claimant's service of an adjudication application is invalid in circumstances where it is reasonable to find that the documents served contained all the information needed.

FACTS

The applicant National Management Group Pty Ltd (**NM**) and the respondent Biriel Industries Pty Ltd (**Biriel**) were parties to an agreement for Biriel to fabricate, supply and install structural steel for two separate projects. In December 2018, Biriel issued two payment claims in respect of the first project. Two weeks later, Biriel issued two payment claims: one, a replacement for the previous payment claims, and a fresh one in relation to the second project.

When NM did not provide Biriel with payment schedules, Biriel applied for adjudication of each of the payment claims.

More than one payment claim made for first project

The Qld BIF Act prohibits a claimant from making more than one payment claim for each 'reference date' under the construction contract.

In regard to its first project, Biriel argued that it issued more than one payment claim in the applicable 'reference date' because the previous payment claims had incorrectly stated the enabling legislation as the now repealed Qld Act rather than the Qld BIF Act. NM argued that the latest payment claim was void because it was in contravention of the Qld BIF Act.

Validity of service of adjudication application

The Qld BIF Act provides that *'a copy of the adjudication must be given to the respondent'* and that a copy of an adjudication application *'must identify the payment claim to which it relates'.*

The Queensland Building and Construction Commission (**QBCC**) wrote two letters to NM informing it that Biriel had lodged two adjudication applications. The next day, NM received two envelopes from Biriel containing some documents from Biriel which NM claimed it did not know were supposed to be adjudication applications as a result of some issues such as missing pages and the absence of a cover letter. NM also pointed out that Biriel had not identified correct invoices for its claims.

NM later wrote to the adjudicator stating that he lacked jurisdiction to decide the applications because Biriel had failed to serve it with a copy of each of the adjudication applications.

The adjudicator decided that it could not consider the response from NM because it was given outside the timeframe for providing an adjudication response. In any case, NM was prohibited under the Qld BIF Act from giving an adjudication response because it did not provide payment schedules after it received the payment claims. NM applied in the Supreme Court for the adjudicator's decision to be set aside.

DECISION

The court declared that the adjudicator's decision in relation to the first application was void. The court found that Biriel issued two payment claims in contravention of the Qld BIF Act and that, as a result, the adjudicator lacked jurisdiction to decide that application. Biriel was permanently restrained from seeking to enforce the adjudicator's decision with regard to the application. It was not relevant that the first payment claim was issued under the Qld Act because this was allowed under the Qld BIF Act.

With regard to the second application, the court dismissed NM's application, having found that Biriel had substantially complied with its obligation to effect service on NM. The court found that it was not plausible for NM to insist that it was not aware that the documents it received contained an adjudication application, given some factual evidence to the contrary including the presence of an application form with a sufficient number of pages and the prior notification by the QBCC. The court also found that any errors with the invoices did not prevent the second application from identifying the payment claim to which it related, given some evidence that NM had enough information to draw the correct conclusions.

The court accepted that NM's preclusion from making an adjudication response did not extend to its entitlement to make submissions about jurisdictional issues. However, the court found that even if the adjudicator had considered the question of jurisdiction, it would not have arrived at a different conclusion given evidence that Biriel had, in fact, validly effected service of the adjudication application on NM.

National Management Group Pty Ltd v Biriel Industries Pty Ltd trading as Master Steel & Ors (No 2) [2019] QSC 276

The general rule that 'costs follow the event' may be departed from in circumstances where both parties have enjoyed a measure of success.

FACTS

National Management Group Pty Ltd (**NMG**) and Biriel Industries Pty Ltd trading as Master Steel & Ors (**Biriel**) entered into an agreement whereby Biriel fabricated, supplied and installed structural steel for two separate projects.

In December 2018, Biriel issued two payment claims in respect of the first project and then two weeks later issued two more payment claims – a replacement for a previous payment claim for the first project and a claim in relation to the second project. NMG did not provide payment schedules for the payment claims, which caused Biriel to apply for an adjudication under the Qld BIF Act. Biriel was successful in both of its adjudication applications.

NMG applied to the Supreme Court of Queensland to set aside both decisions for jurisdictional error on various bases and ultimately the court accepted that:

- in relation to the first adjudication, the replacement payment claim was invalid under the Qld BIF Act and the purported decision was set aside; and
- in relation to the second adjudication, the adjudicator's refusal to allow NMG to make jurisdictional submissions constituted an error but did not invalidate the decision.

Justice Wilson requested submissions on the question of costs.

NMG contended that Biriel should pay its costs as:

- it was successful in relation to the largest claim, being the first project; and
- NMG had been wrongly prevented by the adjudicator from making submissions about jurisdiction regarding the validity of service in relation to the second project,

or, in the alternative, Biriel should pay a proportion of NMG's costs as its arguments were largely successful and it was entirely successful in relation to the larger claim.

In contrast, Biriel sought an order that NMG pay 50% or a portion of Biriel's costs of the proceeding on the basis that:

- NMG was only partially successful on the issues it raised;
- there were five separate issues in the proceeding and NMG was only successful on two narrow legal points;
- issues that were relevant to the decision to dismiss NMG's application to set aside the adjudication decision for the works carried out on the second project occupied a significant part of the hearing; and
- the quantum of the payment claims was not a factor that affected the incursion of time and legal fees,

or, in the alternative, no order as to costs should be made or the parties should bear their own costs as each party had received a measure of success.

DECISION

Wilson J stated that the exercise of the court's discretion to depart from the general rule was warranted (as each party had a measure of success) and ordered that each party bear its own costs in favour of undertaking a complicated assessment of costs based on separate events or questions decided in the application.

In exercising the discretion to depart from the general costs rule, Wilson J took into consideration that the quantum of payment claims in this case was unlikely to have been a factor that affected the incursion of time and legal fees, the failure to allow NMG to make submissions about jurisdiction did not impact the ultimate conclusion and the majority of the proceeding had been taken up with the invalidity of service issue that was unsuccessfully submitted by NMG.

Niclin Constructions Pty Ltd v SHA Premier Constructions Pty Ltd & Anor [2019] QSC 91

Service of an adjudication application, including the adjudication application form, upon a respondent as soon as possible after the application is lodged with the registrar is essential for there to be a valid adjudication decision. If service of an adjudication application form does not occur 'as soon as possible', an adjudicator may decline jurisdiction to decide the matter.

FACTS

The applicant, Niclin Constructions Pty Ltd (**Niclin**), sought orders in relation to four adjudication applications made by it under with the Qld Act.

On 28 November 2018, Niclin lodged the adjudication applications with the Queensland Building and Construction Commission (**QBCC**) and, on the same day, delivered those applications to the respondent, SHA Premier Constructions Pty Ltd (**SHA**).

In serving the adjudication applications on SHA, however, Niclin failed to serve the adjudication application forms themselves (the form required by the QBCC to be lodged with the adjudication applications) (**application forms**).

In SHA's adjudication responses dated 13 December 2018, it raised this service issue submitting to the adjudicator that it was fatal that Niclin had not served the application forms with its submissions. It was argued that service of the application forms was a mandatory requirement as the wording in section 21(5) of the Qld Act used the word 'must'. Section 21(5) states:

> *A copy of the adjudication application must be served on the respondent.*

Niclin served the application forms on SHA the following day (on 14 December 2018).

Three of the four adjudication applications were the subject of adjudication decisions by an adjudicator on 18 January 2019. The adjudicator decided that he did not have jurisdiction to determine the three standard claims because the application forms had not been served upon SHA. Niclin sought orders that those three adjudication decisions be declared void on the basis that the adjudicator had jurisdiction to determine the relevant adjudication applications in the absence of the application forms. Niclin also sought orders that its three adjudication applications be remitted to the adjudicator to perform the duty required of him under the Qld Act, which is to consider the adjudication applications on their merits.

At the time of those adjudication decisions, there was also a fourth adjudication application that had not yet been the subject of a decision by the adjudicator. The same argument about jurisdiction had been raised by SHA.

DECISION

The court held that service of an application form was necessary to confer jurisdiction upon an adjudicator and the adjudicator had not made an error in declining jurisdiction.

The court found that:

- the purpose of section 21(5) of the Qld Act was to provide a respondent with notice of the adjudication application and a reference point for the applicable timeframes for the provision of its adjudication response; and
- section 21(3)(b) of the Qld Act required that an adjudication application be made in the approved form.

The court also found that if there is no service of the application form, then the adjudicator has no timeframe for making his or her decision. The court found that the objective of section 21(5) of the Qld Act is for each party to know precisely where it stands such that service of the adjudication application and the accompanying application form under section 21(5) of the Qld Act is required before an adjudication can be validly undertaken.

The court also found that while the Qld Act provides no timeframe for service, the application form plainly contemplates something close to contemporaneous service of the adjudication application upon the respondent with the making of the adjudication application to the registrar. The court held service was to be 'as soon as possible' after the adjudication applications were made. The court found that, in the context of the Qld Act, which imposes brutally fast timeframes, service 12 business days after the lodging of the adjudication applications was not 'as soon as possible'. Claimants should be aware that the failure to serve an adjudication application on a respondent with the application form will constitute a failure to comply with its obligation to:

- make its adjudication application in the approved form as required by section 25(3)(a) of the Qld Act; and
- serve its adjudication application in accordance with section 21(5) of the Qld Act,

and as such, will not enliven the jurisdiction of an adjudicator.

Niclin Constructions Pty Ltd v SHA Premier Constructions Pty Ltd & Anor [2019] QCA 177

It is crucial that a claimant in an adjudication proceeding ensures that it serves the respondent with the adjudication application as soon as possible. Failure to do this is likely to result in the adjudicator having no jurisdiction to determine the application.

The absence of a particular timeframe in the now repealed Qld Act (and now in its successor the Qld BIF Act) for serving an adjudication application on a respondent does not have the effect that a claimant is allowed to take as long as it likes to effect service. Rather, the *Acts Interpretation Act 1954* (Qld) imposes an obligation for such service to be effected *'as soon as possible'*.

When serving the respondent with adjudication documents, it is crucial that the claimant take steps to ensure that a copy of the mandatory adjudication application form is included in the materials it delivers to the respondent.

FACTS

The essential facts of this case were previously reported in the May 2019 edition of the Construction Law Update (see our note above on *Niclin Constructions Pty Ltd v SHA Premier Constructions Pty Ltd & Anor* [2019] QSC 91).

In summary, Niclin Constructions Pty Ltd (**Niclin**) entered into four contracts with SHA Premier Constructions Pty Ltd (**SHA**) to design and construct four petrol stations. Niclin lodged four separate adjudication applications with the Queensland Building and Construction Commission (**QBCC**).

Under the Qld Act, a copy of an adjudication application must be served on the respondent (in the approved form). The legislation prescribed no timeframe for this service to be made. However, under the *Acts Interpretation Act 1954* (Qld) (**AIA**), if no time is specified for doing a thing under an Act, the thing is to be done *'as soon as possible'*.

