Security of Payment Roundup

A comprehensive review of cases in 2020

MinterEllison.

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The past year has shown that security of payment is still a pertinent area of interest across the country. Following major amendments to the New South Wales SOP Act in 2019, the new Regulation commenced on 1 September 2020 to repeal and replace the 2008 Regulation and introduced a further 4 key changes to the security of payment process. The changes should further reinforce the positive cashflow implications resulting from the changes that were introduced in 2019. While NSW is still waiting to see how many of these changes will be tested in the courts, the key security of payment decisions in 2020 show an emerging trend in New South Wales where the courts will preserve entitlements to payment under the NSW Act wherever possible.

In Queensland, the Building Industry Fairness (Security of Payment) Act 2017 created a more claimant-friendly SOP process and further changes were introduced to the statutory adjudication process on 1 October 2020. These changes provide further protection for claimants and are expected to continue the increasing number of adjudication applications made in Queensland.

In Victoria, the key decisions showed a willingness of the courts to continue to uphold the breadth of the unique excluded amounts regime that operates to restrain both principals and contractors from agitating claims for (amongst other things) time-related compensation.

In Western Australia, a new bill was introduced to repeal and replace the existing security of payment regime. The proposed changes include voiding 'unfair' time bars and adjusting the adjudication process in Western Australia to bring it in line with and adopt features of the 'east coast model'. The existing Act will continue to apply until the new bill is passed.

2020 was a modest year for decisions arising out of the security of payment process in both South Australia and the Northern Territory. Some significant changes to the NT Act came into effect on 3 February 2020 to improve the efficacy of the adjudication process and make it easi to have payment disputes resolved quickly. However, despite the release of an amending Sou Australian Bill for consultation in December 2019, and substantial industry input on that draft, another year has passed without amendment to the SA SOP Act.

We hope you find our comprehensive analysis of the key 2020 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

Over 17 Security of Payment related decisions arose out of the NSW courts in 2020 showing that Security of Payment is still a pertinent area of interest in NSW. A trend appears to be emerging in the NSW Court of Appeal whereby the Court will find where possible that entitlements to payment under the NSW Act will be preserved, even in circumstances where a party has contractual rights to suspend another party's right to payment (see *Parrwood Pty Ltd v Trinity Constructions (Aust) Pty Ltd* [2020] NSWCA 172*).* Similarly, the NSW Court of Appeal has settled a long contentious argument as to whether a payment claim served without an accompanying supporting statement (required by s13(7) of the NSW Act) is invalid, ultimately finding that such a claim would not be invalidated (see *TFM Epping Land Pty Ltd v Decon Australia Pty Ltd* [2020] NSWCA 93).

DEVELOPMENTS

On 1 September 2020, the *Building and Construction Industry Security of Payment Regulation 2020* (**Regulation**) commenced (except Schedule 2 of the Regulation). It repealed and replaced the 2008 Regulation. The amended Regulation covers four key changes including:

1. the introduction of an obligation to provide trust account records to subcontractors if their money is held in trust;
2. the removal of annual reporting requirements for trust accounts to NSW Fair Trading;
3. the introduction of qualification and eligibility requirements for adjudicators; and
4. a clarification of the requirements for head contractor supporting statements.

As the Regulation is not retroactive, it does not apply to contracts entered into before its commencement.

Schedule 2 of the Regulation commences on 1 March 2021. It removes an 'owner occupier construction contract' as a prescribed class of contract to which the NSW Act does not apply, ie the NSW Act will apply to those contracts. The Regulation also provides that an 'owner occupier construction contract' will be an 'exempt residential construction contract', so that it will be subject to s 11(1C) of the Act concerning the due date for payment of a progress payment under such a contract.

FUTURE

It is likely that the recent changes to the Regulations, in addition to the changes to the NSW Act that were introduced in 2019, will result in increased Security of Payment related disputes in NSW. We are still waiting to see how many of these changes will be tested in the courts.

It will be interesting to see whether the introduction of qualification and eligibility requirements for adjudicators will impact the way in which parties approach adjudicators, and whether any adjudicator shopping will arise.

The decision in *Cadia Holdings Pty Ltd v Downer EDI Mining Pty Ltd* [2020] NSWSC 1588 may also lead to more Security of Payment claims and adjudications in the mining industry.

Acciona *Infrastructure Australia Pty Ltd v Holcim (Australia) Pty Ltd* [2020] NSWSC 1330

A single payment claim under the NSW Act cannot cover work done under multiple separate contracts. That principle arises from consideration of:

- section 13(5) of the NSW Act, which prevents the service of more than one payment claim per reference date per construction contract, so that there can only be one adjudication application for any particular payment claim for any particular contract; and
- section 17(1) of the NSW Act, which does not authorise the lodging of multiple adjudication applications in respect of one payment claim.

Parties entering into 'umbrella agreements' under which purchase orders with common terms will be issued should properly consider whether they want each purchase order to be a separate contract (as in this case) given that each purchase order would need to be the subject of a separate payment claim for the purposes of the NSW Act. Whilst it almost goes without saying, if purchase orders do constitute separate contracts, claimants should ensure they comply with the requirements of the NSW Act in relation to payment claims to ensure they have the benefit of remedies under the NSW Act.

This case highlights the need for adjudicators to give consideration to whether they have jurisdiction, and also to remind themselves of procedural fairness requirements.

FACTS

The plaintiff Acciona (**builder**) and the first defendant Holcim (supplier) entered into a goods supply agreement for the supply and delivery of concrete (**GSA**) for the Sydney Light Rail Project. Under the terms of the GSA:

- the builder was required to issue a purchase order if it wished to order goods;
- the supplier's payment claims could only include amounts in respect of goods the subject of a purchase order; and
- upon the issue of a purchase order, a separate contract between the parties was formed on the terms set out in the GSA.

Over the life of the GSA, the builder issued some 12,500 purchase orders and the supplier directed 36 payment claims to the builder. The upstream works were substantively completed in July 2019, at which point the builder stopped paying the supplier's payment claims. The supplier issued 5 further payment claims between July and November 2019 (**Further Claims**). In each payment schedule the builder issued in response to each Further Claim, the scheduled amount was nil on the basis of claimed set-offs.

On 28 May 2020, the supplier lodged a single payment claim covering newly claimed measured works (**New Works**) and the amount of the Further Claims (**Payment Claim**). On 12 June 2020, the builder issued a payment schedule in which the scheduled amount was nil as a result of claimed set-offs. On 26 June 2020, the supplier applied for an adjudication determination under the NSW Act.

The adjudicator found in favour of the supplier. The builder challenged the adjudicator's determination on the following grounds:

- the adjudicator had no jurisdiction as there was no valid payment claim or valid adjudication application, because the Payment Claim impermissibly claimed for work done under two or more contracts (**Ground 1**);
- the adjudicator failed to consider the builder's contention that she lacked jurisdiction (**Ground 2**);
- the adjudicator failed to afford the builder procedural fairness by finding a contractual basis for valuing progress payments upon which the supplier had not relied and which had not been the subject of submissions (**Ground 3**);
- the adjudicator relied on previous payment schedules (rather than the payment schedule the subject of the adjudication application) and, in doing so, failed to afford the builder procedural fairness by not giving it advance notice of her intention of so doing (**Ground 4**);
- the adjudicator failed to afford the builder procedural fairness by rejecting the builder's contention on a particular matter, and also by making credit findings against a builder's witness, both on bases not put by the supplier and not the subject of submissions or advance notice (**Ground 5**); and
- the adjudicator failed to discharge the statutory task of satisfying herself that the supplier had substantiated its claims (**Ground 6**).

DECISION

The court upheld the builder's challenge on the basis of Ground 1, Ground 3, Ground 5 and Ground 6 and quashed the adjudication determination:

- **Ground 1**: In accordance with *Trinco (NSW) Pty Ltd v Alpha A Group Pty Ltd* [2018] NSWSC 239 (***Trinco***) (discussed in our May 2018 CLU), a single progress claim cannot validly claim for work done under multiple contracts. Since the Payment Claim covered multiple purchase orders, and therefore multiple contracts, the Payment Claim was invalid. This also invalidated the adjudication application. In the absence of a valid payment claim or adjudication application, the adjudicator did not have jurisdiction to consider the dispute. Applying *Trinco*, the court found the adjudication determination to be void.
- **Ground 3** and **Ground 5**: The court found the builder should have been given notice of each of these matters and the opportunity to respond. In the absence of the court's finding on Ground 1, this would have vitiated the determination; and
- **Ground 6**: The adjudicator failed to satisfy herself on this matter. While the builder did not adduce material to dispute these details, this did not relieve the adjudicator of her statutory task to be satisfied they were established by the supplier. The adjudication determination was therefore also void on this basis.

Ground 4 was rejected and Ground 2 did not arise given the court's finding of lack of jurisdiction.

Acciona Infrastructure Australia Pty Ltd v Chess Engineering Pty Ltd [2020] NSWSC 1423

Under section 22(2) of the NSW Act, adjudicators are required to assess the merits of a party's claim and the value of the works having regard to the materials before them. The court found that the adjudicator did not indicate, in his determination, that he had adhered to these requirements in relation to one of the eight variation claims the subject of this case.

Where a challenge to an adjudication determination is partly successful, the court may be inclined to make it a condition of the grant of any declaratory relief that the monies paid into court be released to the claimant in the amount of the unaffected parts of the determination. This would have the effect of avoiding an unfair outcome where the value of the portion of the adjudicated amount affected by error is relatively low.

FACTS

In June 2019, Acciona Infrastructure Australia Pty Ltd (**builder**) and Chess Engineering Pty Ltd (**supplier**) entered into a subcontract under which the supplier agreed to supply and install anti-throw screens and related components. In May 2020, an adjudicator made a determination in favour of the supplier under the NSW Act.

In the Supreme Court, the builder contended that the determination was liable to be set aside on the basis of 18 individual challenges relating to eight variation claims because the adjudicator failed to fulfil his statutory function and denied the builder procedural fairness by not considering aspects of its payment schedule and submissions or forming a view as to what was properly payable.

DECISION

The court found that the adjudicator made a jurisdictional error in respect of one of the variation claims.

The adjudicator did not state how he came to be satisfied that the supplier was entitled to be paid the full value of the claim, nor did he draw attention to any material the supplier relied on (as he had done with other claims) or state that he had been provided with information as to how the supplier arrived at the amount claimed.

Further, whilst the court acknowledged that the adjudication determination had to be read as a whole, the adjudicator's awareness of relevant material referred to in the submissions and general statements made in other parts of his determination did not deal with the critical matter which he had to determine with respect to that one claim, being the amount of the progress claim.

With respect to the 17 unsuccessful challenges, the court found that the adjudicator had considered the relevant sections of the adjudication response submissions. In some instances, the court noted that the adjudicator may have misunderstood or misinterpreted parts of the submissions, however, such mistakes were not jurisdictional errors.

Given that the court upheld only one of the challenges in respect of a variation claim valued at $19,826, of which only $2,760 was in dispute, out of a total determination of $640,593, an issue arose as to whether the entire determination should be set aside or whether the court should make it a condition of the grant of relief that the balance of the money held in court be released to the supplier.

Henry J's preliminary views on this aspect of the case (subject to receipt of further submissions from the parties) were that while accepting the force in the builder's submission that any jurisdictional error renders a determination void not voidable, her Honour would be inclined to condition the grant of any declaratory relief, if it were pressed by the builder and made, on the release of the monies paid into court to the supplier to the extent of the unaffected parts of the determination.

Acciona Infrastructure Australia Pty Ltd v Chess Engineering Pty Ltd (No 2) [2020] NSWSC 1788

Where a court determined an adjudicator had exceeded their jurisdiction, no matter how minor the indiscretion, it was common practice for the whole of the adjudicator's determination to be rejected as invalid. However, the court's powers are not limited in that way.

In this decision, the adjudicator's error did not materially affect the totality of the determination and the claimant was still entitled to a significant proportion of the adjudicated amount.

This paves the way for other claimants to have parts of their adjudication upheld, notwithstanding that an adjudicator has exceeded their jurisdiction, where the error did not work practical injustice sufficient to vitiate the whole of the determination.

FACTS

We covered the initial Supreme Court decision in these proceedings in our October 2020 edition of the Construction Law Update. Acciona had sought to quash an adjudicator's determination in favour of Chess in the amount of $640,593.69 on the basis that there was a jurisdictional error that affected part of the determination.

In the payment claim, Chess claimed payment of $22,586 for V17 against which the Acciona scheduled $19,826, leaving only $2,760 in dispute in the adjudication. The dispute related to the labour cost of project managing the works that were the subject of V17. The adjudicator had determined that Chess was entitled to the amount claimed for V17. The adjudicator erred by failing to state reasons for how he came to be satisfied that Chess was entitled to be paid the full value of the claimed amount of V17.

The usual course where an adjudicator's determination is infected by jurisdictional error is, as Acciona submitted, that there has been no determination at law. This is usually so notwithstanding that the error may be with respect to a very small part of the whole determination.

DECISION

Should the determination be quashed because it is infected by jurisdictional error?

The court held that the error was not a 'jurisdictional error' that infected the determination as a whole and refused to quash the determination.

The concept of 'materiality' was a critical component in the consideration of whether the determination was infected by a jurisdictional error. The court held that the Act should be interpreted as incorporating a threshold of materiality in the event of non-compliance by an adjudicator in undertaking their statutory task of determining the amount and timing of a progress payment such that legal force and effect should not be denied to a decision made in the event of every error in undertaking that task. The concept of materiality was described as being a question of whether an error results in a decision lacking the characteristics necessary for it to be given force and effect by the Act and whether the error is sufficiently insignificant that it could not have materially affected the decision that was made.

As mentioned above, the court accepted that the adjudicator made an error in relation to one component of a discrete and proportionately small aspect of the determination, rather than exceeding his jurisdiction in relation to the claim as a whole. The court found that the amount affected by the error was very small in proportion to the rest of the adjudicated amount, being only 0.43% of the total amount. The error was also not critical to and did not determine the outcome of the adjudicator's findings on other aspects of the claim, as the adjudicator had reviewed the required evidence and materials and made the necessary considerations.

Brolton Group Pty Ltd v Hanson Construction Materials Pty Ltd [2020] NSWCA 63

For contracts entered into before 21 October 2019, once a reference date has been objectively determined under section 8(1) of the NSW Act, it is not open to adjudicators to select a different date when performing their functions under section 22(1) of the NSW Act.