In its adjudication responses, SHA stated that the adjudication applications were invalid because Niclin had not served SHA with a copy of each application form with its submissions. Niclin, realising its mistake, served SHA with a copy of each application form 12 business days after the applications were made. The adjudicator concluded that he did not have jurisdiction to decide the applications because they were not served on the respondent *'as soon as possible'* in accordance with the AIA. The court at first instance affirmed the adjudicator's decision. Niclin appealed to the Court of Appeal.

DECISION

The Court of Appeal unanimously dismissed Niclin's appeal, concluding that the primary judge did not err in concluding that Niclin was required to serve the adjudication application, including the prescribed application form, *'as soon as possible'* and that Niclin did not comply with that obligation. As a result, the court held that the adjudicator did not have jurisdiction to determine the adjudication applications.

The court held that given that the Qld Act provided builders with a statutory right to progress payments in a particularly expeditious adjudication process, parliament could not have intended to allow a situation where a claimant would take as long as it liked to serve an application.

The court stated that parliament did not specify any timeframes for the service of adjudication applications because it intended to accommodate the different circumstances that might lead to service not being able to be effected soon after an application being lodged. Therefore, in accordance with the AIA, parliament intended that service of an adjudication application be made on a respondent *'as soon as possible'*.

The court noted that, in this particular case, SHA was legally represented and had given instructions to accept service. It was therefore possible for Niclin to serve the adjudication applications on SHA the same day they were lodged. In these circumstances, the court found that Niclin's service of the adjudication applications 12 business days after the applications were made was not *'as soon as possible'*.

Prime Constructions (Qld) Pty Ltd v HPS (Qld) Pty Ltd & Ors [2019] QSC 301

The extent to which an adjudicator deals with any issue in an adjudication will be largely dependent on how it is presented and explained by a party participating in the process.

A party to an adjudication should ensure all arguments are clearly stated as an adjudicator will not be expected to trawl through material trying to find evidence which may support a case that is not presented in a party's written submissions.

FACTS

Prime Constructions (Qld) Pty Ltd (**contractor**) and HPS (Qld) Pty Ltd (**subcontractor**) entered into a contract that required the subcontractor to supply and install window and door assemblies in a hotel tower in Cairns. By the subcontract, the subcontractor was required to indemnify the contractor against loss or damage to the property of the contractor in or upon which the work was being carried out.

On 10 December 2018, while the subcontractor was carrying out its window works, the hotel tower suffered extensive water damage following a severe storm event. Rainwater penetrated the building from multiple locations, including the windows the subcontractor was responsible for. The contractor rectified the damage caused to the hotel tower and sought to rely on the subcontractor's indemnity to recover the portion of its costs by deducting $866,263 from a payment claim.

The subcontractor disputed the reduced amount and referred the payment dispute to adjudication under the Qld BIF Act. The adjudicator determined that the contractor was only entitled to deduct $69,696 for the rectification costs. The contractor applied to the Supreme Court of Queensland seeking a declaration that the adjudicator's decision was void for want of jurisdiction.

Each of the asserted grounds of jurisdictional error were based on the contractor's claim that the adjudicator had not adequately considered all of the materials in making his decision, mainly:

1. the adjudicator failed to consider genuinely the totality of the contractor's evidence regarding the water damage to the hotel tower rooms. The contractor claimed that the adjudicator did not have regard to the section of a table of costs the contractor incurred that took into account rooms initially thought to be dry but subsequently were found to be suffering water damage, referred to as a 'third category' of room;
2. as a consequence of the first jurisdictional error, the adjudicator committed a second jurisdictional error in failing to give the contractor notice of his intention to make a decision on a basis not contended for in the material submitted, which was a breach of the rules of natural justice;
3. the adjudicator declined to provide any assessment of the rectification costs in rooms on levels 8 and 12 of the hotel tower;
4. in rejecting the contractor's basis of apportionment, the adjudicator failed to have regard to relevant material, including the quantity surveyor's report, and failed to give adequate reasons; and
5. the adjudicator failed to consider genuinely the material relevant to the contractor's pelmet claim by concluding that the contractor's methodology of apportioned general costs was inadequate.

DECISION

Justice Flanagan dismissed the contractor's claims and ordered it to pay the subcontractor's costs of the proceedings.

Regarding the contractor's first ground of appeal, his Honour held that because the contractor had failed to draw the adjudicator's attention to evidence of its 'third category' of rooms, it was not the responsibility of the adjudicator to *'try and find some evidence that support[ed] a case which Prime [didn't] present in their written submissions'*.

As the second jurisdictional error was contingent on the contractor establishing the first jurisdictional error, it was also not established.

The third ground was dismissed on the basis that the evidence the contractor claimed the adjudicator had not considered would not have assisted in identifying the subcontractor's responsibility for the water damage to the two levels. Further, his Honour commented that it was within the adjudicator's jurisdiction to determine the subcontractor's liability to indemnify the contractor by choosing to rely on only contemporaneous documents.

Regarding the fourth ground, his Honour held that despite the contractor's assertions, there was adequate evidence in the adjudicator's reasons to establish he had had regard to the relevant material to reject the contractor's basis of apportionment.

Finally, the fifth ground was dismissed for similar reasons. The contractor's complaint that the adjudicator had not specifically dealt with the 'pelmet' portion of its general costs was not established as it was evident from the adjudicator's reasons that he had adequately dealt with general costs in their entirety, which included the pelmet claim.

S.H.A. Premier Constructions Pty Ltd v Lanskey Constructions & Ors [2019] QSC 81

A principal may impliedly grant a waiver of strict performance of the contract conditions through its conduct. Such a waiver may apply across multiple contracts for different projects between the same parties if those contracts have the same provisions.

Correspondence that is not designated as a variation under a contract may nevertheless constitute a variation if a contractor can show that a principal, through its conduct, waived the principal's requirements for strict compliance with the variation provisions.

FACTS

A national petroleum company, SHA Premier Constructions Pty Ltd (**developer**), entered into contracts with Lanskey Constructions Pty Ltd (**contractor**) for the design and construction of petrol stations at various locations. Each project was the subject of a separate contract entered into between the developer and the contractor.

In the Carrara project, there was an early exchange of emails between the superintendent at the time and the contractor (**Early Emails**), where the contractor asked the superintendent if some changes were subject to variation approvals. The superintendent requested that the contractor submit a variation notice for any *'time or cost impost'*, but also stated that *'work orders will be raised on all approved variations'* and *'no work to proceed without work orders'*.

There were six work orders issued after the Early Emails subject to the dispute, which were addressed to the contractor with the Carrara site address and descriptions of the works referring back to the contractor's earlier quotations (**Work Orders**). The Work Orders contained the words *'Construction Quote Approved'*.

In the Yeppoon project, the contractor received an email from the developer requesting that it proceed with the work and stating that the developer would issue a 'work order' (**Email Order**).

Neither the Work Orders nor the Email Order satisfied the requirements for valid variations under the Contracts. The developer refused the contractor's payment claims for the works done in relation to the Work Orders and the Email Order. The contractor referred the matter to adjudication under the Qld Act. The adjudicator found that the contractor had made valid payment claims. The developer applied to the Supreme Court seeking an order declaring the adjudication decisions void.

DECISION

The Queensland Supreme Court dismissed the developer's application and affirmed the adjudicator's decision.

The court found that the Early Emails were significant because:

- the words *'work orders will be raised on approved variations'* and *'no works to proceed without work orders'* were consistent with a general direction in relation to variations on the Carrara project;
- that general direction was given by the superintendent of that project; and
- the project was conducted thereafter in accordance with that direction.

The court found that the Work Orders given later were entirely consistent with the direction given by the superintendent at the commencement of the project. As all approved variations would be the subject of work orders and no work was to proceed without work orders, those Work Orders could be properly seen as confirmation of approved variations. The court looked at the conduct of the parties and found the developer, by its conduct, waived the requirement for strict compliance with the variation provisions under the contract.

The court found that the developer's conduct in respect of the additional work on the Yeppoon project constituted a waiver, and consequently the work carried out pursuant to the Email Order was a variation. The court did not explicitly state whether it gave any weight on the wording 'work order' included in the Email Order.

SHA Premier Constructions Pty Ltd v Niclin Constructions Pty Ltd [2019] QCA 201

This case illustrates that when a superintendent is not named under a contract, a progress payment regime may be void, leaving the contractor vulnerable to no payment for works completed unless it pursues damages for a breach of contract in the courts.

FACTS

This case was an appeal from a decision of the District Court of Queensland with the essential facts and decision at first instance previously discussed in our May 2019 edition of the Construction Law Update.

The appellant (**SHA**) entered into a design and construction contract with the respondent (**Niclin**) for the construction of some petrol stations. A dispute arose about progress claims made by Niclin which were not paid by SHA. A discrete question was raised in the District Court as to whether the claim was a valid payment claim under the Qld Act. The issue turned on an interpretation of various clauses in the contract between SHA and Niclin. The primary judge resolved the issue in favour of Niclin and ordered SHA to pay $399,894.06 together with interest.

SHA appealed the decision in the Queensland Court of Appeal on the basis that, as it was not nominated as the superintendent under the contract, none of Niclin's payment claims was due and payable.

DECISION

The Court of Appeal set aside three of the orders directed by the primary judge, finding that, because SHA was not a superintendent under the contract, any payment claim submitted by Niclin was ineffective. In reaching its decision, the court discussed the proper construction of a 'superintendent' under the contract.

First, the court looked at a number of clauses that made clear that the contract had proceeded on the basis that the superintendent was to be a separate entity to the principal. Morrison JA, who delivered the lead judgment, then turned to the definition of 'superintendent'.

The contract identified the superintendent as *'S.H.A Premier Construction Pty Ltd nominated person'*. Given that unclear language, the court had to determine whether this meant *'S.H.A Premier Constructions Pty Ltd**'s** nominated person'* (emphasis added) or *'S.H.A Premier Constructions Pty Ltd **or** nominated person'* (emphasis added). His Honour held that the first alternative was to be preferred over the second construction, commenting it would be fanciful to conclude that the parties intended the principal to act as a superintendent considering the conflicting interests that would arise.

Having decided that, the court had to consider whether a term should be implied into the contract to the effect that if SHA had not nominated a superintendent it was itself to perform the superintendent's obligations. That question was answered in the negative with his Honour finding that the contract remained effective without implying such a term.

The failure by SHA to nominate a superintendent had two main consequences:

- first, it amounts to a breach of SHA's obligations under the contract, entitling Niclin to pursue a claim for damages; and
- second, because there was no superintendent to respond to any payment claim submitted by Niclin, the requisite progress certificates were not issued, and no obligation arose for SHA to pay a progress payment under the contract. This also entitled Niclin to pursue damages caused by these breaches, illustrating that the contract did not require the implied term (described above) for it to be effective.

The parties agreed that if the conclusion of the court was that SHA did not nominate itself as superintendent, any response to the payment claim was ineffective. As such, the consequence was that the appeal was allowed and the orders were set aside.

The Trust Company (Australia) Ltd atf the WH Buranda Trust v Icon Co (Qld) Pty Ltd & Anor [2019] QSC 87

Submission of a payment claim via Aconex was considered valid service, despite the contract stating that any notice must be delivered to the principal's physical address.

When serving via Aconex or email, careful consideration is required by the parties in respect of what is considered valid notice and service of a payment claim under the terms of the particular contract.

The court will take into account the commercial context of the contract in determining whether service is valid.

FACTS

This case involved an application to set aside an adjudication decision on the grounds that the payment claim was not properly served and so was not a valid claim under Part 3 of the Qld Act.

The applicant, The Trust Company (Australia) Ltd atf the WH Buranda Trust (**principal**), was the principal under an amended AS4902 with Icon Co (Qld) Pty Ltd (**contractor**). The principal appointed AECOM Cost Consulting Pty Ltd (**AECOM**) as the principal's representative. The contract established Aconex for document control, and the parties used this system for every previous progress claim made under the contract.

The contractor made the relevant progress claim (no. 37) (**PC37**) via Aconex and it was endorsed as a payment claim pursuant to the Qld Act. AECOM's employee received the Aconex notification and accessed PC37 on the day it was sent by the contractor. He then assessed the claim and issued a payment certificate in response (for an amount that was significantly less than the contractor had claimed). The contractor made a successful adjudication application under the Qld Act, which concluded that the amount due to the contractor was roughly the amount claimed in PC37.

Key contractual provisions

Clause 37.1 (payment): *'… each progress claim shall be given in writing to the Principal's Representative…'*

Clause 7 (services of notices): *'…subject to clause 7A, a notice (and other documents) shall be deemed to have been given and received, if addressed or delivered to the relevant address in the Contract...'* and *'subject to clause 7A … a notice sent by email is not a valid notice for the purposes of the Contract'*.

Clause 7A (Qld Act and QBCC Act Notices): *'Any notice served by the Contractor under the… Qld Act shall be served on the Principal's physical address'*.

Key legislative provisions

Section 17(1) of the Qld Act states that the claimant *'may serve a payment claim on the person who, under the construction contract concerned, is or may be liable to make the payment'*.

Section 103(1) of the Qld Act states that *'a notice or other document that under this Act is authorised or required to be served on a person may be served on the person in the way, if any, provided under the construction contract concerned'*.

Submissions

The principal's key submission was that insofar as PC37 was relied upon as being a payment claim under the Qld Act, it is a *'notice' for the purposes of clause 7A, and therefore it should be served on the principal's 'physical address'*, being its solicitor's address (rather than through Aconex).

The contractor's key argument was that the service of a progress claim containing a Qld Act-complaint payment claim is governed entirely by clause 37.1 (*'given in writing to the Principal's Representative'*).

DECISION

Applegarth J found for the contractor and dismissed the application.

Which contractual notice requirements applied to the progress claim?

His Honour held that clause 37 (not clause 7A) governed to whom and how a progress claim is given, and that clause 7A is concerned with other kinds of notices (for example, an adjudication application).

His Honour confirmed that the subject matter and terms of clause 37, in conjunction with the commercial context of the making of progress claims to the principal's representative supports that conclusion. This decision was consistent with the *'business-like operation'* of the contract, as otherwise this would mean that the parties would have to double handle the notice and it would not make sense for the applicant's solicitors to be receiving all of their construction notices.

In his decision, his Honour did not rely on the fact that the principal accepted the previous 36 progress claims submitted by the contractor, each submitted by Aconex, or that the proncipal did not raise the issue of the application of clause 7A in the adjudication process, as he was not of the view that this aided contractual interpretation.

Was the claim validly served?

Yes. In respect of the application of clause 7 (the prohibition of service by way of email), his Honour held that service via Aconex was not *'notice sent by email'*.

His Honour addressed whether AECOM was *'the person who was liable to make the payment'* as required under section 17(1) of Qld Act. Citing Vickery J in a previous Victorian decision, his Honour held that this section does not operate in a *'commercial vacuum'* and that clause 37 conferred express authority upon AECOM as principal's representative to receive a progress claim, and this constituted service on the principal.

Victoria

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In this section, the *Building and Construction Industry Security of Payment Act 2002* (Vic) is referred to as the **Vic Act**.

Victoria overview

EMERGING TRENDS

This year saw only nine security of payment decisions handed down by Victorian courts – the lowest since this publication began including decisions of both Victoria's Supreme and County Courts in 2015. Whether or not this is explicable on the basis of there being fewer adjudications commenced is unable to be determined from the currently available data.

While historically the Vic Act has been far less utilised than its 'east coast' counterparts in New South Wales and Queensland, the well-publicised proliferation of major project activity in this State at least suggests that the opportunities to apply for adjudication may never have been greater.

The comparative lack of adjudication activity in Victoria is often attributed to its anomalous 'excluded amounts' regime (see sections 10, 10A and 10B of the Vic Act) which was introduced by amendment in 2006. This regime limits the types of claims which can be adjudicated. Despite the creditable intentions of the amendment, the anecdotal dearth of adjudication at a time of unprecedented construction gives pause to consider whether the regime is furthering or stymying the 'prompt payment' objectives of the Vic Act.

DEVELOPMENTS

While 2019 may have been a relatively lean year for security of payment judgments in Victoria, two decisions are particularly noteworthy.

First (and foremost) was the welcome decision of Digby J in *MKA Bowen v Carelli Constructions* [2019] VSC 436. There his Honour concluded that a payment claim served prior to a reference date was invalid for the purposes of the Vic Act. Since 2010, the position in Victoria had been that a prematurely served payment claim was not invalid (and could support a subsequent adjudication application). His Honour's decision brings Victoria into step with other 'east coast' jurisdictions on this issue and provides greater certainty to claimants and respondents (and those who advise them) about the Vic Act's requirements for serving payment claims.

Second was *Zulin Formwork v Valeo Construction Group* [2019] VCC 936 which bears close reading for its considered analysis of last year's decision by Digby J in *Shape Australia v The Nuance Group* [2018] VSC 808 (***Shape***). It was held in *Shape* that an amount claimed in a payment claim for previously-deducted liquidated damages was an 'excluded amount' for the purposes of section 10B and such deduction was immune from challenge unless adjudicated immediately. As we predicted would occur in our 2018 SOP Roundup, *Shape* was the subject of scrutiny by Ryan J in *Zulin* who confirmed that Digby J's observation in this regard was *'obiter dicta'* (and accordingly not binding on subsequent decision-makers).

FUTURE

We await to see whether the remarks on the effect of *Shape* advanced by Ryan J in *Zulin* are considered or elucidated upon further by a Victorian court in 2020.

Shape continues to provide a powerful incentive to respondents to tactically deduct liquidated damages at the earliest opportunity so as to 'ringfence' these amounts from future challenge. Arguably this frustrates the 'pay now argue later' policy which underlies the Act.

Despite almost two years having passed since the Murray Report was delivered, we are presently unaware of any amendments being considered to the Vic Act.

BWAY v Pasiopoulos [2019] VCC 691

The Vic Act applies to progress claims regarding domestic buildings only if the building owner is in the business of building residences and the contract is entered into in the course of that business.

The case highlights that this test is made at the time that the contract is entered into and reiterates the matters that will be taken into account when carrying out the assessment.

FACTS

In 2017, Mr Pasiopoulos (**owner**) entered into a construction contract with BWAY (**builder**) in respect of a property in Ringwood East. The contract was in relation to the building of domestic buildings (for the purpose of the *Domestic Building Contract Act 1995* (Vic)), being three townhouses on the property.

During the course of the works, the owner did not provide a payment schedule in response to a payment claim for $183,400 made by the builder and did not pay the claimed amount.

The builder sought judgment against the owner as a debt due under the Vic Act.

In response, the owner claimed that the Vic Act did not apply (and consequently the debt due could not be claimed under the Vic Act) because the owner was not in the business of building domestic buildings, or, if he was, the contract was not entered into in the course of, or in connection with, that business.

DECISION

The building owner was not 'in the business' of building residences

The court noted the decision of *Director of Housing v Structx Pty Ltd T/as Bizibuilders and Anor* [2011] VSC 410, where it was said that the expression 'in the business of building residences' connotes the construction of dwelling houses as a commercial enterprise on the basis of a going concern, that is, an enterprise engaged in for the purpose of profit on a continuous and repetitive basis.

The court held that whether domestic buildings are constructed under such an enterprise is to be determined by looking to the objective 'salient features' of the specific case, such as (i) the professional capacity of the owner; (ii) whether the purpose of the project is profit; (iii) whether the building of residences is on a continuous or repetitive basis; (iv) whether there is a commercial vehicle structured as its purpose to enable the building of domestic residences; and (v) the use of the domestic residences when completed.

Applying the 'salient features' analysis to the circumstances in this case, the court found that the owner was not in the business of building residences because:

(i) the owner took out a personal (not a business) loan to fund construction of the residences;

(ii) the owner's objective was to give a townhouse to each of his children as a gift;

(iii) at the time the contract was made, the owner had never entered into any other contract to construct a residence;

(iv) the property was held in the owner's personal capacity and not on behalf of any trust or vehicle with an ABN in respect of a property business; and

(v) nothing in the contract demonstrated that the owner had any plans to sell the residences.

The court held that the test is determined when the contract is entered into. The court therefore disregarded various statements made during the course of the works regarding the sale of the buildings for profit.

The contract was not entered in the course of, or in connection with, any such business

The court held that, even if it was wrong and the owner was 'in the business of building residences', it was not satisfied that the contract was entered into as part of any such business.

The court held that in order for the Vic Act to apply, an owner must be in the business of building residences at the time the contract is entered, and the contract must be entered pursuant to that business (that is, for the purpose of furthering the business of the owner). In this case, the owner had entered the contract in 2017, and any subsequent property purchases made to carry on a business of building residences were irrelevant.

John Beever (Aust) Pty Ltd v Paper Australia Pty Ltd [2019] VSC 126

The Victorian Supreme Court has confirmed that the context in which a payment claim is served (such as the background knowledge of the parties from their past dealings and prior exchanges of information) can be taken into account when determining whether a payment claim sufficiently identifies the construction work to which the claim relates.

This case also serves as a useful reminder that the requirement for a payment claim to expressly state that it is a 'payment claim made under the Vic Act' will be strictly enforced.

FACTS

The dispute related to whether payment claims made by John Beever (Aust) Pty Limited (**contractor**) on Paper Australia Pty Ltd (**principal**) complied with the requirements of the Vic Act.

Identification requirement: description of the works

The principal challenged the first two claims on the basis that they did not meet the identification requirement in section 14(2)(c) of the Vic Act, that is, that they must identify the construction work or related goods and services to which the progress payment relates. Each of the first two claims was a tax invoice which contained only a limited description of the construction works by reference to the relevant project number, contract, period of work and the amount claimed.