Each party to an adjudication must be afforded natural justice or procedural fairness, which requires the parties to be given an opportunity to be heard, including prior notice of the issues to be addressed, the opportunity to make submissions and the right to have those submissions considered by the adjudicator.

The Court of Appeal declined to make a decision on the correctness of obiter comments of the primary judge which suggested that a payment claim can include a claim for work performed after an available reference date.

FACTS

This case was an appeal from a decision of the Supreme Court of NSW, which we considered in our November and December 2019 Construction Law Update available here.

Hanson Construction Materials Pty Ltd (**principal**) engaged Brolton Group Pty Ltd (**contractor**) under a construction contract in relation to the construction of a quarry processing plant. Under the contract, monthly progress payments were payable with a reference date of the last Tuesday of each month. The principal terminated the contract on 3 October 2018.

On 28 August 2019, the contractor served 'Progress claim No: September 2018' for work performed 'up to September 2018' but which also included a claim for work performed between 25 September 2018 and 10 October 2018, as well as interest up until 28 August 2019 (**Payment Claim**). The principal responded with a payment schedule with an adjudicated amount of '$nil'.

In submissions made in a subsequent adjudication, each party had assumed that the reference date for the Payment Claim was 25 September 2018. The adjudicator adopted a reference date of 23 October 2018 and found in favour of the contractor.

The principal commenced proceedings in the Supreme Court of New South Wales, in which the primary judge found that the adjudicator's determination was void as:

- the adjudicator determined the Payment Claim based on the reference date of 23 October 2018 and in doing so he did not embark on the task he was required to perform under section 22(1) of the NSW Act; and
- the adjudicator's determination involved a denial of natural justice, as the adjudicator determined the dispute on a basis for which neither party contended without giving the parties an opportunity to make submissions on the matter.

The contractor appealed the decision. The principal filed a notice of contention submitting that the contractor's payment claim was not a valid claim for a progress payment on or from a reference date of 25 September 2018, because it included amounts not referable to any entitlement to a progress payment that the contractor had (or purported to have) on that date. This was a reference to subcontractors' invoices for work performed in the period 25 September 2018 to 10 October 2018, and the claim for interest to August 2019.

DECISION

The NSW Court of Appeal dismissed the appeal and declined to make a decision on the notice of contention as that was unnecessary given its primary findings.

Reference dates (pre 21 October 2019)

Once an available reference date is objectively ascertained by the parties, the adjudicator must address that specific reference date when making a determination under section 22(1) of the NSW Act. It is not open to the adjudicator to select another reference date, as this would go beyond the adjudicator's statutory power under section 22(1), giving rise to jurisdictional error.

In this case, it was agreed between the parties that the reference date was 25 September 2018 (as was objectively apparent from the payment claim, payment schedule, adjudication application and adjudication response). However, in the adjudication determination, the adjudicator did not address that specific reference date, but rather chose an alternative reference date of 23 October 2018 (which in any event was not an available reference date). The adjudication determination was void due to jurisdictional error.

The court also held that the contractor could not seek to uphold the validity of the adjudicator's determination by arguing that the 25 September 2018 reference date was available. The adjudicator had not made the determination on the basis of that reference date.

Natural Justice

The court reaffirmed the longstanding principle that each party must be afforded natural justice or procedural fairness. In this case, the adjudicator's determination involved a denial of natural justice or procedural fairness because the adjudicator determined the dispute on a basis for which neither party had contended, without giving the parties an opportunity to make submissions on the matter.

Cadia Holdings Pty Ltd v Downer EDI Mining Pty Ltd [2020] NSWSC 1588

This case has potentially wide-reaching implications for all participants in the mining industry and is the first case in New South Wales construing the so-called 'mining exception' under section 5(2)(b) of the NSW Act.

The case demonstrates that the 'mining exception' is to be construed narrowly to only include work that has a close and proximate connection to the very process of the extraction of minerals, rather than work preparatory to the ultimate and later extraction of minerals. Therefore, any construction contract other than a contract for, or with a very close and proximate connection to, the extraction of minerals will not fall within the 'mining exception' and may well be subject to security of payment legislation.

Additionally, if a contract contains a single undertaking to do 'construction work' under section 5 of the NSW Act, it is a 'construction contract' to which the NSW Act will apply, notwithstanding that any other undertaking to do work under the contract may be excluded. A contract scope of work would have to be very carefully drafted for all work to fall within the mining exception so as to exclude the operation of the NSW Act.

This case will likely also apply to Queensland, Victoria, ACT, Tasmania and South Australia given that the definition of construction work and the mining exclusion in their respective security of payment legislation is identical or substantially the same as the NSW Act considered by this case.

FACTS

Cadia Holdings Pty Ltd (**owner**) entered into a contract with Downer EDI Mining Pty Ltd (**contractor**) for the provision of lateral development works relating to a new 'panel cave', roughly 1,500 metres below the surface, at the Cadia East mine near Orange. The contractor's works involved creating tunnels in order to access the ore body where further tunnelling and ultimately extraction will commence in 2022, as well as establishing infrastructure and installing key services for the eventual extraction of the minerals.

The contractor successfully pursued payment for works performed by adjudication under the NSW Act. The owner sought to have the adjudicator's determination set aside, arguing that the adjudicator had made jurisdictional errors on two grounds:

- the work under the contract was not 'construction work' within the meaning of the NSW Act as it fell within the mining exception in section 5(2)(b) of the NSW Act; and
- there was no relevant reference date for the payment claim in accordance with the NSW Act.

DECISION

The court decided that the owner's challenge to the adjudication failed on both grounds.

Construction Contract

A 'construction contract' under the NSW Act is a contract under which one party undertakes to carry out 'construction work' for another. Construction work is defined in section 5(1) and the exceptions to construction work are set out in section 5(2).

The court held that the effect of what is referred to as the mining exception in section 5(2)(b) was to exclude the following from the definition of 'construction work':

- extraction (whether by underground or surface working) of minerals;
- tunnelling or boring for the purpose of extraction (whether by underground or surface working) of minerals; and
- constructing underground works for the purpose of extraction (whether by underground or surface working) of minerals.

The questions the court sought to answer were:

- was the tunnelling or boring or constructing of underground works called for by the contract for the 'purpose of' the extraction of minerals; and
- did the contract also call on the contractor to undertake work beyond tunnelling or boring or constructing underground works which was construction work under section 5(1) (or the supply of related goods and services under section 6(1))?

Were the works 'for the purpose' of extraction?

The owner argued that it was sufficient if the tunnelling, boring or construction of underground work is for the 'ultimate purpose' of extraction of minerals. Conversely, the contractor argued that a 'close and proximate' connection between the tunnelling, boring and construction of underground works and the extraction of minerals was required, such that it is necessary that these activities be for the 'very process of extraction'.

The court preferred the contractor's construction for a number of reasons, including:

- the 'mining exception' should be construed narrowly as the NSW Act is remedial and beneficial to contractors;
- the extension of the usual meaning of 'extraction' by including tunnelling, boring or constructing underground works for that purpose suggests the need for there to be a close proximity between the works and their purpose;
- a number of cases in Queensland held that 'extraction' does not include work 'associated with' or 'preparatory to' extraction. As such, it is hard to see why tunnelling, boring or constructing underground works, which is in anticipation of the ultimate extraction on minerals, should be deemed 'for the purpose of' extraction; and
- the NSW Act specifies where a less proximate connection is required, for example, section 5(1)(e) includes as construction work, work that is 'preparatory' to such work. This suggests a legislative intention that the purpose of extracting minerals must be for the actual purpose of extracting minerals.

The court ultimately concluded that the work under the contract comprising tunnelling, boring and constructing underground works, by reference to what a reasonable person in the position of the parties would conclude as to the object of the work under the contract, was not 'for the purpose of' the extraction of minerals but was rather work preparatory to and in anticipation of the ultimate and later extraction of minerals.

Were any works not caught by the mining exception?

The court found that even if the 'mining exception' had been engaged in respect of tunnelling, boring and construction of underground works under the contract, the contract was still a construction contract because it contained undertakings to complete 'construction work' which was not tunnelling, boring or construction of underground works.

The court accepted the contractor's submission that a number of undertakings in the contract which were 'construction work' under section 5(1) would not be within the 'mining exception' even assuming a wide interpretation of the 'mining exception' was accepted, such as:

- haulage of excavated material to the nominated dumping point;
- establishing and disestablishing facilities; and
- site clean-up.

Reference date

The owner argued that the contractor's payment claim did not have a valid reference date in accordance with the contract and the NSW Act as it was served on 8 May 2020, rather than 15 May 2020.

The court accepted that at the time the contractor served its 8 May 2020 payment claim, there was an available reference date being 15 April 2020, as this had not been used or extinguished, and that the contractor was entitled to claim again for unpaid amounts the subject of a previous payment claim.

MinterEllison acted for Downer EDI Mining Pty Ltd in these proceedings.

CPB Contractors Pty Ltd & Ors v Heyday5 Pty Ltd [2020] NSWSC 1385 *and CPB Contractors Pty Ltd & Ors v Heyday5 Pty Ltd (No. 2)* [2020] NSWSC 1404

A party seeking to set aside an adjudication determination in the Supreme Court will usually be required to pay the adjudicated amount into court as security. It is common for a party to provide security by submitting an unconditional bank guarantee. The court has held that an unconditional bank guarantee is as good as cash and a party can substitute such a guarantee for cash already paid into court. The underlying reasons for substitution are irrelevant.

A party will be at risk of an indemnity costs order if it refuses a request for consent to substitution of a bank guarantee from the party providing security.

FACTS

CPB Contractors Pty Ltd, Dragados Australia Pty Ltd and Samsung C & T Corporation (operating as a joint venture**, CDSJV**) commenced proceedings to challenge an adjudication determination made under the NSW Act. The adjudication determination required CDSJV to pay Heyday5 Pty Ltd (**Heyday**) $9.6 million. The court is yet to determine CDSJV's challenge to the determination.

On 7 September 2020, the court granted CDSJV interlocutory relief preventing enforcement of the adjudication determination which was conditional upon CDSJV paying the adjudicated amount plus interest into court. On 10 September 2020, CDSJV paid into court cash totalling $9.9 million.

CDSJV sought Heyday's consent to substitute unconditional bank guarantees in favour of Heyday for the cash held in court. Consent was unreasonably withheld. On 29 September 2020, CDSJV filed a notice of motion seeking leave for substitution.

Heyday opposed the motion and proposed a timetable for evidence and submissions culminating in an oral hearing six days before the hearing challenging the determination. In addition, Heyday served on CDSJV a notice to produce seeking a copy of CDSJV's joint venture agreement, financial statements and proposed terms of the bank guarantee.

CDSJV argued that there was no basis for Heyday to resist the motion and asserted that a guarantee is the bank's promise to pay Heyday to which CDSJV is not a party. CDSJV submitted that in this arrangement, evidence of their financial position is irrelevant.

DECISION

Decision No. 1

On 12 October 2020, the court held there was no reasonable basis for Heyday to oppose the substitution of cash with an unconditional bank guarantee. The court made it clear that an unconditional bank guarantee is as good as cash and is commonly used in the Technology and Construction List as security.

The court made orders allowing CDSJV to deliver to the court unconditional bank guarantees equalling the amount of cash paid by CDSJV into court on 10 September 2020 in exchange for the return of the cash paid by CDSJV (including any accrued interest). Heyday was also ordered to pay CDSJV's costs of the notice of motion on an indemnity basis.

Decision No. 2

Following receipt of the judgment on 12 October 2020, Heyday sought a stay of enforcement and leave to make further submissions in relation to the notice of motion, which was granted by the court. In an attempt to substantiate the arguments previously raised, Heyday suggested its review of the proposed terms of the bank guarantee was required to ensure that the guarantee was 'unconditional' as this could not be left to the Supreme Court Registry.

In a judgment delivered on 13 October 2020, the court held that the Supreme Court Registry would be able to recognise whether any bank guarantee sought to be lodged in substitution for cash paid into court is or is not 'unconditional'.

The court determined there was no reason to alter the judgment made on 12 October 2020.

MinterEllison acted for CDSJV on the notice of motion.

CPB Contractors Pty Ltd v Heyday5 Pty Ltd [2020] NSWSC 1625

Contractors need to exercise extreme caution when issuing correspondence to any subcontractors regarding compliance with their existing obligations so as to avoid a subcontractor claiming a variation under a construction contract.

FACTS

On 9 July 2018, CPB Contractors Pty Ltd, Dragados Australia Pty Ltd and Samsung C & T Corporation (operating as a joint venture, CDSJV) engaged Heyday5 Pty Ltd (**subcontractor**) to do electrical installation works as part of Sydney's WestConnex New M5 project (**contract**).

The contract gave CDSJV the right to direct the subcontractor to increase, decrease or omit any part of the work under the contract. The contract also required the subcontractor to maintain and progressively provide to CDSJV safe work method statements (**SWMS**) before the commencement of work (or portion of work) to be performed.

The subcontractor used mobile elevated work platforms (**MEWPs**) to perform its work. The subcontractor submitted to CDSJV two SWMS for the use of MEWPs. The first SWMS submitted on 2 July 2018 required the driver of a MEWP to maintain visual contact with the spotter. The 12 December 2018 iteration had different drafting.

In light of a newly published South Australian work and safety report, on 25 January 2019, CDSJV issued to all subcontractors engaged by it in connection with the WestConnex project (including the subcontractor) a direction which stated that when MEWPs were being used, spotters were required to be within sight and verbal communication distance of the MEWPs. The subcontractor claimed that the direction constituted a variation under the contract.

Despite CDSJV submitting that its direction was not a variation because the subcontractor was obligated under the contract and work health and safety legislation to provide spotters to eliminate risks arising from the use of MEWPs, an adjudicator determined that CDSJV's direction constituted a variation and that the subcontractor was entitled to the recovery of additional costs incurred.

CDSJV sought to set aside the adjudication determination on two grounds:

- the determination of the spotters claim was 'unintelligible'; and
- the spotters claim was determined on a basis on which neither party made submissions in the adjudication application or response.

DECISION

The court upheld the adjudicator's determination.

The court acknowledged that the first sentence of the adjudicator's determination in relation to the spotters claim when read literally was unintelligible, but it was only unintelligible because it contained a typographical error. The other passages referred to by CDSJV were not unintelligible. When read as a whole, the court found a fair and common sense reading of the determination showed the spotters claim was plainly in play and appropriately dealt with by the adjudicator.