Statement requirement: statement that the claim is under the Vic Act

The third claim was challenged on the basis that neither the claim nor the email which attached the claim contained a statement that the claim was a payment claim made under the Vic Act, contrary to section 14(2)(e) of the Vic Act.

DECISION

The court granted summary judgment in respect of the first two claims on the basis that they satisfied the identification requirement under section 14(2)(c). However, the court denied summary judgment in respect of the third claim on the basis that the claim did not include the statement required under section 14(2)(e).

First two claims: identification requirement

The court held that, while the information provided on the face of each of the first two payment claims was not, of itself, sufficient to identify the construction work to which the progress payment related, the court held that 'the objective context and circumstances' in which the payment claims were prepared can be taken into account.

After reviewing the authorities, the court said the following principles are clear:

- the test of whether a claim is a payment claim under the Vic Act is objective;
- compliance is not overly demanding and should not be approached in an unduly technical manner;
- the identification requirement is that the payment claim reasonably identifies the construction works such that the basis of the claim is reasonably comprehensible to the recipient when considered objectively; and
- in evaluating the sufficiency of that identification, the background knowledge of the parties and the past dealings may be taken into account.

Accordingly, the court was able to take into account email correspondence between the principal and contractor regarding the construction works that were the subject of each of the claims. On the basis of this information, the court found that the claims were able to reasonably identify to the principal the construction work to which they related.

Third claim: statement requirement

The court reaffirmed the notion that the statement requirement is of critical importance as it notifies the recipient that it must comply with the time requirements under the Vic Act. Strict observance of the statement requirement under section 14(2)(e) is required of a person seeking payment under the Vic Act.

As neither the third claim nor the email by which it was served contained a statement that the claim was made under the Vic Act, the court found that the statement requirement was not met.

Interestingly, the court suggested that subsequent correspondence can remedy an earlier claim which would have otherwise failed to comply with the statement requirement. The court held that the test is whether, viewed objectively, the recipient would have reasonably concluded that a claim is a payment claim under the Vic Act. In this case, the subsequent email sent by the contractor referred to various previous claims and was found to fail the statement requirement.

The court considered that it was not relevant that the principal had treated the third claim as a payment claim under the Vic Act by providing a payment schedule as this only evidenced the subjective perception of one of the parties and not the objective circumstances.

John Beever (Aust) Pty Ltd v Paper Australia Pty Ltd (No 2) [2019] VSC 575

Where a claimant obtains summary judgment for an undisputed payment claim made under the Vic Act, both the rate of interest and the period of time over which interest accrues is dictated by the Vic Act. The court has no discretion as to the award of interest where it awards summary judgment for undisputed progress claims made under the Vic Act, even where there has been significant delay between the time the payment falls due and when the claimant applies for summary judgment.

FACTS

In March 2019, Lyons J decided that John Beever (Aust) Pty Limited (**contractor**) was entitled to summary judgment against Paper Australia Pty Ltd in relation to two payment claims made under the Vic Act in 2014.

The issue in the present proceedings was whether interest on an amount awarded by summary judgment proceedings commenced under section 16(2)(a)(i) of the Vic Act is to be calculated in accordance with section 12(2) of the Vic Act or one of sections 58 or 60 of the *Supreme Court Act 1986* (Vic) (**SC Act**).

Where interest is calculated under section 12 of the Vic Act, the rate of interest and the period of time over which it is payable is dictated by the Vic Act. By contrast, where interest is calculated under sections 58 and 60 of the SC Act, the court has a discretion to determine both the rate of interest and the period of time over which it is payable.

DECISION

The court decided in favour of the contractor, finding that interest on the unpaid progress payment should be determined in accordance with section 12(2) of the Vic Act rather than the SC Act.

The court looked to the language, structure and purpose of the Vic Act and the SC Act interest provisions. Ultimately, Lyons J found that that section 12 of the Vic Act on its proper construction provides for a specific regime which mandates the time from when, and the rate at which, interest is to accrue on the unpaid portion of an undisputed payment claim sought to be recovered in proceedings pursuant to section 16(2) of the Vic Act. His Honour held that this superseded or displaced the interest provisions of section 58 of the SC Act.

His Honour recognised that this decision would result in the court having no discretion as to the interest payable on an undisputed payment claim recovered in a summary judgment proceeding, and that this may be problematic where the claimant delays in issuing proceedings for summary judgment. In this case, the claimant waited nearly four years before issuing proceedings for summary judgment. His Honour noted that such a delay is inconsistent with the quick recovery of progress payments, which is the purpose of the Vic Act. Nevertheless, this did not influence his Honour's conclusion.

Levi v Z&H Building Development [2019] VSC 633

The Victorian Supreme Court has confirmed the following two principles of the Vic Act:

- **items may be claimed in successive payment claims so long as they remain unpaid; and**
- **objective factors such as language, content, mode of submission and context will be taken into account in determining whether a claim is in the nature of a final payment claim. Whilst not defined in the Vic Act, a final payment claim is a final balancing of account between the parties which, depending on the words of the relevant contract, may only be submitted after a certain date or circumstance, such as actual or practical completion.**

This case clarifies that contractors are entitled to continue to pursue unpaid payment claims until the final payment claim.

FACTS

Levi Pty Ltd (**head contractor**) engaged Z&H Building Development Pty Ltd (**subcontractor**) to perform certain construction and engineering works.

Having served the head contractor with an August and September payment claim, on 28 December 2018 the subcontractor served a further payment claim for the claims included in the September payment claim and a final retention sum of $17,000 which totalled $101,365 (**December Payment Claim**). The head contractor provided a payment schedule for the December Payment Claim for a lesser amount, and consequently the subcontractor made an adjudication application. The adjudicator determined that the head contractor was liable to pay the builder $77,687.

The head contractor sought judicial review of the adjudicator's determination on the grounds that:

- the jurisdictional time limit for service of payment claims was not complied with; and
- the claim was a final payment claim (which could not be submitted under the building contact until the date of practical completion).

DECISION

The court upheld the adjudicator's determination and dismissed the head contractor's review application.

Time limit for service of payment claims – seeking previously claimed amounts in subsequent claims

The court found that the subcontractor had validly served payment claims in August, September and December 2018 in accordance with sections 9(1) and 14(1) of the Vic Act. The court held that a claim for an item of work, goods or services may be claimed again as components of successive payment claims, provided the original payment claim was valid and timely pursuant to the Vic Act. The court held that the time limit for service of claims (three months after the relevant reference date) is a limit on the payment claim itself and not the item or amount claimed within the claim.

Determination of the reference date – the nature of a final payment claim

The court determined that the December Payment Claim was not in the nature of a final payment claim. In reaching this decision, the court held that:

- the adjudicator had, as a matter of fact, determined that certain defective and incomplete works were yet to be completed at the time the December Payment Claim was made;
- a reference to '100% complete to date' in a payment claim is not in itself determinative. Instead, one must objectively construe the language, content, mode of submission and context of the claim; and
- the words 'final retention sum' are not of themselves determinative of the status of the payment claim in which such a claim is included.

MKA Bowen v Carelli Constructions [2019] VSC 436

This decision marks a change in the legal position in Victoria with respect to the early service of payment claims under the Vic Act.

Since Vickery J's decision in *Metacorp Australia Pty Ltd v Andeco Construction Group Pty Ltd & Ors* (2010) 30 VR 141, it has been accepted that a bona fide payment claim served prematurely could be valid. However, this is no longer the case, even where the relevant construction contract contains a clause deeming an early payment claim as effective only from the next reference date.

Accordingly, to engage the operation of the Vic Act, claimants must ensure that payment claims are only served on or after the relevant reference date under the contract. In particular, where a reference date falls on a non-business day, parties must serve the payment claim on or after the non-business day (and not on the business day prior).

FACTS

MKA Bowen Investments Pty Ltd (**principal**) engaged the first defendant, Carelli Constructions Pty Ltd (**contractor**) to design and construct an apartment complex in Mont Albert, Victoria.

Under clause 37.1 and Item 33 of the contract, payment claims were to be submitted on the 25th day of each month (being the relevant reference date). Where a payment claim was served early, clause 37.1 of the contract stipulated that the early payment claim *'shall be deemed to have been made on the date for making that payment claim in accordance with Item 33'*.

On 26 November 2018 (in reliance on the 25 November 2018 reference date), the contractor served a payment claim on the principal for $39,087. On 21 December 2018 (in reliance on the 25 December 2018 reference date), the contractor served a further payment claim on the principal for $411,358 (**December Payment Claim**). In response to the December Payment Claim, the principal provided a payment schedule to the contractor in the amount of $7,182.

The contractor referred the December Payment Claim to adjudication under the Act. The adjudicator determined that the contractor was entitled to payment of $209,470. The principal commenced proceedings in the Supreme Court of Victoria seeking to quash the adjudication determination because the December Payment Claim was not validly served under the Act as it was not served *'on and from'* the relevant *'reference date'*.

DECISION

The court held that the December Payment Claim was not a valid payment claim under the Act as it was served before the relevant reference date. Accordingly, the adjudication determination was quashed.

Following the High Court of Australia's reasoning in *Southern Han Breakfast Point Pty Ltd (in Liquidation) v Lewence Construction Pty Ltd* [2016] HCA 52 and the New South Wales Court of Appeal in *All Seasons Air Pty Ltd v Regal Consulting Services Pty Ltd* [2017] NSWCA 289 (**All Seasons**), the court considered that sections 9(1) and 14(1) of the Vic Act did not permit the service of a payment claim prior to the relevant reference date. In reaching this conclusion, the court had particular regard to the words *'on and from each reference date'* which appear in section 9(1)(a) of the Vic Act.

The court considered that the provision of the contract which purported to deem early payment claims as being made on the relevant reference date did not cure the invalidity of the December Payment Claim. Citing *All Seasons*, the court emphasised that the Vic Act establishes a time-critical regime for the submission of payment schedules and referral to adjudication. The court was concerned that uncertainty would arise if such deeming provisions could have the effect of circumventing the temporal requirements of the Vic Act. Accordingly, the clause was held to be of no effect and did not cure the invalid early service of the December Payment Claim.

NewGrow Pty Ltd v Buxton Constructions (Vic) Pty Ltd [2019] VCC 464

Payment schedules served under the Vic Act must be sufficiently accurate in order to meet the requirements of section 15 of the Vic Act, including the requirement that a payment schedule must identify the payment claim it is intended to address. Perfect precision is not required for a payment schedule to be valid. However, if insufficient care is taken in preparing a payment schedule resulting in too many discrepancies and errors, it may fail to meet the requirements of section 15 of the Vic Act and be treated as if no payment schedule was served at all.

FACTS

Buxton Constructions (Vic) Pty Ltd (**head contractor**) subcontracted NewGrow Pty Ltd (**subcontractor**) to perform landscaping work as part of the construction of an aged care facility. The subcontractor sought judgment in relation to two payment claims issued under the Vic Act on the basis that the head contractor failed to serve payment schedules in response to either of the payment claims within the 10 business day period specified in the Vic Act.

The first payment claim in dispute was a claim for $281,923 served on 25 August 2018 (**August Payment Claim**). On 31 August 2018, the head contractor served a payment schedule stating that it would pay $59,811 (**August Payment Schedule**). Then, on 11 September 2018, the head contractor served a revised payment schedule stating that it would pay $140,279.

The second payment claim in dispute was a claim for $214,790 served by the subcontractor on 25 September 2018. On 5 October 2018, the subcontractor served a revised payment claim for $204,735 (**September Payment Claim**). On 25 October 2018, the head contractor served a payment schedule in response to the revised payment claim stating that it would pay the subcontractor $138,395 (**October Payment Schedule**) and then paid that amount on 1 November 2018. The head contractor alleged that, in correspondence on and after the October Payment Schedule, the subcontractor had agreed to revise its September Payment Claim to match the October Payment Schedule (which was served outside the time required by the Vic Act) and therefore the subcontractor had agreed to permanently forgo the remainder of the amount originally claimed.

DECISION

The court found in favour of the subcontractor. The court:

- held that there was no valid payment schedule issued in response to the August Payment Claim because the purported payment schedule contained numerous errors and inconsistencies; and
- rejected the head contractor's contention that the subcontractor had waived its rights to claim the full amount of the September Payment Claim by agreeing to revise its payment claim to reflect the October Payment Schedule.

August Payment Claim

Cosgrave J held that the August Payment Schedule was not a payment schedule under the Vic Act. His Honour acknowledged that perfect precision is not required for a payment schedule to meet the requirements of the Vic Act but on balance considered that there were such a number of basic, unexplained errors and inconsistencies in the August Payment Schedule that *'a reasonable person standing in the shoes of the claimant could be justifiably confused about whether the August payment schedule was addressing the August payment claim'*. Examples of the errors included both numbers and dates of the August Payment Claim not matching the August Payment Schedule. As a result, his Honour held that the August Payment Schedule did not satisfy the requirements of section 15 of the Vic Act, in particular by failing to identify the payment claim to which it related and failing to indicate why the scheduled amount was less than the claimed amount. In respect of the 'revised' payment schedule of 11 September 2018, this did not assist the head contractor. His Honour found that because the original August Payment Schedule was not a payment schedule under the Vic Act, it could not be 'revised'; in any case, the 'revised' payment schedule was served too late and was also afflicted with many of the same discrepancies which were fatal to the initial August Payment Schedule.

September Payment Claim

Looking to the correspondence between the parties that followed the October Payment Schedule, Cosgrave J held that there was no agreement between the parties to vary the September Payment Claim because the terms of the alleged agreement were too vague and uncertain and no consideration was provided. In any event, his Honour stated that such an agreement would likely be void because its terms would contravene section 48 of the Vic Act, which renders ineffective any agreement between parties to contract out of the operation of the Vic Act.

Rise Constructions v El-Hajj [2019] VSC 818

This decision is a reminder of the importance of meeting the strict timeframes set out in the Vic Act. Parties need to be cautious in ensuring that documents are delivered within the timeframes allowed under the Vic Act. A finding as to the date of when a document was served or received is likely to be a factual matter, within the jurisdiction of the adjudicator and not amenable to judicial review.

FACTS

The plaintiff, Rise Constructions Pty Ltd (**head contractor**), and the first defendant, Walid El-Hajj trading as Andary Excavation (**subcontractor**), entered into a subcontract on 1 February 2019 under which the subcontractor agreed to carry out excavation and concreting work for the head contractor. On 12 June 2019, the subcontractor served a payment claim on the head contractor claiming a progress payment of $139,942. On 2 July 2019, the head contractor issued a payment schedule in response to the payment claim scheduling a payment of $Nil. The subcontractor referred the payment claim to adjudication under the Vic Act.

On 4 July 2019, the head contractor received the adjudication application. By letter dated 5 July 2019, the adjudicator sent to the head contractor his notice of acceptance of his appointment under section 20(1) of the Vic Act (**Notice of Acceptance**). On 12 July 2019, the head contractor lodged with the adjudicator its adjudication response. On 6 August 2019, the adjudicator delivered his adjudication determination in which he determined that the subcontractor's entitlement to payment was $66,950.

In the adjudication determination, the adjudicator determined that the head contractor received the Notice of Acceptance on 8 July 2019. As the adjudication response was not provided until 12 July 2019 (more than two business days after the Notice of Acceptance was received), the adjudicator determined that he was precluded by section 22(3) of the Vic Act from considering it.

The head contractor applied for judicial review of the adjudication determination on the basis that the adjudicator erred in deciding the date of service of the Notice of Acceptance based on the available evidence and that as a result the adjudicator wrongfully failed to have regard to its adjudication response. The head contractor submitted that it received the Notice of Acceptance on 10 July 2019 and not 8 July 2019. The head contractor also contended that this failure constituted a denial of natural justice.

DECISION

The court dismissed the head contractor's application for judicial review.

In doing so, Digby J held that the adjudicator's determination that the Notice of Acceptance had been received on 8 July 2019 was a finding of fact and did not go to the adjudicator's jurisdiction. Therefore, this finding was within the jurisdiction and power of the adjudicator and the finding was not amenable to judicial review.

His Honour further held there was no error of law apparent on the face of the record, because the material before the adjudicator was sufficient for the adjudicator to reach the finding he did as to the date of receipt of the Notice of Acceptance. His Honour considered that the provisions of the Vic Act and of the contract were clear as to when postal service is taken to be received, finding that the Notice of Application was served on 8 July 2019 and not 10 July 2019.

Valeo Construction v Tiling Expert [2019] VSC 291

This decision affirms that parties to a construction contract are not to be taken to have contracted out of the Vic Act if they enter into a settlement agreement in a genuine final resolution of the parties' disputes. A subsequent breach by one party cannot render the resolution disingenuous retrospectively. As a result, the Vic Act is not a back-door to recover unpaid settlement amounts or other claims that were the subject of a valid settlement agreement.

FACTS

Tiling Expert (Vic) Pty Ltd (**contractor**) carried out work for Valeo Construction Pty Ltd (**Valeo**) and reached practical completion on 21 December 2017. In February 2018, the parties entered into a settlement agreement to resolve a number of matters in dispute. As part of the settlement, Valeo agreed to pay the contractor $120,000 in instalments. Under the settlement agreement the contractor waived any current and future claims against Valeo.

The first instalment of $60,000 was paid to the contractor in March 2018, however, Valeo failed to pay the remaining four monthly instalments of $15,000.

On 4 July 2018, the contractor submitted a further progress claim for the rectification of defects. The contractor argued it was entitled to make this claim because Valeo breached the settlement agreement by failing to pay the remaining balance. The contractor also argued that Valeo's breach of the settlement agreement inferred Valeo did not enter into a genuine final resolution.

The adjudicator determined that the settlement agreement was not a genuine attempt to resolve the parties' disputes and the contractor was entitled to claim costs under the Vic Act for the rectification of defects.

Issue on appeal

The central issue on appeal was whether the adjudicator committed a jurisdictional error in finding that the settlement agreement was not a genuine attempt to resolve the parties' dispute.

DECISION

The court allowed Valeo's appeal and set aside the adjudicator's determination. It was held that there was a genuine final resolution of the parties' dispute, which precluded the contractor from making any future progress claims under the Vic Act or otherwise.

Digby J emphasised that whether the resolution is genuine must be assessed at the time of entering into the settlement agreement. The court considered the terms of the agreement, the parties' negotiations and the relatively contemporaneous communications between the parties. In this case, the circumstances showed that the parties intended to settle any rights or entitlements by the terms of the settlement agreement. Therefore, the fact Valeo subsequently did not honour the settlement agreement did not revive the contractor's right to an additional progress claim. Digby J noted that if there was disingenuousness at the time of making the agreement, that may render it void by reason of section 48 of the Vic Act.

The settlement agreement was also held not to have restricted the operation of the Vic Act. This was because it resolved and removed any pre-existing or potential claims by the contractor. Digby J stated that Parliament did not intend for section 48 of the Vic Act to impede the settlement of disputes even where the construction contract is regulated by Security of Payment legislation. The contractor's right to sue Valeo for breach of the settlement agreement was not affected as a consequence of this decision; only the contractor's attempt to utilise the Vic Act was found to be invalid.

Zulin Formwork Pty Ltd v Valeo Construction Pty Ltd [2019] VCC 936

The cost of engaging other parties to undertake rectification works for allegedly defective work is not an excluded amount under the Vic Act, either as a negative variation or as damages. A claimant's decision not to challenge by adjudication an amount deducted in a payment schedule will not prevent the claimant from later claiming this amount in a subsequent payment claim.

This decision casts uncertainty on Digby J's comments in *Shape Australia v The Nuance Group* [2018] VSC 808 (*Shape*) that a claimant is not entitled to recoup previously deducted liquidated damages which are an excluded amount, particularly in circumstances where there has been no previous adjudication.

FACTS

Zulin (**subcontractor**) entered into a subcontract with Valeo (**head contractor**) for the construction of residential apartments to supply all the labour, materials, plant and equipment for concrete structure works.

On 22 June 2018, the subcontractor made payment claim No 10 (**PC-10**) for the sum of $488,840. The head contractor issued a payment schedule certifying payment of $183,738. The difference arose as a result of the head contractor offsetting amounts it had incurred for rectification carried out by other parties of defective work performed by the subcontractor. The offset amounts were described in the payment schedule as 'variations' and were supported by third party contractor invoices. No payment was made by either party. The subcontractor did not make any application under the Vic Act and continued to carry out work.

On 25 July 2018, the subcontractor issued payment claim No 11 **(PC-11**) for the sum of $288,840. The claim was for the balance of the subcontract sum, a retention sum and a sum for seven undisputed variations. PC-11 made no allowance for the amounts previously set off by the head contractor in respect of PC-10. The head contractor did not issue a payment schedule or make payment of PC-11 by the due date.

The subcontractor sought judgment under section 16(2)(a)(i) of the Vic Act for the amount claimed in PC-11, together with interest and costs. The head contractor opposed the application on the basis that the claimed amount included excluded amounts under section16(4)(a)(ii) of the Vic Act, being set-offs made by the head contractor against PC-10, as either negative variations or damages.

DECISION

The court found in favour of the subcontractor for the sum claimed. The court found that the head contractor was liable to pay PC-11 as it did not provide a payment schedule or pay by the due date and that the amounts claimed under PC-11 were not excluded amounts.

Rectification works are not a variation

Ryan J held that the cost of engaging other parties to undertake rectification works for allegedly defective work is not a 'variation' as defined under the Vic Act, being a *'change in the scope of the construction work to be carried out'*. Her Honour was of the view that construction work had not been removed from the subcontractor's scope of works by the head contractor. Rather, the subcontractor's work was completed and subsequently rectified by other contractors. Accordingly, the amounts claimed in PC-11 could not be construed as 'negative variations' and therefore were not excluded amounts under section 10B(2)(a) of the Vic Act.