With respect to CDSJV's second ground of appeal, the court found it was CDSJV's burden to identify documentation stating that the subcontractor was required to have spotters with visual contact of MEWPs. The court held that CDSJV had every opportunity to do that as part of its adjudication response.

The court was hesitant to scrutinise the procedural behaviour of the adjudicator in circumstances where the subcontractor served 33 lever-arch folders comprising the adjudication application and the adjudicator was required to determine the issues within tight time limits imposed by the NSW Act.

MinterEllison acted for CDSJV in these proceedings. Interlocutory proceedings relating to this case were covered in our Construction Law Update of October 2020.

Diona Pty Ltd v Downer EDI Works Pty Ltd [2020] NSWSC 480

An adjudicator who fails to expressly consider a contractual argument raised by a party in its submissions will not necessarily fall afoul of the requirement for adjudicators to consider the 'provisions of the construction contract' under the NSW Act. Parties should always clearly and thoroughly articulate their legal arguments at adjudication.

FACTS

Diona Pty Ltd (**head contractor**) entered into a subcontract agreement (**contract**) with Downer EDI Works Pty Ltd (**subcontractor**) in relation to safety upgrades on the Great Western Highway at Blackheath. The subcontractor proceeded to adjudication on a payment claim served on the head contractor under the contract.

At adjudication, the subcontractor claimed two extensions of time (**EOT 18** and **EOT 21**) pursuant to clause 28 of the contract which would have reduced the liquidated damages it owed to the head contractor. The head contractor argued that the subcontractor was not entitled to EOT 18 or EOT 21 because, by reason of clause 40 of the contract, the claims were time-barred.

The adjudicator determined that the head contractor should pay the subcontractor $430,990. An amount of $30,000 was determined as being due and payable to the subcontractor for delay costs in relation to EOT 18 and EOT 21.

The head contractor sought injunctive and declaratory relief, contending that the adjudicator's determination was void on the basis that the adjudicator failed to address his statutory function in relation to EOT 18 and EOT 21. The head contractor argued that it was apparent the adjudicator had not, as section 22(2)(b) of the Act required, *'considered'* the *'provisions of the construction contract'* because:

- both parties' submissions at adjudication identified EOT 18 and EOT 21 as claims that the head contractor had rejected;
- the head contractor's adjudication response argued that:
    - its determination of the claims for EOT 18 and EOT 21 were final and could not be disturbed other than by way of a claim under the contract; and
    - the contract contained a time-bar (clause 40) on the making of such a claim which had been enlivened; and
- the adjudicator's determination failed to expressly refer to clause 40, or consider whether EOT 18 and EOT 21 were time-barred under the contract. The determination only mentioned EOT 18 and EOT 21 by reference to clause 28.

DECISION

Stevenson J dismissed the head contractor's application to quash the adjudicator's determination. His Honour questioned whether it should be inferred that, despite the adjudicator having acknowledged his obligation to consider the provisions of the contract pursuant to section 22(2)(b) of the Act in the adjudication determination, the adjudicator had nonetheless failed to do so.

Stevenson J noted that the question of whether the adjudicator *'considered'* the provisions of the contract, as required by the Act, is a question of fact.

In coming to a decision on the question posed, his Honour noted that, while the head contractor had further developed its legal arguments in submissions on its application for declaratory relief, the case it put forward in the adjudication response was limited and was *'not put forward with great clarity'*. In the adjudication application, the subcontractor had devoted a number of pages to its contentions concerning EOT 18 and EOT 21. However, in its adjudication response, on the question of EOT 18 and EOT 21, the head contractor referred to clause 40 and simply stated that its determinations of those claims *'are final and cannot be disturbed except by raising a claim under the contract, see relevant clauses of the [contract]'* and that the head contractor had *'granted 20.9 days … [and] reject[ed] all other requests for extension of time'*.

The head contractor also addressed its own claimed contractual entitlement to set off liquidated damages only briefly, and it did not otherwise engage with the subcontractor's contentions regarding EOT 18 and EOT 21.

Stevenson J accepted the subcontractor's submission that there could be a number of possible reasons why the adjudicator had not referred to clause 40 in considering the matter. The adjudicator may have determined that, in circumstances where the head contractor did not clearly articulate its argument, he did not need to deal with that point. Alternatively, it may have been the case that the adjudicator misunderstood the head contractor's argument. But that, without more, was not enough to set aside the determination.

East End Projects Pty Ltd v GJ Building and Contracting Pty Ltd [2020] NSWSC 819

A clause that made the right to make a payment claim contingent on the provision of a draft payment claim on a certain date was void as it unduly restricted the operation of the NSW Act.

However, the Supreme Court noted that a requirement to submit a draft payment claim will not always be void if it does not prevent a reference date arising and does not have the effect of excluding, modifying or restricting the operation of the NSW Act. The same would apply under the new NSW regime where the definition of the term 'reference date' has been deleted from the NSW Act and replaced with an express right to serve a payment claim each named month.

FACTS

East End Projects Pty Ltd (**developer**) and GJ Building & Contracting Pty Ltd (**builder**) contracted for construction works on a project at East End, Newcastle (**contract**). The developer sought a declaration that a payment claim was void for the purposes of the NSW Act and an order restraining the builder from seeking a determination under the NSW Act regarding that claim because a reference date had not arisen when the claim was served.

The mechanism for making a claim for payment under the contract required the builder to provide a draft claim before its actual progress claim was:

- by clause 37.1, the builder had to provide a draft progress claim to the superintendent by the 25th day of each month for work done to the last day of that month (**Draft Progress Claim**);
- by clause 37.1(e), the builder had to strictly comply with the clause 37.1 requirements, and, if it did not, the Draft Progress Claim was deemed not to be a Draft Progress Claim for the contract;
- by clause 37.2, the superintendent had to issue a preliminary assessment of the amount which the superintendent considered due in relation to the Draft Progress Claim within 5 business days of receiving the Draft Progress Claim;
- by clause 37.3(a), no earlier than 7 business days after the date the Draft Progress Claim was provided, the builder had to provide the superintendent with a progress claim in final form (**Final Progress Claim**); and
- by clause 37.3(b), the date referred to in subclause 37.3(a) was the 'reference date' for the NSW Act.

The builder did not follow the draft progress claim procedure and instead served a progress claim on 28 May 2020 without having served a Draft Progress Claim. The builder claimed that the mechanism for fixing a reference date was void under section 34(2) of the NSW Act, and therefore the reference date arose on the last day of each month under section 8(2)(b) of the NSW Act. The claim was said to have been served regarding the 30 April 2020 reference date. The developer claimed that the reference date was to be determined by the contract under section 8(2)(a) of the NSW Act, and therefore no relevant reference date arose because no Draft Progress Claim had been served.

DECISION

The court found in favour of the builder by holding that the contract did not identify a date on which a claim for a progress payment may be made. A reference date arose under the contract under section 8(2)(b) of the NSW Act (being the last day of the month in which the work was carried out).

The court did not accept the developer's argument that the requirement to submit a Draft Progress Claim before the Final Progress Claim was a mechanism designed to facilitate the prompt payment of progress claims rather than a mechanism which impeded a reference date from arising and restricting the operation of the NSW Act.

The fatal flaw in the payment mechanism was the requirement that a Draft Progress Claim had to be served by the 25th day of the month, the result being that if the builder failed to serve the Draft Progress Claim by that date, no reference date would arise and the builder would lose its entitlement to serve a progress claim regarding that month. That requirement restricted the operation of the NSW Act.

Although ultimately the court agreed with the builder's submission that the reference date mechanism restricted the operation of the NSW Act, it is interesting to note the court disagreed with the builder's suggestion that the regime was contrary to the NSW Act because it gave the developer notice of the issues likely to be raised within the progress claim and therefore afforded the developer more than the 10 business days allowed under the NSW Act to prepare its payment schedule. The advance notice would not exclude, modifying or restricting the operation of the NSW Act. In that regard, the court noted that *'The purpose of the time limit is to ensure that once the processes of the NSW Act commence with the service of a payment claim, they occur promptly. It is not the purpose of the NSW Act to prevent the parties from introducing other mechanisms in their contract to ensure that they are not caught by surprise.'*

Grocon (Belgrave St) Developer Pty Ltd v Construction Profile Pty Ltd [2020] NSWSC 409

If a bank guarantee is validly called on by a principal under a contract, a contractor cannot seek to reclaim the amounts called through a payment claim, even if the payment claim is expressed as the net of the value of the works undertaken less the amount the contractor has been paid. The payment claim will be void.

FACTS

Grocon (Belgrave St) Developer Pty Ltd (**developer**) entered into a contract with Construction Profile Pty Ltd (**contractor**) on 24 May 2017 for the contractor to construct the Telstra Exchange residential development in Manly. The contractor provided two bank guarantees each in the amount of $498,911 as security for performance of its obligations under the contract.

On 10 January 2020, the contractor served Payment Claim No 32 in the amount of $3,220,377. The developer responded with a payment schedule indicating that the amount due to the contractor was -$1,360,307 and that therefore the scheduled amount was nil. This was calculated by deducting from the value of the work performed an amount of $1,655,624 for liquidated damages in respect of delay in reaching practical completion. On the same day the developer issued a tax invoice for payment of the liquidated damages. The contractor disputed the claim for liquidated damages and at adjudication it was determined that the amount payable by the developer in respect of Payment Claim No 32 was $1,241,238. The adjudicator determined that the contractor was entitled to extensions of time which extended the date for practical completion beyond the date of practical completion (thus the value of the developer's claim for liquidated damages was nil). The developer paid the adjudicated amount.

The developer then called on the two bank guarantees (relying on the tax invoice it had issued and its contractual entitlement to call on security in the event that the contractor became indebted to the developer and the developer remained unpaid after 5 business days since issue of an invoice to the contractor). The contractor did not challenge the developer's right to call on the bank guarantees.

On 17 March 2020, the contractor served Payment Claim No 33 in the amount of $1,054,386. The claim was for the net balance of the total amount claimed under the contract against the amount said to have been already paid. The amount said to have been paid included two negative amounts each for $498,911 which were described as amounts *'to cover LDs under the contract'*.

In response, the developer sought a declaration in the Supreme Court of New South Wales that Payment Claim No 33 was void and of no effect under the NSW Act. The developer also sought an injunction restraining the contractor from seeking an adjudication determination under the NSW Act on the grounds that Payment Claim No 33 was for repayment of the amounts paid under the bank guarantees, and was not a claim for performance of construction work or supply of related goods or services under the NSW Act.

The court was asked to determine:

- whether the question of whether the claim fell under the NSW Act was a question that could only be determined by the adjudicator;
- whether Payment Claim No 33 was a claim for construction work because the payment claim included the value of the whole of the work undertaken less the amount the contractor had been paid; and
- whether the developer's right to set-off under the contract was rendered void by section 34 of the NSW Act.

DECISION

The developer was successful in its application. The court determined that Payment Claim No 33 was void and of no effect under the NSW Act and granted an injunction restraining the contractor from seeking an adjudication under the NSW Act in respect of that payment claim.

Ball J relied on High Court authority in *Southern Han Breakfast Point Pty Ltd (In Liquidation) v Lewence Construction Pty Ltd* (2016) 260 CLR 340 to find that while jurisdiction of an adjudicator is determined by the NSW Act, it is ultimately a question for the court to determine whether adjudicators have jurisdiction to determine a particular claim. Ball J also clarified that there was no general principle in relation to courts being reluctant to grant injunctions to restrain purported payment claims from being referred to adjudication.

In relation to the second point, Ball J referred to section 13 of the NSW Act which requires that a payment claim identify the *'construction work (or related goods and services)'* to which it relates. These expressions are defined in sections 5 and 6 of the NSW Act. On review of the materials, Ball J could not find that the claim for the two negative amounts of $498,911 could be described as claims for construction work or for related goods and services. Framing a payment claim as being for the whole of the work done less amounts paid was not sufficient to alter the character of the amounts in question. Ball J decided that Payment Claim No 33 was not a valid payment claim under the NSW Act, irrespective of the fact that other smaller amounts were also claimed in that payment claim.

Finally, in relation to the third contention, section 34 of the NSW Act provides that provisions of contracts which seek to exclude, modify restrict or deter action under the NSW Act will be void. Ball J did not determine this issue as the contractor did not challenge the validity of the developer's right to call on the guarantees. Ball J did however make comments in obiter that questioned the correctness of previous obiter comments made in respect of an application to injunct a call on security following an adjudication determination and the question of whether any contractual entitlement to call on the guarantees in those circumstances was rendered void by section 34 of the NSW Act.

Lindvest DM Pty Ltd v CPDM Pty Ltd [2020] NSWSC 1290

It is not an abuse of the process of the court for a party against whom judgment has been entered under the NSW Act (following the making of an adjudication determination against it) and who does not seek to stay or set aside that judgment, to instead commence proceedings to enforce its contractual rights.

Substantive proceedings seeking a final determination of matters in dispute under a contract can therefore be advanced by a judgment debtor whilst an adjudicated amount remains unpaid.

FACTS

Lindvest DM Pty Ltd (**developer**) contracted CPDM Pty Ltd (**project manager**) under a development services agreement to provide project management services in relation to a property development in NSW. On 16 October 2019, the developer gave 60 days' notice of termination without cause. The parties agreed that the effect of this notice was to cause the agreement to come to an end on 16 December 2019.

On 11 December 2019, the project manager made a payment claim to the developer for $109,725. The payment claim was the subject of an adjudication determination made in favour of the project manager for $104,000. The project manager subsequently obtained judgment in the District Court of NSW for the adjudicated amount and applied for a writ for levy of property against the developer. The writ was returned unsatisfied and the developer was therefore presumed to be insolvent.

In the meantime, the developer commenced separate proceedings seeking a declaration that the project manager was not entitled to any payment in accordance with the terms of the contract but, crucially, did not seek to have the adjudicator's determination itself quashed or to set aside or seek a stay of enforcement of the resultant judgment.

The project manager sought an order that the proceedings be dismissed on the basis that their prosecution would be an abuse of process (ie circumstances in which the use of a court's procedures would be unjustifiably oppressive to a party or would bring the administration of justice into disrepute).