Rectification costs paid to other contractors are not damages

The head contractor sought to rely on the decision of Digby J in *Shape*. In that case, the claimant had included in its payment claim amounts for liquidated damages which had previously been deducted from its earlier claims. Digby J was of the view that the recoupment of those monies was impermissible because it constituted an excluded amount. Ryan J found that the remarks of Digby J were in obiter, distinguished the present case from *Shape* on a number of factual grounds (including that the amount deducted by the head contractor from PC 10 was not adjudicated) and ultimately preferred the view that the claims in PC-11 were not claims for damages or variations.

On the question of whether rectification costs constituted an excluded amount, her Honour, citing the decisions in *Seabay Properties Pty Ltd v Galvin Construction Pty Ltd* [2011] VSC 183 and *Maxstra Constructions Pty Ltd v Joseph Gilbert & Ors* [2013] VSC 243, held that rectification costs paid to other contractors were not the equivalent of damages and therefore not excluded amounts.

On the basis of her Honour's findings that the cost of rectification works was not an excluded amount, the head contractor's attempt to rely on the offset amounts was deemed to be a cross-claim and/or defence to its liability for PC-11 which is prohibited under section 16(4)(b) of the Vic Act, given that it failed to issue a payment schedule in response to PC-11.

Failure to apply for adjudication does not limit recoupment of previous deduction/set-off

The head contractor contended that the subcontractor's failure to make an application in relation to the set-off applied by the head contractor against PC-10 prohibited it from claiming those previously deducted amounts in PC-11. Her Honour noted that the Vic Act provides that a claimant may apply for adjudication of a payment claim but is under no compulsion to do so and would not be prevented from including previously deducted amounts in a later payment claim if it did not adjudicate.

Western Australia

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- *Russell Noble Constructions Pty Ltd v Sewell* [2019] WADC 148
- *Sandvik Mining and Construction Australia Pty Ltd v Fisher* [2019] WASC 352

In this section, the *Construction Contracts Act 2004* (WA) is referred to as the **WA Act**.

Western Australia overview

EMERGING TRENDS

The McGowen Government indicated that the WA Act may be repealed and replaced with a security of payment model akin to the NSW model. A bill for those reforms is expected to be before Parliament in 2020. The use of the WA Act otherwise continued on a downward trend following sustained contraction in the construction sector. In the courts, there were no substantive decisions regarding the interpretation of the WA Act except for a novel District Court case deciding that adjudication determinations could not be recovered from third-party guarantors.

DEVELOPMENTS

The use of the WA Act continued on a downward trend following the decline in activity across key sectors of the construction industry. The number of applications for adjudication and the value of payment disputes were recorded at their lowest levels in a decade.

In late 2018, the Report into Security of Payment Reform in the WA Building and Construction Industry (**Fiocco Report**) recommended that the WA Act be overhauled and a new regime be introduced based on the NSW Act. In July 2019, Minister Quigley, WA Attorney-General and Minister for Commerce, responded to the Fiocco Report recommendations commenting that new legislation may be introduced to adopt imputed statutory trusts and repeal WA's current payment dispute system. Minister Quigley commented that a bill for those reforms may be submitted to Parliament in early 2020.

Continuing from 2018, the courts were still not afforded the opportunity to interpret the 2016 amendments to the WA Act such as 'recycling' payment claims.

In the courts we saw:

- global claims will not be permitted to be used as a 'trojan horse' for poorly pleaded claims: *Built Environs WA Pty Ltd v Perth Airport Pty Ltd [No 3]* [2019] WASC 399;
- the court will be unwilling to prevent enforcement of an adjudication determination unless it is in the balance of convenience to prevent payment: *Sandvik Mining and Construction Australia Pty Ltd v Fisher* [2019] WASC 352; and
- a party cannot recover the amount of a determination from a person that was not a party to the adjudication based on the terms of another agreement. This is because a determination does not finally determine the rights of the parties: *Russell Noble Constructions Pty Ltd v Sewell [2019] WADC 148*.

FUTURE

In 2020, we expect that a bill may be introduced into Parliament for reform of the WA Act based on the Fiocco Report recommendations.

Otherwise, indications are that the use of the WA Act will continue a downward trend consistent with expected contraction in the construction sector.

Built Environs WA Pty Ltd v Perth Airport Pty Ltd [No 3] [2019] WASC 399

Global claims will not be permitted to be used as a trojan horse for poorly pleaded claims.

This decision provides a reminder that, even in factually complex construction disputes, the court will expect plaintiffs to properly plead and particularise claims from the outset.

FACTS

The case follows on from an earlier case, *Built Environs WA Pty Ltd v Perth Airport Pty Ltd [No 2]* [2019] WASC 76, in which the court held that paragraphs of the plaintiff contractor's statement of claim (**SoC**) be struck out as legally embarrassing and gave the plaintiff permission to seek leave to replead the paragraphs. We discussed that case in in our March 2019 Construction Law Update.

In this case, Built Environs WA Pty Ltd (**contractor**), sought to replead the paragraphs. The paragraphs dealt with alleged deficiencies in the defendant's design drawings, which the contractor claimed caused it losses due to additional work.

DECISION

The court refused the contractor's application to replead the offending paragraphs of the claim.

The court considered the contractor's amended SoC, noting that the alleged design deficiencies had still not been linked to additional hours worked or costs incurred.

The court was highly critical of the contractor's approach, stating that the detail lacking from the SoC:

> *'is the kind of preparatory detail that ought to have been assembled for a claim like this before the writ was issued in this action … in order for a plaintiff to … hold a reasonable basis for commencing and pursuing a breach of contract damages action, in the first place'.*

While the court acknowledged the evidence about the scale of work done in preparing the amended SoC, the court was ultimately of the view that, in light of details of the alleged general drawing deficiencies *'emerging in piecemeal fashion'*, the global manhours pleaded was *'not an acceptable, or workable regime of sufficient clarity to viably engage with, or to conduct a trial upon'*.

In other words, the court will be unwilling to permit global claims to be used as a trojan horse for poorly pleaded claims.

Russell Noble Constructions Pty Ltd v Sewell [2019] WADC 148

Only the parties to an adjudication are bound by the determination.

A party cannot recover the amount of a determination from a person that was not a party to the adjudication based on the terms of another agreement. This is because a determination does not finally determine the rights of the parties.

FACTS

Russell Noble Constructions Pty Ltd (**Russell Noble**) commenced proceedings against a third party guarantor (**Sewell**) for payment of an adjudication determination between Russell Noble and Truepalm Pty Ltd (**Truepalm**). The proceedings were based on Sewell's liability as a guarantor of a contract between Russel Noble and Truepalm.

Under a deed of guarantee and indemnity, Sewell guaranteed to Russell Noble fulfillment of Truepalm's obligations under a construction contract and indemnified it against any claim, loss or damage resulting from any non-fulfillment of Truepalm's obligations under that construction contract.

Russell Noble submitted an adjudication application against Truepalm under the WA Act for failure to pay amounts under a payment claim for that construction contract. An adjudicator later determined that Truepalm was liable to pay Russell Noble the sum of $207,614.

Truepalm failed to pay Russell Noble the amount of the determination.

As Sewell had not been a party to the construction contract, it made an application in the District Court of Western Australia to strike out Russell Noble's statement of claim pursuant to O 20 r 19(1)(a) of the *Rules of the Supreme Court 1971* (WA), including the portions seeking to recover the amount of the determination from it under the guarantee and indemnity.

DECISION

The court ordered that the portions of the statement of claim seeking to recover the amount of the determination from Sewell be struck out as they disclosed no viable cause of action.

The court held that as Sewell was not a party to the adjudication, it was not bound by the determination. This was because a determination does not finally determine the rights of the parties. In particular, the court placed reliance on section 45(4) of the WA Act which provides that a court may revise amounts to be paid under a determination and order restitution. As a result, the terms of the guarantee and indemnity were inapplicable to the interim determination.

Ultimately, it was said that if a court revised the amount of the determination under section 45(4) of the WA Act, there would be no mechanism for Sewell to be reimbursed for monies that might otherwise have been repayable.

Sandvik Mining and Construction Australia Pty Ltd v Fisher [2019] WASC 352

The court will be unwilling to prevent enforcement of a adjudication determination under the WA Act unless it is in the balance of convenience to prevent payment.

FACTS

The decision is part of a payment claim dispute between the plaintiff contractor, Sandvik Mining and Construction Australia Pty Ltd (**contractor**), and the other defendant subcontractor, Civmec Construction & Engineering Pty Ltd (**subcontractor**).

The subcontractor issued a notice of dispute in relation to a payment claim and applied for adjudication under the WA Act (**First Application**). The appointed adjudicator determined that the contractor was liable to pay the subcontractor $4.9M (**First Determination**), which the contractor subsequently paid. In March 2019, the subcontractor made a second application in relation to the same payment claim (**Second Application**). The adjudicator determined that the contractor was liable to pay the subcontractor $1.6M (**Second Determination**).

The contractor sought judicial review of the Second Determination on the basis that the payment dispute was determined in the First Determination and sought an injunction to prevent enforcement of the Second Determination pending the outcome of that review.

DECISION

The court reapplied the two-part test as set out in *Mineralogy Pty Ltd v Sino Iron Pty Ltd* [2016] WASCA 105 for whether an injunction should be ordered, being:

- did the contractor have a prima facie case in the challenge proceedings; and
- what is the balance of convenience to the contractor and the subcontractor if the injunction were ordered?

Prima Facie Case

The court considered the strength of the contractor's case in challenging the Second Determination. While it was satisfied that the contractor had a prima facie case that the First Determination did determine the unchallenged assumed items, the court said it was not a strong case because the subcontractor's First Application expressly stated that it only concerned five of the disputed items.

Balance of convenience

The court then considered who would be more inconvenienced if the injunction was ordered. The court reiterated that the purpose of the WA Act is to keep the money flowing.

The contractor argued the only inconvenience to the subcontractor would be delayed payment; however, the court was unconvinced, particularly given the purpose of the WA Act.

The contractor also argued that there was an actual risk that, if the Second Determination was enforced, the subcontractor would not be able to repay if its challenge was successful. The court considered evidence, including the subcontractor's financial statement for Financial Year 2019 and determined that risk was of little weight.

The court affirmed previous WA Act decisions, including *Easy Stay and Re Anstee-Brook; Ex parte Karara Mining Ltd* [2012] WASC 129 and confirmed that the WA Act is a *'pay now, argue later'* system.

The court refused to order the injunction on the basis that, while the contractor's challenge case had a chance of success, the subcontractor would be more inconvenienced if the injunction had been ordered.

Australian Capital Territory

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CASE INDEX

- *Canberra Drilling Rigs Pty Ltd v Haides Pty Ltd* [2019] ACTCA 15
- *Empire Global Pty Ltd v SA Expert Designs Pty Ltd* [2019] ACTSC 244

In this section, the *Building and Construction Industry (Security of Payment) Act 2009* (ACT) is referred to as the **ACT Act**.

Canberra Drilling Rigs Pty Ltd v Haides Pty Ltd [2019] ACTCA 15

If a construction contract exists between two parties, then it is not an essential precondition to the making of a payment claim under the ACT Act that the work was in fact done under that contract. A mere claim by the contractor that the work was performed under the construction contract is sufficient to entitle the contractor to make a payment claim, and enliven the jurisdiction of an adjudicator to determine that claim.

The ACT Act is closely modelled on the NSW Act and is substantively similar in relevant respects to security of payment legislation in Queensland, South Australia, Tasmania and Victoria. On the basis that courts (other than the High Court) must follow decisions of courts of appeal in other Australian jurisdictions on the interpretation of uniform national legislation unless convinced that the interpretation is 'plainly wrong', this decision could be followed in those jurisdictions.

FACTS

Core Building Group (**Core**) contracted Canberra Drilling Rigs Pty Ltd (**Canberra Drilling**) to undertake piling and anchoring works for a multi-storey residential development. Canberra Drilling subcontracted Haides Pty Ltd (**Haides**) to carry out some of that work. Haides performed the work in April and May 2016 (**2016 Work**) and (at the request of Core) carried out additional work on 31 May 2017 and 1 June 2017 (**2017 Work**). Importantly, the 2017 Work was performed more than 12 months after the 2016 Work. Canberra Drilling disputed that the 2017 Work was performed under its subcontract with Haides.

In June 2017, Haides gave Canberra Drilling a payment claim under the ACT Act claiming payment for the 2017 Work as well as for unpaid 2016 Work carried out more than 12 months earlier. In September 2017, Haides issued another payment claim for the same amount. Canberra Drilling made no payment and did not issue a payment schedule under the ACT Act for either of those claims.

Haides applied for adjudication of the September 2017 payment claim. The adjudicator determined that $284,057 was payable to Haides. Canberra Drilling filed proceedings in the Supreme Court of the Australian Capital Territory, challenging the validity of the adjudication decision. Canberra Drilling contended that the adjudicator had fallen into 'jurisdictional error' in determining the adjudication because the work was not carried out under the relevant contract. The primary judge rejected this contention, and the application was dismissed (see *Canberra Drilling Rigs Pty Ltd v Haides Pty Ltd* [2018] ACTSC 282, a summary of which is available in MinterEllison's 2018 Security of Payment Roundup).

Canberra Drilling appealed this decision, with its main ground of appeal being that section 15(4)(b) of the ACT Act (which states that a payment claim may only be given within 12 months after the construction work to which the claim relates was last carried out) requires that work has in fact been done under the relevant construction contract within 12 months of the claim. Canberra Drilling argued that, on the basis that the 2017 Work was not performed under the contract, the payment claim in respect of the 2016 Work was time-barred as it had been performed more than 12 months earlier. Accordingly, Canberra Drilling argued that Haides' payment claim was invalid, and the adjudicator's jurisdiction was not enlivened.

The Court of Appeal of the Australian Capital Territory examined whether, under the ACT Act, it was a 'jurisdictional fact' that relevant work be performed under a construction contract (a jurisdictional fact being a 'factual precondition' or 'essential preliminary' to the exercise of an adjudicator's power).

DECISION

The Court of Appeal held that it was not a jurisdictional fact, upholding the decision of the primary judge and dismissing the appeal.

The Court examined whether section 15(4) of the ACT Act requires work to have actually been done under the construction contract, or whether it is sufficient to claim that the work was done under the contract. The court held that the language of section 5(4) contained nothing which made the link between the work done and the construction contract a jurisdictional fact. Instead, the court considered that the text and the structure of the ACT Act indicate that the question of whether the work was done under the relevant construction contract is one to be determined by the adjudicator. In the court's view this was consistent with the structure and purpose of the ACT Act to deliver a 'rough and ready' determination in the interests of speed, while preserving the parties substantive rights to litigate matters in due course.

Empire Global Pty Ltd v SA Expert Designs Pty Ltd [2019] ACTSC 244

It is sufficient for the application of the ACT Act to establish that a construction contract exists between the parties and that one party claims work was performed under it. Whether or not the work was actually performed under the construction contract does not affect a party's entitlement to serve a payment claim (and therefore does not affect an adjudicator's jurisdiction to determine the matter). The decision of *Canberra Drilling Rigs Pty Ltd v Haides Pty Ltd* [2019] ACTCA 15 (Canberra Drilling Appeal) was affirmed, consistent with the underlying 'pay now argue later' policy approach of the ACT Act.

FACTS

SA Expert Designs Pty Ltd (**subcontractor**) tendered to carry out painting works for Empire Global Pty Ltd (**head contractor**). The parties entered into a written subcontract for the works on or about 25 July 2017 (**subcontract**). At the request of the head contractor's site representative, the subcontractor performed additional works in the course of the project which were outside the original scope of works in the subcontract. For each item of additional work, the subcontractor generated a docket which was signed by head contractor's site representative. The head contractor then issued a purchase order corresponding to the docket.

The subcontractor made a payment claim under section 15 of the ACT Act, claiming payment for the additional work to the value of $83,788.95 (**payment claim**). The head contractor rejected the payment claim on the basis that the subcontractor did not follow the agreed administrative process for seeking the prior written approval of the additional work.

The subcontractor applied for adjudication of the payment claim, relying on the dockets and associated purchase orders for the additional work. In its adjudication response, the head contractor asserted that, for any additional work to be a variation under the subcontract, the work must have been the subject of prior written approval of the head contractor. The head contractor asserted that the requirement for written approval had been agreed by the parties in a 'post tender meeting' on 14 July 2017. Accordingly, the head contractor asserted that the adjudicator had no jurisdiction to make a determination in the matter.

The adjudicator decided it had jurisdiction and found for the subcontractor. The adjudicator preferred the subcontractor's submission that it had entered into an arrangement with the head contractor's site personnel under which the subcontractor would carry out the works, get its 'docket' signed, and the head contractor's site representative would issue a purchase order for that work. The adjudicator noted that if the head contractor disagreed that the subcontractor had carried out the additional work, then it would not have issued the purchase orders.

The head contractor made an application to the ACT Supreme Court to set aside the adjudicator's decision by reason of jurisdictional error, submitting that:

- the adjudicator had erred in finding that the additional work had been done 'under' the subcontract because, under that subcontract, variation works required the prior written approval of the head contractor (consequently, any claim for payment for the additional work should have been made on a quantum meruit basis rather than under the ACT Act); and
- alternatively, each item of additional work was the subject of a separate construction contract and therefore should have been the subject of a separate payment claim and adjudication.

DECISION

The court dismissed the application and found that the adjudicator's decision was not infected by jurisdictional error as the additional items of work had been done under the subcontract.

The core issues before the court were:

- whether the adjudicator's finding that the additional works were carried out under a construction contract was a finding of jurisdictional fact; and
- if so, whether the precondition (that the works were completed under the contract) was satisfied.

The head contractor contended that its case ought to be distinguished from the Canberra Drilling Appeal on the basis that the issue was not whether the works were in fact carried out under a relevant construction contract but whether the relevant contract even existed. The court rejected this argument, stating that this was simply an attempt to characterise the issue as something other than *'whether the relevant work was done under the relevant construction contract'*.

The court affirmed the decision in *Canberra Drilling* that it is sufficient for a claimant under the ACT Act to claim that works were done under the construction contract (as opposed to this being the objective fact).

Other issues

In considering the preliminary issue of whether the head contractor served a valid payment schedule, the court also noted an important difference between section 16 of the ACT Act and section 14 of the NSW Act. Section 16(2)(b) of the ACT Act provides that a respondent to a payment claim must 'state' the amount of payment to be made to a claimant (if any), whereas the NSW Act provides that the respondent must 'indicate' the amount of payment.

The court noted that using the word 'state' rather than 'indicate' showed a difference in legislative intent. The court expressed a view that there may be a question in the ACT as to whether a payment schedule which does not state but only indicates the proposed amount to be paid is a valid payment schedule, and therefore that the test for a valid payment schedule may be slightly higher in the ACT. Given that this issue was not raised or argued by the subcontractor in its submissions, it was merely noted by the court.

Northern Territory

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CASE INDEX

- *Ichthys LNG Pty Ltd & Anor v JKC Australia LNG Pty Ltd & Anor* [2019] NTSC 71
- *James Engineering Pty Ltd v ABB Australia Pty Ltd & Anor* [2019] NTCA 7
- *Jemena Northern Gas Pipeline Pty Ltd v Civmec Constructions & Engineering Pty Ltd & Smith* [2019] NT 52

In this section, the *Construction Contracts (Security of Payments) Act* (NT) is referred to as the **NT Act**.

Ichthys LNG Pty Ltd & Anor v JKC Australia LNG Pty Ltd & Anor [2019] NTSC 71

In the Northern Territory, an adjudicator is prohibited from adjudicating more than one payment dispute between the same parties without their consent. However, whether a contravention of this law occurred is a question of fact, which the party alleging the contravention will bear the onus of proving. It is therefore important that such a party provides adequate proof to substantiate its claim.

FACTS

On 8 November 2018, JKC Australia LNG Pty Ltd (**head contractor**) made an adjudication application (**First Application**) claiming an amount of money from Icthys LNG Pty Ltd and INPEX Operations Australia Pty Ltd (**principal**). An adjudicator was appointed to adjudicate the dispute in respect of this application. The adjudicator issued a determination on 6 January 2019 (**First Determination**).

Meanwhile, on 21 December 2018, the head contractor made two further adjudication applications (**Second Application**). The same adjudicator was appointed for the Second Application. In its adjudication response, the principal disputed the adjudicator's jurisdiction on the basis that the Second Application was in relation to two payment disputes. In his adjudication determination (**Second Determination**), the adjudicator found that he had jurisdiction and decided the dispute against the principal.

The principal brought two applications in the Supreme Court of the Northern Territory, seeking orders that both the First and Second Determinations be quashed, or in the alternative, a declaration that they have no legal effect.

In the Supreme Court proceeding, the principal argued that First and Second Determinations were affected by jurisdictional error because the adjudicator made decisions regarding them simultaneously without the consent of both parties, in contravention of section 34(3)(b) of the NT Act. This section provides that an adjudicator may *'with the consent of the parties, adjudicate simultaneously 2 or more payment disputes between the parties'.*

Nothing in this case turned on the fact that the principal advanced two different arguments in its adjudication response to the Second Application and in its Supreme Court applications.

DECISION

The court rejected the principal's argument and dismissed the applications.

The court endorsed the position that 'simultaneously' for the purpose of section 34(3)(b) of the NT Act is intended to operate in the temporal sense, that is, in the sense of adjudication determinations 'occurring or operating at the same time'. This is as opposed to the competing view that 'simultaneously' only refers to circumstances where evidence in one adjudication is used in the other.