The issue before the court was whether it was an abuse of the process of the court for a party against whom judgment has been entered under the NSW Act (following the making of an adjudication determination against it) and who does not seek to stay or set aside that judgment, to instead commence proceedings to enforce its contractual rights.

DECISION

The court dismissed the project manager's claim to strike out or stay the proceedings, holding that the developer's claim for final relief in relation to its contractual rights did not constitute an abuse of process despite the judgment on the adjudicated amount being unsatisfied. The court remarked that an adjudication judgment is provisional and that the NSW Act contemplates either concurrent or consecutive proceedings on the adjudication judgment and under the contract.

The court also considered the earlier decision in *Nazero Group Pty Limited v Top Quality Construction Pty Limited* [2015] NSWSC 232 which held that a party seeking relief in court must first pay into court the adjudicated amount, but distinguished that case on the basis that the developer had not sought to quash the adjudication determination itself, or to set aside or seek a stay of the resultant judgment. We considered the significance of that decision in our 2015 Security of Payment Roundup.

The court also held that the developer's commencement of proceedings did not deny the operation of the NSW Act or subvert its operation because the project manager remained free to enforce the NSW District Court adjudication judgment.

MTR Corporation (Sydney) NRT Pty Ltd v Thales Australia Ltd [2020] NSWCA 226

This decision is important for those considering an application for a stay of the enforcement of an adjudication determination, particularly where proceedings for judicial review, based on jurisdictional error, have been dismissed.

These factors were all considered relevant in this case:

- the policy of the NSW Act, which allows a speedy adjudication of a payment claim to ensure that subcontractors and contractors are not deprived of cash-flow whilst building disputes are resolved;
- whether the applicants have a reasonably arguable case on appeal (although it was noted that on applications for leave to appeal generally, merely establishing a reasonably arguable case would not usually warrant a grant of leave);
- whether there is prejudice to either party turning on the outcome of the application; and
- whether there is a risk of reputational harm if payment is required (although on the facts there was no such risk, and so reputational harm was not relevant to the actual decision).

It was noted that a court should be reluctant to grant a stay in proceedings under the NSW Act unless the applicants can establish clear grounds by way of prejudice or other considerations which warrant depriving the respondent of its statutory entitlements, upheld by a judge in judicial review proceedings.

Finally, even though the stay was granted, the Court of Appeal described it as an indulgence to the applicants, and that therefore the respondent should not have to pay the costs of the applicants' success.

FACTS

The first instance decision was covered in our August 2020 edition of Construction Law Update. In summary, Thales made an adjudication application against MTR under the NSW Act. On 5 June 2020, the adjudicator allowed a claim in an amount of ~$25.5 million in favour of Thales. MTR then commenced proceedings seeking judicial review of the adjudicator's determination but was unsuccessful. MTR also introduced claims of misleading or deceptive conduct under section 18 of the Australian Consumer Law.

On 31 August 2020, subject to certain conditions regarding the commencement of proceedings seeking leave to appeal, the primary judge granted an interlocutory injunction restraining the respondent from enforcing the adjudication determination, and the stay was extended by agreement until the day on which the application for a further stay was listed before the Court of Appeal.

DECISION

The extended stay was granted, noting the absence of any real prejudice against either party from the stay being granted, and that there was an expectation of an early hearing and determination of the application for leave to appeal and the appeal.

MTR Corporation (Sydney) NRT Pty Ltd v Thales Australia Ltd [2020] NSWSC 1174

The difficulty faced by a respondent in seeking to set aside an adjudicator's determination for a denial of procedural fairness has been highlighted in this Supreme Court decision. The court will not lightly find that an adjudicator has made a determination on a basis for which neither party contended, and without giving the parties an opportunity to make submissions on the question, such that a breach of natural justice arises.

FACTS

MTR Corporation (Sydney) NRT Pty Ltd and UGL Rail Services Pty Ltd formed a systems joint venture (**SJV**) for the delivery of works on the Sydney Northwest Rail Link. SJV was required to design, build, test and commission a package of works including the delivery of trains, communication based train controls, low voltage power distribution, tunnel mechanics and electrical systems.

On 3 August 2015, SJV entered into a construct contract with Thales Australia Ltd (**Thales**) in respect of the installation of input/output points required to integrate third party equipment and systems in the Sydney Metro system.

On 5 June 2020, pursuant to the NSW Act, an adjudicator determined Thales was entitled to payment of $25,246,170 (**determination**).

SJV appealed the adjudicator's determination on the basis that it contained four jurisdictional errors. SJV alleged that the adjudicator:

- decided a claim on a basis that had not been advanced by either party (**ground 1**). SJV contended that the adjudicator should have informed the parties that she considered Thales' claim had been made pursuant to cl 3.7 of the Specification (and not only cl 57 of the Contract), and given them the opportunity to make submissions in relation to the issue;
- failed to perform her duties set out in section 22(2) of the NSW Act (**ground 2**);
- failed to come to a view or consider the merits of three of Thales' claims (**ground 3**); and
- failed to decide whether a set-off totalling $800,000 had been made out (**ground 4**).

DECISION

The NSW Supreme Court dismissed SJV's appeal in its entirety. Each ground of appeal asserted by SJV is considered below.

Ground 1: In considering whether the adjudicator decided a claim on a basis that had not been advanced by either party, the judge determined that although the payment claim did not expressly refer to cl 3.7 of the Specification, the description in the payment claim was apt to refer to a claim under cl 3.7. The payment schedule referred to both cl 3.7 and cl 57. In the adjudication application, Thales developed detailed arguments by reference to cl 3.7 and in subsequent paragraphs asserted a claim under cl 57. The adjudication response referred to both cl 3.7 and cl 57. The adjudicator interpreted Thales' claim to be asserted under cl 3.7 and under cl 57. The judge held that the adjudicator had not failed to afford the parties procedural fairness in preferring one claim over the other.

Ground 2: The adjudicator had rejected an argument put forward by SJV on the basis it was not raised in the payment schedule. In doing so, the judge found that the adjudicator had evaluated SJV's contentions. Whether or not the evaluation was correct was irrelevant as any such error did not deprive the adjudicator of jurisdiction. Ground 3: The judge disagreed with SJV's claim that the adjudicator failed to come to a view or consider the merits of three of Thales' claims. SJV had rejected two of the claims in the payment schedule on the basis that Thales had not substantiated the amount claimed. The judge held that the adjudicator considered the two claims and formed the view that the quantum was not in dispute. SJV had rejected the third claim by reference to a release which the adjudicator was not satisfied had effect in relation to that claim. Accordingly, the judge held that the adjudicator had given proper consideration to the third claim as well.

Ground 4: The adjudicator concluded that the reasons supporting SJV's set-off claim as put forward in the adjudication response were not raised in the payment schedule and could not then be considered in the determination. The judge found that the adjudicator had therefore not simply rejected the set-off claim.

Parrwood Pty Ltd v Trinity Constructions (Aust) Pty Ltd [2020] NSWCA 172

A builder has a right to make a payment claim under the NSW Act even where the work is later taken out of its hands by a developer, as long as the reference date arose before the works were taken out or suspended.

An adjudicator must determine the amount of a progress payment (if any) which is to be made to a claimant, even if that amount is '$nil' or '$0' under section 22(1)(a) of the NSW Act.

It is not necessary for a claimant to seek a declaration that an adjudication determination is void in court before applying for a second adjudication. The NSW Act does not require a claimant to do so.

FACTS

The NSW Court of Appeal considered a developer's application to appeal the decision of the Supreme Court of NSW (which we considered in our March 2020 Construction Law Update.

Parrwood Pty Ltd (**developer**) engaged Trinity Constructions (Aust) Pty Ltd (**builder**) under an amended AS4902-2000 contract to design and construct a development known as the Affinity Project.

In September 2019, the developer took the work out of the builder's hands for substantial breach of the contract. The builder served a payment claim for work up to 25 August 2019 and the developer responded with a payment schedule for $nil.

There were two adjudication determinations:

- on 15 November 2019, where the first adjudicator determined that despite a valid reference date being available, the developer had validly exercised its right to take work out of the builder's hands, such that payment under the contract was suspended until it became due after a final reckoning under clause 39.6 of the contract, but declined to determine an adjudicated amount (**first determination**); and
- on 22 November 2019, where the second adjudicator determined that the first determination was void because the first adjudicator failed to determine the amount of the progress payment. The second adjudicator determined the value of the progress payment (**second determination**).

The developer commenced proceedings in the Supreme Court and the builder filed a cross-claim.

Supreme Court decision

The Supreme Court upheld the second adjudicator's determination that the first determination was void because:

- the first adjudicator failed to determine the progress payment to be paid to the builder as required by section 22 of NSW Act; and
- the first adjudicator wrongly determined that the builder's right to a progress payment was suspended until payment became due under the contract because the developer had exercised its right to take the work out of the builder's hands. A right to a progress payment under the NSW Act had arisen given that the reference date arose before the date of suspension.

DECISION

The Court of Appeal dismissed the appeal.

Was the first determination void?

The builder's entitlement to make a payment claim did not cease as a valid reference date had arisen before the date that the developer exercised its right to take the works out of the builder's hands.

The first adjudicator had failed to perform his statutory duty to determine the amount of the progress payment (if any) to be paid by the developer to the builder.

Based on the first adjudicator's language, the court held that the first adjudicator did not determine an amount (if any) payable to the builder and continuously admitted that he did not make any such determination. As a consequence, the court found that this failure to perform an adjudicator's duty under section 22(1)(a) of the NSW Act was *'as clear a case as one might find of misconception of function amounting to jurisdictional error'*.

Was the second determination void?

The builder did not necessarily have to commence litigation seeking a declaration that the first determination was void before proceeding to a second adjudication because:

- a court's determination is a possible solution to the problem;
- the NSW Act does not expressly or impliedly prohibit the builder from applying for a second adjudication until a court has declared an earlier determination void;
- while the parties could avoid time and costs in proceeding to litigation before applying for a second adjudication, that is not enough to prevent the builder from exercising its rights under the NSW Act; and
- there was no abuse of process in applying for a second adjudication, especially in the circumstances where the first determination was void.

Parrwood Pty Ltd v Trinity Constructions (Aust) Pty Ltd [2020] NSWSC 208

Although no new reference date arose and the right to payment was suspended after work was taken out of the builder's hands, a right to a progress payment that existed before suspension could be pursued under the NSW Act.

If a claimant's position is that an adjudicator has failed to determine an adjudication application within the time allowed by section 21(3) of the NSW Act, it is unnecessary for the claimant to commence proceedings for a declaration to that effect before exercising its rights under section 26(2) of the NSW Act to withdraw the application and make a new adjudication application.

FACTS

Parrwood Pty Ltd (**developer**) engaged Trinity Constructions (Aust) Pty Ltd (**builder**) under an amended AS4902-2000 contract to design and construct 59 apartments in a development known as the Affinity Project. In September 2019, the developer exercised its right to take work out of the builder's hands for substantial breach under clause 39.4 of the contract. The builder served a payment claim to which the developer issued a payment schedule for a scheduled amount of $nil.

On 15 November 2019, an adjudicator made a determination that no amount was owing to the builder because when the payment claim was made, the developer had validly exercised its right to take work out of the builder's hands, so that payment under the contract was suspended until it became due under clause 39.6 (**first determination**).

On 22 November 2019, the builder purported to withdraw the adjudication application by notice served on the first adjudicator under section 26 of the NSW Act and made a new adjudication application. The second adjudicator decided that the first adjudicator had failed to perform his statutory function because he declined to determine the payment claim, meaning that the first determination was void. There was nothing preventing the second adjudicator from determining the claim herself, which she did in favour of the builder (**second determination**).

The developer sought a declaration in the Supreme Court of New South Wales that the second determination was void. By cross-summons filed without leave of the court, the builder sought a declaration that the first determination was void.

Ball J had to determine:

- whether it was open to the builder to contend that the first determination was void where the builder hadn't applied to set it aside before the second adjudication and if so, whether it was void; and
- whether the payment claim was invalid due to it being accompanied by a supporting statement which the builder allegedly knew to be false or misleading in a material particular.

DECISION

Ball J granted the builder leave to file the cross-summons and held that the first determination was void. His Honour decided that it had been clear since the builder purported to withdraw the adjudication application that it thought the first determination was void and that the cross-summons simply formalised the position that existed before it was filed. His Honour noted that the builder could have commenced proceedings after the first determination was handed down, but that it was *'neither necessary nor sufficient to protect its position for it to do so … because it was open to [the builder] to take the view that the determination was void and proceed on that basis'*.

It was not disputed that on and from 25 August 2019, the builder became entitled to a progress payment under section 8 of the NSW Act and as a result became entitled to serve a payment claim regarding that progress payment. Under section 22 of the NSW Act, the adjudicator appointed to adjudicate that claim had to determine the progress payment to be paid to the builder. The first adjudicator did not do this and instead concluded that because of decision to take the work out of the builder's hands, the right to a progress payment was suspended until the final reckoning mechanism in clause 39.6 had operated. The first adjudicator was wrong, as a right to a progress payment under the NSW Act had arisen regarding a reference date that arose before suspension occurred.

In relation to the developer's claim that the supporting statement contained a false statement, his Honour was not satisfied that the developer had discharged its onus of proof, particularly as it was a serious allegation and had to be established by clear evidence. His Honour held that the three subcontractors not disclosed in the supporting statement were not engaged by the builder, but by a related company, and there was no evidence from which it could be inferred that the builder knew that the supporting statement was false.

Reward Interiors Pty Ltd v Master Fabrication (NSW AU) Pty Ltd [2020] NSWSC 1251

Settlement agreements regarding amounts payable under payment claims will be permitted by the NSW Act and will cause the relinquishment of a party's ability to otherwise enforce its right to payment under the NSW Act.

Such an agreement will in effect be held to acknowledge the operation of the NSW Act but record the parties' agreement that, in the particular circumstances, their rights will instead be governed by their agreement. This will not be an 'attempt to deter a person from taking action under' the NSW Act under section 34(2)(b).

FACTS

In March 2020, Master Fabrication (NSW) (AU) Pty Ltd (subcontractor) served a payment claim under the NSW Act on Reward Interiors Pty Ltd (contractor). The contractor did not submit a payment schedule in response to the payment claim. Under the NSW Act, the subcontractor could have sought judgment for the amount claimed under the payment claim because the contractor had failed to issue a payment schedule within the required time. However, in April 2020, the parties agreed at a meeting that the contractor would pay a lesser sum in full satisfaction of the payment claim (settlement sum). The contractor paid the subcontractor the settlement sum.

The contractor sued the subcontractor for damages arising from the construction work. In its cross-claim in the proceedings, the subcontractor sought summary judgment for the difference between the settlement sum and the amount claimed under the payment claim. The subcontractor argued that it was entitled to summary judgment because the agreement for the settlement sum amounted to the parties contracting out of the NSW Act, and was void.

DECISION

In deciding the summary judgment application, the court found that the contractor had an arguable case that the agreement (assuming it had been made, but not determining that issue) was not void under the NSW Act and dismissed the summary judgment application on that basis. In making this decision, the court found that, due to the agreement, the subcontractor had relinquished its right to seek judgment for the amount claimed under the payment claim due to the contractor's failure to issue a payment schedule.

TFM Epping Land Pty Ltd v Decon Australia Pty Ltd [2020] NSWCA 93

A claimant's failure to serve a head contractor's supporting statement with a payment claim in accordance with section 13(7) of the NSW Act will not invalidate service of the payment claim. This decision settles a long-standing query as to the effect of such a failure, meaning respondents will no longer be able to rely on this technical breach to avoid the operation of the NSW Act. The Court of Appeal has, however, left open the question of whether a claimant is entitled to payment of amounts claimed for work performed after a reference date has arisen.

FACTS

This case was an appeal from a decision of the NSW Supreme Court, which we considered in our October 2019 Construction Law Update available here.

TFM Epping Land Pty Limited and Katoomba Residents Investment Pty Limited (together, **the principals**) entered into a design and construct contract with Decon Australia Pty Limited (**contractor**) in respect of a residential apartment building in Epping known as the Juniper Development (**contract**).

The contractor served a progress claim on the principals on 3 June 2019 (**payment claim**). The claimed amount was $6,355,352 (**claimed amount**), which included amounts for work done within the original contract sum, variations claimed under the contract, and for interest on overdue progress claims.

The principals sent an email to the contractor's solicitor on 14 June 2019 indicating (in a section headed *'Your clients' claims'*) that the variations claimed were not agreed (**14 June email**).

The contractor commenced proceedings in the NSW Supreme Court seeking summary judgment of the claimed amount. The primary judge granted Decon's summary judgment application and, in doing so, found that the payment claim complied with the requirements of the NSW Act. The primary judge held that the principals' 14 June email was not a valid payment schedule under the NSW Act.

The principals appealed the judgment. The issues on appeal were whether the payment claim was invalid because it was:

- a claim for payment in respect of variations which were not claims under the contract, but rather quantum meruit claims;
- not made in respect of an available reference date; and
- not accompanied by a supporting statement in accordance with section 13(7) of the NSW Act.

DECISION

The Court of Appeal dismissed the principals' appeal. The court found that it was not open to the principals to resist an application by the contractor for judgment on the question of whether the amounts for variations did lawfully arise under the contract. There was nothing on the face of the payment claim which suggested that the claims for variations were not made under the contract.

The principals needed to raise this issue with the contractor in a payment schedule issued under section 14 of the NSW Act. When the principal did not issue a proper payment schedule to the contractor raising the issue, they forfeited the right to argue the defence to the contractor's application.

On the second ground, the court, relying on *Southern Han*, held that the inclusion of interest accruing after the reference date did not mean that the payment claim was not made in respect of the reference date. However, the court expressly declined to decide whether a claimant is entitled to payment of amounts claimed for work performed after a reference date has arisen.

Settling the divergence in NSW case law, (including McDougall J's judgments in *Kitchen Xchange v Formacon Building Services* and *Greenwood Futures v DSD Builders* and Ball J's judgment in *Central Projects Pty Ltd v Davidson*), the court held that a claimant's failure to comply with section 13(7) of the NSW Act by failing to serve a supporting statement with its payment claim will not mean the payment claim was invalidly served. The NSW Act does not expressly state that a payment claim will be invalidated in such circumstances; it provides a sanction for such a failure. As a result, the fact that a claimant does something in contravention of a law does not *'annul'* the thing done (ie the service of the payment claim) but simply imposes a penalty on the claimant which is a separate issue.

TFM Epping Land Pty Ltd v Decon Australia Pty Ltd [2020] NSWCA 118

When seeking a stay of execution of a judgment debt under the NSW Act the onus is on the party seeking relief to demonstrate a real risk of irreparable prejudice flowing from refusal of the stay, given this relief would detract from the purpose of the NSW Act of enabling a builder to be paid.

Section 32 of the NSW Act, which preserves rights under a construction contract and in civil proceedings, speaks to the legal rights of the parties only and not the practical effect on them. The operation of section 32 does not depend upon whether a developer is in a liquidity crisis or alternatively has deep reserves of liquid assets as that would cause uncertainty in the application of the section.

FACTS

TFM Epping Land Pty Limited and Katoomba Residents Investment Pty Limited (together, **developers**) are judgment debtors of Decon Australia Pty Ltd (**builder**). The judgment debt is founded on the failure of the developers to serve a payment schedule in response to a payment claim made under the NSW Act.

Procedural history

Following the issue of a payment claim for an amount of $6,355,352 (**claimed amount**), the builder commenced two proceedings against the developers. The first proceeding was commenced on 27 May 2019 for the claimed amount (**Construction List Proceeding**). The second proceeding was commenced on 3 July 2019 for the claimed amount following the developers' failure to serve a payment schedule in response to the payment claim (**SOP Proceeding**).

The primary judge in the SOP Proceeding found that the builder was entitled to the claimed amount. This was upheld in the Court of Appeal and recently considered in our May 2020 Construction Law Update.

Following the developers' failed appeal in the SOP Proceeding, the developers filed a cross-claim in the Construction List Proceeding alleging that the builder was not entitled to its retention or variation claims and was additionally liable for defects in an estimated amount of $4,787,810 and general damages in an unquantified amount.

The developers sought a stay of execution of the SOP Proceeding judgment, which was refused. In these proceedings, the developers appealed the refusal on the basis that they would become insolvent if obliged to pay the claimed amount, and that their defences to the claims giving rise to the judgment debt and their cross-claim would be prejudiced as a result. The failure to grant a stay in such circumstances was, they argued, contrary to the statutory purpose of section 32 of the NSW Act of not permitting interim rights to become final rights. The developers also asserted this was an instance of, or analogous to, a 'Grosvenor stay' (by reference to *Grosvenor Constructions (NSW) Pty Ltd (in administration) v Musico* [2004] NSWSC 344).

DECISION

The Court of Appeal refused leave to appeal.

In reaching this decision, the court *considered the applicability of a 'Grosvenor stay' and affirmed the comments of McDougall J in Veolia Water Solutions & Technologies (Australia) Pty Ltd v Kruger Engineering Australia Pty Ltd (No 3)* [2007] NSWSC 459, that the granting of a stay requires a balancing exercise between the policy of the NSW Act that successful applicants be paid promptly, and the likelihood of a real risk of irreparable prejudice flowing from refusal of the stay because a cross-claim would be rendered worthless. Ultimately, the court rejected the applicability of Grosvenor. It held that the Grosvenor stay was designed for circumstances where a cross-defendant, which had received a payment under the NSW Act, would be unable to meet the judgment following determination of the cross-claim, and not for circumstances where a judgment debtor cannot pay a judgment ordered pursuant to rights created by the NSW Act.

In response to the developers' argument regarding section 32 of the NSW Act, the court found that section 32 only speaks to the legal rights of the parties and not the practical effect on them. The appointment of a liquidator would not prejudice the developers' legal rights to prosecute the cross-claim. Further, accepting the developers' argument would mean that the qualifications in section 32 would have a varied operation depending upon the financial circumstances of the parties (which might not be known to each other).

The court commented that the purpose of the NSW Act is to promote speedy determinations and ensure that progress claims are dealt with and paid promptly. This regime necessitates that rights created under it are enforceable as if they were final determinations of a court. The statutory consequence is that in some cases the statutory entitlement will lead to a judgment debt, which is no less enforceable than any other judgment.

Whilst the court may intervene where there is the likelihood of irreparable prejudice (including where the practical effect is to make an interim right permanent), given that relief detracts from the purpose of the NSW Act and would prevent the ordinary operation of the processes authorised by the NSW Act, the onus is on the party seeking relief. In this case, the developers did not meet this threshold and could not establish that a failure to obtain a stay would have the practical effect of stultifying the litigation of the cross-claim.

TWT Property Group Pty Ltd v Cenric Group Pty Ltd [2020] NSWSC 72

A builder's failure to pursue a claim for payment in earlier proceedings was unreasonable so it was prevented by an Anshun estoppel from making the same claim under the NSW Act. A party may not make a claim for payment under the Act regarding the same facts and issues that were the subject of earlier court proceedings.

FACTS

TWT Property Group Pty Ltd (**developer**) contracted with Cenric Group Pty Ltd (**builder**) for the demolition of a structure and excavation of a site. The developer excluded the builder from the site on 19 March 2018 and contracted with the builder's subcontractor to complete the excavation works. The builder commenced proceedings (**2018 Proceedings**) against the developer and the subcontractor for damages arising from the exclusion. The court held that the builder should not have been excluded from the site, but that it had not proved any damages.

Relevantly, the builder had raised a claim for work performed up to 19 March 2018 as a set-off to the developer's cross-claim in the 2018 Proceedings but led no evidence in support of the claim and withdrew the claimed set-off in closing submissions.

On 14 December 2018, the builder served a payment claim on the developer for $444,726 for work done before its exclusion from site (**December Claim**). The developer served a payment schedule in the amount of $Nil. The builder made an adjudication application regarding which the adjudicator found that:

- it was 'common ground' that the only work undertaken during the 12 months preceding the payment claim was excavation of the sandstone and the December Claim included no amount for excavation of sandstone;
- the payment claim was not served within 12 months after the construction work to which the claim related was last carried out, and therefore the payment claim did not comply with section13(4)(b) of the NSW Act;
- the adjudicator therefore had no jurisdiction to determine the matter; and
- the builder was not entitled to a progress payment.

The builder purported to withdraw its first adjudication application and made a further adjudication application (also regarding the December Claim). The developer commenced proceedings to challenge the December Claim or uphold the first adjudication.

The court was asked to consider two questions:

- whether it was an abuse of process of the NSW Act for the builder to make the December Claim by reason of an Anshun estoppel arising from the builder's failure to pursue in the 2018 Proceedings a claim for work done before its exclusion from site; and
- if there is no Anshun estoppel, whether the adjudicator's decision was amenable to challenge because, as a matter of objective fact, the December Claim related to work carried out within 12 months of service of the December Claim.

DECISION

The court made orders restraining the builder from proceeding with the second adjudication.

The Anshun Question

Stevenson J held that the December Claim arose from the same facts as those considered in the 2018 Proceedings and that it was *'unreasonable, indeed inexplicable'* that the builder did not include the December Claim in the 2018 Proceedings. In these circumstances, the builder was estopped from bringing such a claim in later proceedings, including by way of adjudication under the NSW Act.

The builder had argued that a letter from the builder's solicitor to the developer's solicitor on the eve of the hearing of the 2018 Proceedings indicated an agreement to hold a separate inquiry into amounts owing to the builder (and therefore address the December Claim) and this justified the builder's failure to pursue a claim for payment in the 2018 Proceedings. Stevenson J rejected that argument by finding the builder's interpretation of the letter unconvincing.

The first adjudication – was there a breach of natural justice?

Stevenson J stated, in obiter, that the December Claim related to work carried out by the builder within 12 months of service of the December Claim.

In coming to that conclusion, Stevenson J decided that compliance with section 13(4)(b) of the NSW Act raises a jurisdictional fact as to when the work was carried out, but an error by an adjudicator in determining that fact is not one that is reviewable by the court. However, had the court been required to determine the issue, his Honour would have found that the adjudication determination was void because in coming to the finding on what was 'common ground' between the parties, the adjudicator must have failed to consider the builder's submission that the excavation works the subject of the December Claim did relate to sandstone excavation. His Honour stated that such a failure breached natural justice.

Waco Kwikform Ltd v Complete Access Scaffolding (NSW) Pty Ltd [2020] NSWSC 1702

Payment clauses in construction contracts should make express reference to the date on which a payment claim can be made, or risk potential disputes over the legitimacy of a payment claim. A contract must expressly nominate the day on which a progress payment may be claimed in order for that date to be considered a valid reference date under section 8 of the pre-21 October 2019 version of the NSW Act.

The definition of 'reference date' was removed from the NSW Act on 21 October 2019. However, section 13(1B) of the NSW Act (as amended) provides that if the construction contract makes provision for an earlier 'date' for the serving of a payment claim in any particular named month, the claim may be served on and from that date instead of on and from the last day of that month. It is likely that the principles arising from this case will apply to section 13(1B) and will call into question contractual provisions that allow claims to be made 'by' a particular date, not 'on' that date.

FACTS

Waco Kwikform Ltd (**respondent**) sought to challenge an adjudication determination made under the NSW Act that it pay Complete Access Scaffolding (NSW) Pty Ltd (**claimant**) $301,856. The basis of the challenge was that the payment claim was not a valid claim as there was no reference date.

Section 8(2)(a) of the pre-21 October 2019 version of the NSW Act defined a reference date as:

> *'a date determined by or in accordance with the terms of the contract as the date on which a claim for a progress payment may be made in relation to work carried out or undertaken to be carried out (or related goods and services supplied or undertaken to be supplied) under the contract.'*

The issue for the court to decide was whether or not the construction contract made 'express provision' with respect to 'the date on which a claim for a progress payment may be made' for the purpose of section 8(2)(a) of the NSW Act as it then stood.

Waco submitted that this express provision was at clause 4.1:

> *'4.1 Claims submitted by the 20th day of the month will, if approved by Waco Kwikform, be paid by the end of the following month. If any part of a claim is not approved then such part will not be paid and the Subcontractor will be provided with the reasons for the non-payment.'*

DECISION

The court dismissed the respondent's challenge to the adjudication determination.

The court held that in order for a term to be a term of the contract for the purpose of section 8(2)(a), the term must be one where a date can be identified from the terms of the contract itself as being *'the date on which a claim for a progress payment may be made'*. The provision in the contract must, by its own terms, determine the date by which the payment claim can be made.