However, the court held that whether the adjudicator adjudicated the First and Second Applications simultaneously was a question of fact which the principal bore the legal and evidential onus of proving on the balance of probabilities. The principal needed to do more than just allege that the adjudicator's appointments overlapped.

The court's reasoning was that under the NT Act, there is no requirement for the parties to give consent before an adjudicator can be appointed. Rather, what the NT Act prohibits is an adjudicator adjudicating payment disputes simultaneously without the parties' consent. The principal did not furnish any proof that simultaneous adjudications occurred nor could the court find any proper basis for drawing an inference to that effect.

The principal's case failed because it relied solely on the fact that the adjudicator's appointments overlapped, not taking into account the fact that the adjudicator was duly appointed under the NT Act. In addition to alleging an overlap, it was important that the principal was required to provide proof that the adjudicator adjudicated the First and Second Applications simultaneously.

James Engineering Pty Ltd v ABB Australia Pty Ltd & Anor [2019] NTCA 7

Adjudicators must consider claims by respondents for a set-off alongside the relevant adjudication application. Failure to do so will amount to a jurisdictional error and make the adjudication decision void.

FACTS

On 22 December 2017, James Engineering Pty Ltd (**subcontractor**) served a payment claim on ABB Australia Pty Ltd (**head contractor**) claiming $2,129,234 for variations and associated costs. In its payment schedule served on 11 January 2018, the head contractor disputed the payment claim for reasons including that the head contractor had set off an amount for liquidated damages. the subcontractor applied for adjudication under the NT Act.

In his adjudication decision, the adjudicator determined that the head contractor was to pay the subcontractor $1,516,310 and made no allowance for a set-off. He found that there was no mention of such claim in the head contractor's payment schedule but that, even if there was, the question of whether the head contractor was entitled to a set-off for liquidated damages was one for a separate adjudication application. He therefore found that he had no jurisdiction to determine the head contractor's set-off claim on its merits in his decision.

The head contractor sought judicial review of the adjudicator's decision. On 21 December 2018, Kelly J held that the adjudicator fell into jurisdictional error by misconstruing the nature of his function under the Act and failing to deal with the head contractor's set-off claim. Her Honour made a declaration that the adjudication determination was void and made an order for it to be set aside. The subcontractor appealed this decision in the Court of Appeal of the Northern Territory. Its grounds for appeal were that:

- the trial judge decided the case based on the head contractor's set-off claim which the head contractor had not relied on;
- the trial judge incorrectly found that the adjudicator's treatment of the head contractor's set-off claim was erroneous; and
- even if the adjudicator was wrong in declining determination of the head contractor's set-off claim, such error was not a jurisdictional error.

Section 33(1)(b) of the NT Act provides that an *'adjudicator must determine on the balance of probabilities whether* [a party] *is liable to make a payment… and if so, determine'* the amount to be paid and the date on which the payment must be made. Section 34(1)(a) requires the adjudicator to make his or her determination on the basis of the adjudication response and its attachments. The decision in this case involved an examination of these provisions.

DECISION

The court dismissed the subcontractor's appeal and reaffirmed the trial judge's decision that the adjudicator's decision was affected by jurisdictional error and therefore void.

Regarding the argument that the head contractor did not advance a set-off claim, the court found on the facts that the head contractor clearly claimed that it was setting off the amount for liquidated damages. The court referred to references in the head contractor's payment schedule and adjudication response in relation to this.

The court rejected the adjudicator's finding that there was no set-off claim in the head contractor's payment schedule but noted that the NT Act differed from the security of payment legislation in Queensland and New South Wales where there are stringent requirements regarding payment schedules, including that a respondent is prohibited from relying in its adjudication response on a reason it had not raised in the payment schedule. The NT Act does not refer to a 'payment schedule'.

Further, the court found that the adjudicator's decision that the head contractor's set-off claim was one for a separate application was wrong in law and a failure on his part to carry out his functions under sections 33(1)(b) and 34(1)(a) of the NT Act. The court held that *'a respondent to an application may use … set-off as a defence'* and that the adjudicator was required to take this into consideration in reaching his determination.

By failing to consider the set-off claim as part of the payment dispute, the adjudicator failed to comply with an essential condition required to perform his decision-making process. This materially affected the purported exercise of his power.

Jemena Northern Gas Pipeline Pty Ltd v Civmec Constructions & Engineering Pty Ltd & Smith [2019] NT 52

In an adjudication, the way parties deal with a payment claim and an adjudication application can be used as evidence in determining if there is a payment dispute, notwithstanding that the NT Act states that the existence of a payment dispute is an objective test.

Principals must be cautious in their responses to payment claims and adjudication applications, as:

- **an assessment of a payment claim, notwithstanding that the assessment disputes the validity of the payment claim, can be evidence of accepting the existence of a payment claim; and**
- **active participation in an adjudication process can be evidence of recognising that there is a payment dispute.**

FACTS

Jemena Northern Gas Pipeline Pty Ltd (**contractor**) had an agreement with the Northern Territory Government to design, construct and operate the Northern Gas Pipeline (**project**). The contractor and Civmec Constructions & Engineering Pty Ltd (**subcontractor**) entered into a contract to carry out certain works for the project (**contract**).

The subcontractor made a payment claim to the contractor on the basis that there should have been an extension of time (**EOT**) granted under the contract and as such the subcontractor should be entitled to reversed liquidated damages equivalent to the delay costs (**payment claim**). The contractor rejected the payment claim on the basis that it was not lodged within the timeframe stipulated under the contract for EOT claims.

The subcontractor made an adjudication application under the NT Act for the alleged payment dispute. The contractor applied to the Supreme Court of the Northern Territory for an order to compel the adjudicator to dismiss the adjudication application, arguing that a payment dispute did not exist and therefore the adjudication application lacked a subject matter for the adjudicator to determine.

DECISION

The court found in favour of the subcontractor and refused to grant an order to compel the adjudicator to dismiss the adjudication application.

The court confirmed that a payment dispute arose when a payment claim had been rejected and clarified that a claim being out of time did not mean that a payment dispute could not exist.

The court stated that, although whether a payment dispute existed was an objective test under the NT Act, the way that the parties dealt with the payment claim could be used as evidence in determining if there was in fact a payment dispute. The court concluded that there was a payment claim that had led to a payment dispute and subsequently to the appointment of the adjudicator under the NT Act, on the basis that:

- the contractor wrote to the subcontractor stating that the contractor, having reviewed the payment claim, assessed the amount payable as nil, indicating that the contractor accepted that there was a payment claim; and
- the contractor, in its response to the adjudication application, dealt with various contractual terms in detail and asked the adjudicator to find in its favour, which indicated that the contractor recognised that there was a payment dispute, notwithstanding the contractor's primary position in its response that the adjudicator did not have jurisdiction.

The court further stated that it would dismiss the application even if there were no payment dispute on the basis that the application was premature as the contractor was actively participating in the adjudication and there was no reason to suggest that the adjudicator would act beyond his jurisdiction when he had not yet made a determination.

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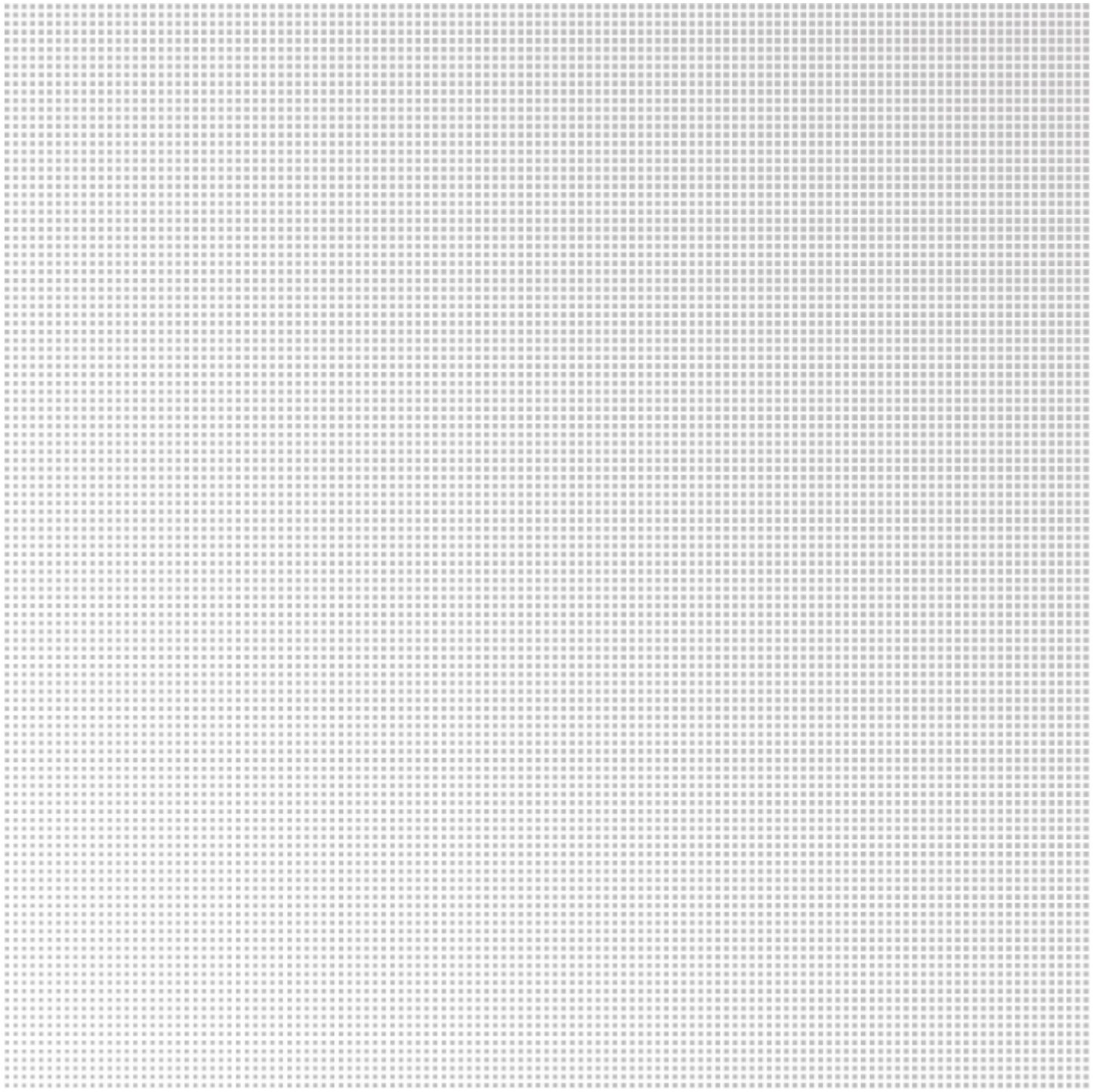

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