Clause 4.1 was not a term of the contract having the effect contemplated by section 8(2)(a) of the NSW Act. It did not require the claimant to make any claim. Rather, clause 4.1 gave the claimant discretion to decide on which day to make a progress claim, and the claimant could theoretically make any number of claims in the days leading up to the 20th day of the month. That day chosen by the claimant would not be determined 'by or in accordance' with the 'terms of the contract' and clause 4.1 in particular; but by the claimant itself.

As such the reference date was determined under clause 8(2)(b) of the NSW Act, being the last day of the month in which construction work was first carried out under the contract and the last day of each subsequent month.

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 *Building Industry Fairness (Security of Payment) Act 2017* (Qld) (**Qld BIF Act**) created a more claimant-friendly SOP process in Queensland. On 1 October 2020, further changes to the statutory adjudication regime, as well as mechanisms for securing payment of adjudicated amounts, came into effect. These changes provide further protection for claimants, and we expect this will continue the increasing number adjudication applications made in Queensland.

DEVELOPMENTS

From 1 October 2020, the following key provisions took effect:

- Head contractors must provide a supporting statement with payment claims to the principal. The supporting statement must declare that all subcontractors have been paid all amounts owed to them at the date of the payment claim or, if they have not been paid the full amount, state the reasons for withholding payment. Failure to provide a payment statement can incur a penalty under the Qld BIF Act.
- A head contractor owed money under an adjudication determination, which the principal fails to pay, can lodge a payment withholding request (**PWR**) to the principal's financer to set aside a portion of the funds in favour of the head contractor.
- A subcontractor that has not been paid an adjudication award can lodge a PWR to the principal over funds payable to the head contractor.
- If a head contractor is not paid an adjudicated amount, it can also request a charge over the property, owned by the principal, on which the construction work and related goods and services were performed.

We expect that the number of adjudication claims in Queensland will continue to rise. Statistics of the Queensland Building and Construction Commission recorded that in the 2018 – 2019 year 572 applications were made. This compares to 240 in 2018 and 274 in 2017.

FUTURE

The recent changes to the Qld BIF Act (which also include changes to the Project Bank Accounts set to be rolled out throughout 2021) will introduce an increased administrative and cost burden to projects, especially for head contractors.

Participants in the construction industry should consider the documentation it requires from subcontractors when making a payment claim and include the requirement to provide a supporting statement with a payment claim as standard.

We also recommend that respondents to payment claims remain vigilant in responding to payment claims on time and with fulsome reasons as to why any funds are being withheld. We continue to regularly provide advice to respondents in circumstances where they have failed to provide fulsome reasons in payment claims for withholding funds and are then precluded from raising new (and usually valid) reasons in the adjudication response.

Acciona Agua Australia Pty Ltd v Monadelphous Engineering Pty Ltd [2020] QSC 133

Respondents must be thorough when including reasons in their payment schedule for withholding payment to avoid being barred from relying on a particular reason in a subsequent adjudication. Adjudicators should also be wary to identify and ignore any new reasons raised in the adjudication response in order to avoid falling into jurisdictional error.

FACTS

Monadelphous Engineering Pty Ltd (**Monadelphous**) and Acciona Agua Australia Pty Ltd (**Acciona**) were parties to a contract under which Acciona agreed to carry out engineering services, and supply equipment and materials to Monadelphous, for the upgrade of the Kawana Sewage Treatment Plant in Queensland.

Acciona's application before the Supreme Court concerned the adjudicator's decision in an adjudication under the Qld BIF Act. The adjudicator determined that Acciona was entitled to receive a payment of approximately $1 million. However, Monadelphous had also made out an entitlement to a claimed set-off of $4,424,904 which reduced the payment owing to Acciona to $NIL.

Acciona argued that the part of the adjudicator's decision which dealt with the claimed set-off fell into jurisdictional error because the adjudicator had:

- considered reasons advanced by Monadelphous in its adjudication response which were not included in its payment schedule, in breach of section 88(3)(b) of the Qld BIF Act;
- failed to give proper reasons for his decision that Monadelphous was entitled to its set-off claim, in breach of section 88(5) of the Qld BIF Act; and
- failed to apply the construction contract properly, in breach of section 88(2) of the Qld BIF Act.

DECISION

Ground 1 – the adjudicator considered something he was required to ignore

In its adjudication response, Monadelphous claimed that Acciona had breached the collaboration deed so Monadelphous was entitled to recover damages on two alternative bases, in the form of contributions, which could be used to set off the claimed amount payable. Neither of the two alternative bases were included in the payment schedule as reasons for withholding payment. Consequently, the court found that the alternative bases were 'new reasons' as contemplated by section 82(4) of the Qld BIF Act and Monadelphous was prohibited from including them in its adjudication response within the meaning of section 88(3)(b) of the Qld BIF Act.

The court found that not only had the adjudicator considered the new reasons contrary to section 88(3) of the Qld BIF Act, he had also used them to justify the set-off. Accordingly, after providing useful guidance as to the application of jurisdictional error in Queensland, the court held that the adjudicator had fallen into jurisdictional error.

Ground 2 – inadequacy of the adjudicator's reasons

Acciona contented that the adjudicator's finding regarding set-off was not supported by any demonstrable process of reasoning. The court agreed, finding that the adjudicator's reasons were deficient as his decision did not indicate which of the two alternative bases he accepted, nor why he accepted whichever one he had accepted. The court held that the adjudicator had not discharged the task required of him under the Qld BIF Act and had not carried out the active process of intellectual engagement with the issues and the submissions that the Qld BIF Act required. Again, for this reason, his decision was attended by jurisdictional error.

Ground 3 – jurisdictional error by failing to apply the construction contract properly

Acciona submitted that the adjudicator had, contrary to section 88(2)(b) of the Qld BIF Act, failed to properly apply the terms of the construction contract. While the court acknowledged there were logical inconsistencies in the adjudicator's decision, it was more appropriate to make a finding of jurisdictional error under earlier grounds.

Order

The court declared the parts of the adjudicator's determination affected by jurisdictional error void, but found it was permissible to allow the remainder of the determination to stand, and this part (in which Acciona was awarded approximately $1 million) remained binding on the parties.

Benjamin v KMV Constructions Pty Ltd & Ors [2020] QDC 3

A director of a company will not be a party to a contract its company enters into unless they do so in their personal capacity.

FACTS

Ms Benjamin contracted with KMV Constructions Pty Ltd (**KMV**) to construct a residential property. Mr Vincent and Ms Vincent (**KMV Directors**) were directors of KMV at the time the contract was executed. There was no evidence that the KMV Directors had entered into the contract in their personal capacity, nor did Ms Benjamin claim that the KMV Directors provided any guarantee to secure KMV's performance of its obligations under the contract.

A dispute arose about completing the contract and Ms Benjamin commenced an action for breach of contract against KMV and the KMV Directors. While the breach of contract proceeding was on foot, Ms Benjamin applied to the court for a freezing order under the *Uniform Civil Procedure Rules 1999* (Qld) to prevent Ms Vincent from selling a property she owned and was about to sell.

Counsel for KMV and the KMV Directors submitted that Ms Benjamin's application should be refused as Ms Benjamin's breach of contract claim was against KMV and not Ms Vincent in her personal capacity. Accordingly, there was no arguable case to grant a freezing order over Ms Vincent's property.

DECISION

Judge Reid dismissed the application and ordered Ms Benjamin to pay Ms Vincent's costs of the application.

His Honour found that there was a strong argument that Ms Benjamin's breach of contract claim against the KMV Directors was 'misconceived' as Ms Benjamin had failed to establish that the KMV Directors were parties to the contract. His Honour determined that Ms Benjamin could not identify any arguable basis on which Ms Vincent could be held personally liable under the contract.

EHome Construction Pty Ltd v GCB Constructions Pty Ltd [2020] QSC 291

If a construction contract is terminated, the final reference date to be used when calculating the time limit for a payment claim is the date of termination. Additionally, a payment claim is valid even if retention monies form part of the claim.

FACTS

The applicant EHome Construction Pty Ltd (**developer**) engaged the respondent GCB Constructions Pty Ltd (**builder**) to construct a five-storey building in Surfers Paradise in October 2018. Between 2 November and 20 December 2019, the builder issued 14 payment claims to the developer, of which payment claim numbers 12, 13 and 14 had not been paid. As a result, the builder stopped work on 20 December 2019 and issued a show cause notice. On 6 January 2020, the builder suspended works under the contract, and the contract was terminated on 4 or 5 February 2020. Subsequently, on 6 March 2020, the builder issued a payment claim (number 15) seeking payment of $889,892 for all work that had been carried out by the builder, less the amounts previously paid by the developer. The claim also incorporated an amount for retentions deducted from the value of previous claims. An adjudication followed and the developer was ordered to pay $614,265.

The developer challenged the adjudicator's decision for a jurisdictional error. The developer had two main arguments:

1. the builder was unable to demonstrate that payment claim 15 had been given before the expiry of the time periods specified in sections 75(2) and 75(3) of the Qld BIF Act; and
2. the payment claim was not for 'construction work' because it included a claim for amounts on retention.

DECISION

The court dismissed the application and ordered the sum of $668,342 be paid to the builder.

Issue 1: Timing of payment claim

The developer argued that the periods referred to in sections 75(2) and 75(3) of the Qld BIF Act (which details the time period for issuing payment claims) could not be ascertained under this construction contract as it was terminated, and therefore there was no reference date to calculate from. However, this argument failed. The court accepted that section 67(2) of the Qld BIF Act determined that the final reference date was the date of termination (being either 4 or 5 February 2020). The time period within which to make a final payment claim was to be determined by that reference date.

The court found that payment claim 15 was properly categorised as a payment claim relating to a 'final payment', and therefore the time period specified in section 75(3) of the Qld BIF Act applied. The applicable time period in this case was under section 75(3)(c) of the Qld BIF Act, being six months after completion of all construction work to be carried out under the contract. The court interpreted this to mean six months from 5 February 2020, because all construction work under the contract necessarily had to be completed on 5 February 2020, the date the contract ceased. The result was that the builder lodged its payment claim within the required period and was therefore valid.

Issue 2: Retention monies

The developer argued that the case of *Grocon (Belgrave St) Developer Pty Ltd v Construction Profile Pty Ltd* [2020] NSWSC 409, applied. That case found that a payment claim was void for including a claim for an amount paid under a guarantee, because it was not a claim for 'construction work'. However, the court dismissed that argument, stating that Grocon was not applicable. It was found that retention monies were amounts that had been deducted from the value of construction work and therefore did relate to 'construction work'. This meant that the payment claim was valid.

Galaxy Developments Pty Ltd v Civil Contractors (Aust) Pty Ltd t/a CCA Winslow & Ors [2020] QSC 51

Contractors must ensure that they are licensed to perform all works (however small or discrete), as a failure to do so may render an entire contract void. Strict compliance with the statutory timeframes imposed by the Qld BIF Act is required from all parties involved in an adjudication, including the adjudicator. An adjudicator's failure to make an adjudication decision by the deadline prescribed by the BIF Act will render a late decision void and unenforceable. Similarly, an adjudicator may not be paid fees and expenses related to the late adjudication decision.

FACTS

On 29 October 2019, Mr Thomas Jones (**adjudicator**) delivered an adjudication decision (backdated to 24 October 2019) under the Qld BIF Act which required Galaxy Developments Pty Ltd (**developer**) to pay $1.3 million to Civil Contractors (Aust) Pty Ltd (**contractor**). The contract was for civil works, a minor part of which included widening a road. In widening the road, the contractor removed a bus seat, bus shelter, bus sign and bike rack before undertaking paving, retaining wall and fencing work. The contractor then re-fixed the bus stop seat, bus shelter and bike rack to the new concrete paving created (**bus stop works**).

In delivering his decision, the adjudicator failed to comply with the timeframes prescribed by sections 84, 85 and 86 of the Qld BIF Act.

The developer brought an application to have the adjudicator's decision declared void because:

- the building contract under which the contractor claimed payment was void owing to the fact that the contractor was not appropriately licensed; and
- the adjudicator's decision was delivered after the maximum period prescribed by the Qld BIF Act.

section In relation to the second ground, the question was whether the Qld BIF Act should be interpreted as showing legislative intention that an adjudicator's decision delivered outside the maximum time prescribed by the statute is void. The developer argued that:

- the deliberate use of mandatory ('must') and permissive ('may') language in Chapter 3 of the Qld BIF Act shows that the purpose of the legislature was to achieve a rapid extra-curial determination of disputes about progress claims;
- the courts have recognised that non-compliance with time limits set by mandatory language is fatal to the validity of actions taken by parties to a claim; and
- the statutory purpose in ensuring speedy resolutions of claims must mean that the same result occurs when there is a failure to meet statutory deadlines by the adjudicator.

DECISION

Did the contractor hold the appropriate licence?

The Supreme Court of Queensland held that the contractor was not appropriately licensed to perform the bus stop works and, by virtue of section 42 of the QBCC Act, cannot be paid for work under the $1.3 million contract.

Dalton J observed that her conclusion was the result of the 'stochastic' and 'illogical' provisions in the schedules to the QBCC Regulations and produced a result that, while correct in law, was 'absurd in reality' where the contractor could remove and re-fix the bus shelter, but not the smaller structures of the bus seat and bike rack and as a result was denied fair remuneration.

Time for delivery of adjudication decision

The court held that the adjudicator's decision was void because it was delivered after the statutory time limit imposed by sections 85(1) and 86(2)(a) of the Qld BIF Act. Further, having regard to section 95(6), it was held that because the adjudicator's decision was delivered out of time, he could not have payment of his fees.

Dalton J distinguished previous decisions of the Victorian Court of Appeal and Supreme Court of New South Wales which had held that an adjudicator's decision was not invalidated by being late. The language of the Victorian and NSW legislation is sufficiently different, and the Queensland legislation has taken a deliberately different approach. The purpose of the Qld BIF Act is not to guarantee payment but to ensure a speedy extra-curial determination of a claimant's progress claim. The late delivery of an adjudicator's decision deprives a claimant of the opportunity of a speedy determination. The same approach should be taken where mandatory language is used in relation to an adjudicator's obligations as it is used in relation to the obligations of claimants and respondents.

Regarding the question of fees, Dalton J concluded that it seemed fair that, if a right arises under section 94(2) of the Qld BIF Act (that is, an original adjudication has feasibly ended because no decision has been produced), an adjudicator is not entitled to his or her fee.

Dalton J clarified that the adjudicator was not relieved by section 96(8) (which provides that an adjudicator may have fees in circumstances where a court has found an adjudicator's decision void) because the adjudicator had not acted with 'good faith'. Instead, the adjudicator had represented that he had decided within time, on 24 October 2019, when that was not the case. It was her Honour's view that section 95(8) was intended for a situation where an adjudicator delivers a decision in time but the decision is void because he or she has made some other jurisdictional error.

McCarthy v TKM Builders Pty Ltd & Anor [2020] QSC 301

When serving the other side with an adjudication application, it is imperative that all documents are properly attached or included. Merely providing a link to a cloud-based server or website, such as Dropbox which contains the relevant documentation, will be insufficient to satisfy the general service requirements in the *Acts Interpretation Act 1954* (Qld) and those specific to security of payment disputes in the Qld BIF Act.

FACTS

Legislative requirements for the service of documents

This dispute centred around the use of the cloud-based file hosting website 'Dropbox' to serve adjudication documents to another party. In general, section 39 of the *Acts Interpretation Act 1954* (Qld) (**AIA Act**) provides that personal service of a document on an individual may occur via post, telex, facsimile or similar facility to the receiver's personal or business address. Section 79 of the Building Industry Fairness (Security of Payment) Act 2017 (Qld) (Qld BIF Act) outlines the procedure for commencing an adjudication application and requires a copy of the adjudication application, which may include relevant submissions, to be given to the respondent.

Facts of the case

TKM Builders Pty Ltd (**claimant**) and Mr McCarthy (**respondent**) were parties to a construction contract. The claimant lodged an adjudication application and sent an email to the respondent which attached the application. The accompanying submissions were contained in a Dropbox folder which was accessible via a link contained in the text of the same email. The respondent claimed that he did not open the Dropbox link, meaning he did not 'receive' a copy of the submissions contained in the Dropbox folder. As a result, the adjudicator did not have jurisdiction to deal with the matter because the claimant failed to comply with the service requirements in section 79 of the Qld BIF Act.

The adjudicator held that provision of the Dropbox link was sufficient to show the respondent was in possession of a copy of the adjudication application and the accompanying submissions, and was satisfied that the documents were given to the respondent. The adjudicator ultimately held in favour of the claimant in the payment claim and the respondent has since paid the amount owing.

DECISION

Martin J concluded that service of the claimant's submissions via the Dropbox link was not effective. Section 79 of the Qld BIF Act sets out the essential elements of an adjudication application and provides that the application also 'may' contain submissions. If submissions are included, they form part of the adjudication application and must be served accordingly. In this case, the respondent was not made aware of the submissions merely by being presented with a Dropbox link containing them. This meant the adjudication application was not properly served on the respondent.

The Qld BIF Act outlines a strict timetable for the resolution of an adjudication which commences upon the respondent's receipt of the adjudication application. Time does not begin to run, and the adjudicator does not have capacity to decide the matter, until the respondent is given the adjudication application. In this case, the respondent was not given a copy of the adjudication application, meaning the adjudicator did not have jurisdiction to decide the matter.

S.H.A. Premier Constructions Pty Ltd v Niclin Constructions Pty Ltd & Others [2020] QSC 307

An adjudication decision will not be void for jurisdictional error if the adjudicator makes only minor mistakes or fails to address a small number of submissions or matters when making the decision. When considering an adjudicator's jurisdiction, there is a distinction between an objective jurisdictional fact (a valid payment claim) and a subjective jurisdictional fact (going to an adjudicator's state of mind, such as a decision as to whether or not an application is frivolous or vexatious). Whilst both are threshold issues, an allegation in respect of the former will require the court to consider the question independently, whereas the latter will merely require the court to examine the extent to which the subjective fact was determined in the manner contemplated by the legislature.

FACTS

S.H.A. Premier Constructions Pty Ltd (**principal**) and Niclin Constructions Pty Ltd (**contractor**) were parties to three construction contracts, each of which had achieved Practical Completion and commenced the 12-month Defects Liability Period (**DLP**) (extended by defect notices), when a dispute arose and the contracts were terminated. The contractor simultaneously commenced proceedings and lodged adjudication applications under the Qld BIF Act. The adjudicator decided in favour of the contractor, and the principal sought a declaration that the decision was void due to jurisdictional error on three grounds.

Ground 1: Misconception of the adjudicator's function or power

The principal asserted that the adjudicator acted outside the jurisdiction conferred on it by the Qld BIF Act to only consider specific matters outlined in the Qld BIF Act (including the contract and the payment claim, among others) because there could be no other explanation for the conclusions reached. It was asserted that the adjudicator must have relied on other evidence (beyond the mandate of the Qld BIF Act) to make the determination. Alternatively, the principal submitted that the adjudicator's reasons were severely deficient and, on either or both those bases, the adjudicator had fallen into jurisdictional error.

Ground 2: Failure to undertake the statutory task

The principal submitted that in failing to determine whether work was defective as alleged, estimate the cost of rectifying the defective work and consider the rectification costs in the ultimate valuing of the payment claim, the adjudicator had failed to undertake its statutory function thereby committing a jurisdictional error.

Ground 3: The adjudication application was vexatious and did not satisfy statutory timeframes

The principal argued that, under section 84(2)(a) of the Qld BIF Act, the adjudicator should have determined the applications were vexatious because the contractor changed its position on one issue between the initial court proceeding and the adjudication (approbation and reprobation). In that regard, in the proceeding the contractor asserted that the DLP under each contract had not been extended by the issuing of defect notices under each contract, however, in an effort to access an available reference date available under section 75 of the Qld BIF Act, the contractor asserted the opposite position (that the DLP had been extended) in the adjudication. It was further submitted that the adjudicator should have determined that the contractor's payment claims were issued outside of the statutory timeframes in breach of the Qld BIF Act, with the effect that a failure to satisfy these two preconditions meant the adjudicator's jurisdiction was not enlivened.

DECISION

The applicant failed on all three grounds and the court dismissed the application because, in respect of each ground above:

1. the adjudicator decided the application based on several relevant factors which were outlined in his reasons and which were discernible and authorised by the Qld BIF Act, such that the adjudicator had not misconceived its own function or power and had not fallen into jurisdictional error;
2. whilst the court agreed that the adjudicator had failed to properly address some of the defect items for valuation, it concluded that despite this minor omission the adjudicator had otherwise correctly identified the statutory task and the adjudicator's omissions were due to accident or mistake only which constitutes an error within jurisdiction and therefore does not amount to jurisdictional error; and
3. an adjudicator must satisfy itself as a precondition to making any determination under the Qld BIF Act that the payment claims comply with the statutory time frames and the application is not frivolous and vexatious, however, only the validity of the payment claim is a question of objective jurisdictional fact. Whilst declining to express a view on the approbation and reprobation point in the context of the application (aside from indicating that the inconsistency might ground a strike out or defence in the proceeding), the court determined that:
   (a) the question of whether or not an application was frivolous or vexatious was a subjective jurisdictional fact, or 'state of mind' determined by the adjudicator; and
   (b) to the extent that the adjudicator discharged its obligation to consider those preconditions in the manner contemplated by the legislature (which the court found it did), it was properly within its jurisdiction to determine the application on that basis.

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 around 20 security of payment decisions handed down by Victorian courts. A number of these decisions showed a willingness of the court to:

- continue to uphold the breadth of the unique 'excluded amounts' regime within the *Building and Construction Industry Security of Payment Act 2002* (Vic) (**Vic Act**) which operates to restrain both principals and contractors from agitating claims for (amongst other things) time-related compensation; and
- assess a payment claim on the face of the document, rather than having regard to extensive extrinsic evidence.

Unlike other jurisdictions (such as New South Wales), the Supreme Court of Victoria has also arguably rendered it impossible to claim under the Vic Act for the return of retention in a payment claim, even where the contractor has a contractual right to it.

DEVELOPMENTS

Three cases in 2020 in were particularly noteworthy.

In *Façade Design International Pty Ltd v Yuanda Vic Pty Ltd* [2020] VSC 570, as no payment schedule was issued, the claimant sought payment of the amount claimed as a debt due under section 16(2)(a)(i) of the Vic Act. In considering the requirement that judgment is not to be given unless the court is satisfied that the claimed amount does not include any excluded amounts, the court held that the 'claimed amount' is the amount at the time of judgment, not the amount claimed in the payment claim. The court also held that, if the payment claim includes excluded amounts, this does not invalidate the entire payment claim as such amounts are severable. This case also upholds the growing inclination of courts to assess a payment claim on its face (together with any documents expressly or impliedly referred to). The courts are reluctant to undertake a full investigation of the underlying facts and circumstances.

VCON Pty Ltd v Oliver Hume Property Funds (Royal Parade) Parkville Pty Ltd [2020] VSC 767 upheld the case of *Shape Australia v The Nuance Group* [2018] VSC 808 in holding that a claim for the reimbursement of previously-deducted liquidated damages was a claim for an 'excluded amount' and was therefore prohibited from being taking into account in a later adjudication.

Finally, the Victorian Supreme Court in *Punton's Shoes Pty Ltd v Citi-Con (Vic) Pty Ltd* [2020] VSC 514 held that, notwithstanding a contractual right to the return of a portion of retention monies, a claim for such monies does not constitute 'construction work' and cannot be brought under the Vic Act.

FUTURE

Based on the most-recent publicly available data, the Vic Act continues to be less-utilised in comparison to equivalent regimes in New South Wales and Queensland (when volume of construction work in the respective states is compared).

The Vic Act was last amended in 2013 (with the amendments being administrative in nature). Further, in the intervening period significant changes have been adopted in other jurisdictions in relation to their security of payment regimes. Notwithstanding this, there has been no indication (at least publicly) that Victorian Government plans to make any amendments to the current regime.

The appointment of the Honourable Justice Stynes to the bench of the Supreme Court of Victoria and as deputy judge in charge of the TEC List is a welcome addition and further strengthens the court's expertise in security of payment matters.

ASEA 1 Pty Ltd v Rudyard Pty Ltd [2020] VSCA 122

This case re-affirms that, in respect of appeals involving the Vic Act, a superior court will be more unwilling than in other circumstances to grant a stay of judgment pending the appeal given the Act's objective to ensure prompt payment to builders and contractors.

FACTS

This case involved an interlocutory determination in respect of an appeal of *Rudyard Pty Ltd v ASEA 1 Pty Ltd* [2019] VCC 1995, which we covered in our March 2020 edition of CLU. At first instance, Rudyard Pty Ltd (**builder**) sought judgment against ASEA 1 Pty Ltd (**owner**) under the Vic Act for the owner's failure to issue a payment schedule in response to the builder's payment claims. The court entered judgment in favour of the builder in the sum of $343,750 plus interest.

The owner sought leave to appeal on a number of grounds and made an application for a stay of the orders made at first instance pending the appeal. In support of its application for a stay, the owner submitted that:

- in the absence of such an order, there was a real risk that the builder would disperse the proceeds of judgment to third parties and, given the builder's financial position, any ensuing successful appeal by the owner would be rendered worthless; and
- if the owner were required to pay the judgment sum before the hearing of the appeal, the owner's right to appeal would be frustrated due to its own financial incapacity to meet the judgment debt.

DECISION

Principles for grant of a stay

The court reiterated the following general principles regarding stay applications in reaching its decision:

- the appellant (in this case the owner) bears the onus of establishing that a stay should be granted;
- in Victoria, a stay should only be exercised where the appellant has demonstrated the existence of special or exceptional circumstances;
- special circumstances can exist where it is demonstrated that there is a real risk that an appeal, if successful, would be rendered worthless in the absence of the grant of a stay;
- in such a case the court must balance the real risk that an appeal, if successful, would be rendered worthless in the absence of a stay, against the principle that a successful party is ordinarily entitled to the benefit of the judgement; and
- a stay will not be granted unless the owner demonstrates that it has an arguable ground of appeal.

In addition to the general principles above, the court noted that, in respect of appeals involving the Vic Act, the underlying purpose of the Vic Act (being to ensure prompt payment to builders and contractors) adds weight to the principle that the successful party in the proceeding at first instance is entitled to the benefit of the judgment in its favour.

The application for a stay

The court accepted that the owner's proposed grounds of appeal were at least arguable. However, the court held that the owner failed to demonstrate that there was a material risk that a successful appeal would be rendered worthless in the absence of the grant of a stay. The court had particular regard to the fact the builder was an actively trading entity, with a work force and active involvement in building and construction projects.

The court also considered the risk to the owner if it were required to pay the judgment sum before the hearing of the appeal, and whether the right to appeal would be frustrated due to an incapacity of the owner to meet the judgment debt. On this point the court found that, while the owner lacked assets, it had sufficient financial support available to it from a related entity to enable it to meet the judgment debt.

Bayside Design & Construct Pty Ltd v Kanbur [2020] VCC 691

This case confirms that builders will find it difficult to show that mixed-use developments, which include a domestic component, fall within the application of the Vic Act.

FACTS

Bayside Design & Construct Pty Ltd (**builder**) brought a claim against the owner Mr Kanbur (**owner**) in respect of unpaid payment claims under a contract for the construction of a mixed use development, comprising a first-floor residential unit and terrace and two ground floor shops (**property**).

The main question at the hearing was whether the building contract was excluded from the application of the Vic Act because it included a domestic component.

Under section 7(2)(b) of the Vic Act, the Vic Act will not apply to a *'domestic building contract'* within the meaning of the *Domestic Building Contracts Act 1995* (Vic) (**DBCA**) for the carrying out of domestic building work, other than a contract where the building owner is in the business of building residences and the contract is entered into in the course of, or in connection with, that business.

The builder argued three main points against the application of section 7(2)(b) of the Vic Act, namely:

- that the owner was in the business of building residences and the building contract was entered into in the course of, or in connection with, that business;
- that the building contract was not a domestic building contract within the meaning of the DBCA because of the mixed use nature of the development; and
- that the builder could overcome the difficulty presented by section 7(2)(b) of the Vic Act by claiming only those items in its payment claims that relate solely to the commercial component of the development.

DECISION

His Honour dismissed the claim that the owner was in the business of building residences on the basis that the owner was in full-time employment (in a profession not related to the construction industry), purchased the property primarily to provide a replacement residence and was not involved in any other property or construction transactions of any kind (let alone residences). In reaching this conclusion, his Honour disregarded other factors raised by the builder, such as the fact the owner secured an ABN and that the land was zoned as Commercial Zone 1.

Turning to the question of whether the mixed use nature of the development meant that the building contract was not a domestic building contract within the meaning of the DBCA, his Honour noted that no authorities had previously considered the application of section 7(2)(b) of the Vic Act to a mixed use development.

His Honour stated that there is nothing in the Vic Act or the DBCA to support a construction that requires that all (or even most) of the work under a building contract to be the erection or construction of a home. Instead, his Honour held that the DBCA suggested that a building must be used for only business purposes before it is disqualified. On this basis, his Honour was satisfied that the building contract was a domestic building contract within the meaning of the DBCA for the carrying out of domestic building work and therefore attracted the operation of section 7(2)(b) of the Vic Act.

Finally, his Honour held that the builder could not sever just the commercial component from its payment claim and therefore avoid the exclusion in section 7(2)(b) of the Vic Act in respect of the commercial works. His Honour held that, contrary to section 12 of the DBCA, the building contract failed to clearly delineate between the domestic building work and the commercial building work, particularly as to the amount the builder was to receive.

Interestingly, his Honour held that, even if the building contract has complied with section 12 of the DBCA, it was unclear that doing so would avoid the operation of section 7(2)(b) of the Vic Act for the non-domestic building work. In the case of mixed use developments with owners that are not in the business of building residences, his Honour's view was that the consequences of section 7(2)(b) could only be avoided by entering into two contracts (being one for the domestic building work and one for the commercial building work).

Citi-Con (Vic) Pty Ltd v Punton's Shoes Pty Ltd [2020] VCC 804

In cases where a payment claim has already been served in respect of a particular reference date, that claim cannot be withdrawn in substitution of a later claim in respect of the same reference date, unless the submitting party has agreement from the other party. Unilateral withdrawal of a claim is not permitted, and the later claim will be invalid.

FACTS

Citi-Con (Vic) Pty Ltd (**builder**) served a payment claim on Punton's Shoes Pty Ltd (**owner**) on 29 October 2019 which relied on a reference date of 30 July 2019 (**October Claim**). The builder had however already served an earlier payment claim in July 2019 which relied on the same reference date (**July Claim**).

The October Claim was served via email to the owner with a note that the builder was withdrawing all and any payment claims previously issued in respect of that reference date, including the July Claim. The owner did not agree to the withdrawal of the July Claim and claimed that the October Claim was invalid as it breached section 14(8) of the Vic Act which prohibits a claimant from serving more than one payment claim in respect of each reference date.

DECISION

Marks J held that the builder was not permitted to unilaterally withdraw the July Claim and substitute the October Claim, and as a result the October Claim was invalid.

In reaching this conclusion, her Honour took the view that section 14(8) of the Vic Act did not allow for unilateral purported withdrawal of a payment claim which had already been served. Her Honour held that parties can, by agreement, decide that an earlier payment claim may be substituted for another in particular circumstances, which may often be a cost-effective and expeditious way of dealing with disputes. However, in the absence of agreement between parties, as was the case here, a builder cannot substitute a claim already served for another.

Her Honour then referred to established case law that the consequence of serving more than one payment claim in respect of the same reference date is that the second claim is void. This meant that, of the two claims submitted by the builder, the October Claim was void.

Citi-Con (Vic) Pty Ltd v 8-10 New Street Richmond Pty Ltd [2020] VCC 1161

An accord or satisfaction agreement (or settlement agreement) will not be found to restrict the operation of the Vic Act if the agreement has the requisite intention from both parties and is directed at the genuine resolution of a dispute.

FACTS

8-10 New Street Richmond Pty Ltd (**owner**) engaged City-Con (Vic) Pty Ltd (**builder**) for the construction of apartments. The builder encountered delays during construction and claimed a number of extensions of time to the date for practical completion. The validity of the builder's claims for extensions of time was disputed, and the owner claimed $179,999.40 in liquidated damages for these delays.

Representatives of the parties met and resolved that the owner would not claim further damages if the builder reached practical completion by July 2019. The representatives then exchanged text messages confirming this agreement and that the builder would pay the $179,999.40 owed in damages via GST deductions from payment claims. The owner, in reliance upon the text messages, withheld GST from six payment claims between April and November. The builder subsequently claimed the amount which had been withheld.

DECISION

The owner conceded that it was indebted to the builder for the withheld GST payments but argued that the text conversation between the representatives established a valid agreement for accord and satisfaction which extinguished its liability to the builder under the payment claims.

The owner claimed that the builder's failure to complain about the withheld GST after the agreement showed acceptance to the agreement. In response, the builder claimed the text messages were merely preliminary discussions and there was no actual agreement. The builder also claimed that the accord and satisfaction agreement was invalid in that:

- it was a variation to the contract and did not comply with the contractual requirements for variations as it was not signed; and
- it breached section 48 of the Vic Act as it excluded, modified or restricted the operation of the Vic Act by preventing the builder from receiving money owed under a payment claim.

The court dismissed the proceeding and found in favour of the owner.

The court held that the text conversation constituted an accord and satisfaction agreement and the necessary requirements of a valid agreement were satisfied. Accord and satisfaction is an agreement between parties for the acceptance of something in place of a cause of action and its existence is a question of fact that turns upon the parties' intentions. Her Honour held that the builder's unequivocal text responses demonstrated the requisite intention to be bound by the agreement. Despite the informal nature of the agreement over text, the fact the parties were discussing significant sums of liquidated damages strongly indicated an intention to be bound, as did the builder's post agreement conduct by failing to pursue the owner for the withheld GST amounts.

The court rejected both the builder's arguments regarding the accord and satisfaction agreement being a variation to the contract and a breach of section 48 of the Vic Act.

Accord and satisfaction agreements operate to create a new, entirely separate agreement to the existing contract. The accord and satisfaction agreement is not a variation to an existing contract, and therefore the provision requiring variations to be signed did not apply. Her Honour also held that, even if that provision did apply, the builder would be estopped from denying the existence of the agreement because the owner relied to its detriment upon the assumption that it would not be liable if it failed to pay GST, which was induced by the builder.

With regard to section 48 of the Vic Act, the court held that the text message conversation, on a literal interpretation of the section, did restrict the operation of the Vic Act. However, her Honour held that section 48 did not exist to prevent a party from relying on an accord and satisfaction agreement, if such agreement was directed at the genuine resolution of a dispute, rather than the exclusion, modification or restriction of the operation of the Vic Act. Her Honour held that the court should not deter parties from resolving disputes under the Vic Act and rather further the purpose of the Vic Act by facilitating the efficient resolution of payment disputes.

Launch No. 4 v Southstar Homes [2020] VSC 299

This case reiterates the usual approach taken by courts regarding the granting of an injunction suspending and deferring a party's entitlement to recover an adjudicated amount which has been challenged, namely that, as a balancing condition for the issuing of such an injunction, the party seeking the injunction should be required to provide security in respect of the adjudicated amount.

In seeking an injunction of this type, parties should be acutely aware of the merits of their case, especially in respect of whether there is a serious issue to be tried, and be prepared that the granting of the injunction will likely come at the cost of providing security (usually totalling the adjudicated amount) to the court.

FACTS

Launch No. 4 Pty Ltd (**owner**) and Southstar Homes Pty Ltd (**builder**) entered into a contract for the design and construction of a residential and retail development (**contract**). The builder submitted a number of payment claims, to which the superintendent under the contract issued a payment schedule for a lesser amount. The builder went into administration, and the owner served notice that the whole of the remaining work would be taken out of the hands of the builder. A revised payment schedule was issued, with the scheduled amount being $NIL.

The builder made an adjudication application under the Vic Act and the adjudicator determined an adjudicated amount of $222,570 (including GST) plus interest and adjudication costs. The owner sought judicial review to quash the adjudication determination as void and unlawful.

As an interlocutory step, the owner sought an injunction preventing the builder from relying on or enforcing payment of the adjudicated amount. The owner also sought leave pursuant to section 440D of the *Corporations Act 2001* (Cth) to begin and proceed with its application for the injunction and to continue its judicial review process despite the builder being in administration.

DECISION

The court granted an injunction to preserve the status quo until the determination of the judicial review on the condition that the owner pay to the court the adjudicated amount as security.

Application of section 440 of the *Corporations Act 2001* (Cth)

The court held that the proceeding fell within the language and intent of section 440 of the *Corporations Act 2001* (Cth), as this was a proceeding against a company in administration and in respect of its property (**the adjudication determination**). Leave was granted on the basis that (among other reasons) the owner was essentially defending itself from being required to pay the adjudicated amount, the application was made early in the process and the owner would suffer disadvantage and prejudice if leave was not granted.

Interim injunction

The owner argued there was a serious issue to be tried in two respects: principally, that the adjudicator had acted beyond jurisdiction in concluding that there was a relevant reference date available in relation to the payment claim and had erred in concluding that the Vic Act was applicable, notwithstanding the builder was in voluntary administration and not able to perform the contract works.

The court agreed that there was a serious issue to be tried, though did note that, in its view, the issues were no stronger than arguable. The court found that the builder's arguments were stronger, and this informed the balance of convenience in the builder's favour.

On the provision of security, the court reiterated that, as a balancing condition for the granting of an injunction of this kind, the owner should provide security in respect of the disputed adjudication amount. It was not submitted that giving security would stultify the owner's ability to proceed with judicial review, and it was found non-provision of security would give rise to likely prejudice to the builder in that it would likely delay the recovery of the adjudicated amount (which the builder was presently entitled to) and may give rise to the risk of non-recovery.

Pelligra Build Pty Ltd v Australian Crane & Machinery Pty Ltd [2020] VCC 545

Parties should be wary that a contractor may have a right to serve a payment claim by email, despite the contract saying otherwise.

Parties should also be careful when using standard form contracts and ensure that the contract reflects their true intentions regarding how payments are to be made (whether on a milestone or regular basis).

FACTS

Pelligra Build Pty Ltd (**Pelligra**) was a party to a Master Builders Association GCC-5 standard form contract with Australian Crane & Machinery Pty Ltd (**Australian Crane**). During the course of the works, Pelligra submitted numerous payment claims via email to Australian Crane for works under the contract to which Australian Crane failed to pay or provide payment schedules.

Australian Crane argued that the invoices did not classify as payment claims because (among other things):

- service of notices via email was expressly prohibited under the contract; and
- no reference dates had arisen under the contract because the claims were not submitted in accordance with the milestone payments schedule.

The issue regarding reference dates arose because the contract had inconsistent payment terms in that the terms and conditions referred to payment every 10 days from the start of the works, but the payment schedule set out milestone payments. Pelligra relied on the terms and conditions to claim that the reference dates arose every 10 days from the start of the works while Australian Crane argued that a reference date arose under the contract only when the works for each milestone had been completed.

DECISION

Service by email

The court held that the *Electronic Transaction (Victoria) Act 2000* (Vic) (**ETA**), which permits service by email, does not of itself negate the express terms of the contract which prohibited service by email. This is because Australian Crane had not consented to the information being given by means of electronic communication (which is a requirement under section 8(2)(b) of the ETA Act for that Act to apply).

Nonetheless, the court held that the payment claims had been validly served by email. The court came to the view that Parliament would not have intended a standard form clause in a building contract to frustrate the rights given to contractors under the Vic Act in circumstances where the relevant payment claim had in fact come to the attention of Australian Crane, even if not by an authorised means of service. The court echoed the reasoning in *Metacorp v Andeco Construction* (2010) 30 VR 141, [2010] VSC 199, where Vickery J stated that it would border on absurdity to allow a party, which was in fact able to respond to a claim, have it assessed and have a payment schedule prepared, to be in a position where the court may declare the claim invalid because of improper means of service.

Reference dates

The court held that, because the milestone schedule in the contract represented a more immediate expression of the parties' intentions than the standard form clauses, the reference dates should be determined by the completion of each milestone.

As to whether works under each milestone had in fact been completed, the court held that reference to the milestone in a payment claim was sufficient and that the court did not need to undertake an assessment about whether the particular work for that milestone had been completed for a reference date to arise.

Radman v Open Plan [2020] VSC 318

Parties to court cases involving judicial review of an adjudicator's determination made under the Vic Act should be aware of the potential for the court to grant an indemnity certificate.

Such a certificate gives a party the right to apply to the Appeal Costs Board for payment of both the respondent's and the appellant's legal costs in respect of the appeal, on the basis that the error of law is attributed to a fault of the administration of justice rather than of the parties. The costs of having the error rectified ought ordinarily not to be borne by the unsuccessful respondent but from a public fund.

In this case, the court held that an adjudicator appointed pursuant to section 23 of the Vic Act constitutes a 'court' under the *Appeal Costs Act 1998* (ACA). Accordingly, where an adjudicator's determination on a payment claim is quashed upon judicial review (including if the court allows an appeal by consent), the respondent may be entitled to an indemnity certificate in respect of legal costs incurred in relation to the judicial review proceedings.

FACTS

Radman (**principal**) engaged Open Plan Pty Ltd (**builder**) to construct residential dwellings on land owned by the principal. During the course of the works, the builder issued a number of payment claims under the Vic Act. The principal disputed the payment claims, which were referred to adjudication pursuant to section 23 of the Vic Act. The principal sought judicial review of the adjudication determination on the basis of jurisdictional error, which the court ultimately quashed by consent orders.

The builder submitted that it was entitled to an indemnity certificate in respect of costs under section 4 of the ACA on the basis that:

- the subject proceeding for judicial review was an 'appeal' as defined by section 3 of the ACA;
- the adjudicator was a 'court' within the meaning of section 3 of the ACA;
- the judicial review had 'succeeded' within the meaning of section 4(1) of the ACA in that the court by consent quashed the adjudication determination; and
- the award of an indemnity certificate would be consistent with the purpose of the ACA.

DECISION

Digby J ordered that the builder be granted an indemnity certificate.

Meaning of 'appeal'

His Honour held that the term 'appeal' was to be given a wide meaning on the basis of the underlying policy and purpose of the ACA. His Honour held that, as remedial legislation, the ACA must be construed broadly and beneficially. An appeal refers generally to the right of entering a superior court to redress the error of a lower court. His Honour held that judicial review of the adjudication determination under the Vic Act (being to a superior court on an error of law) was an 'appeal' within the meaning of the ACA.

Meaning of 'court'

His Honour similarly held that the term 'court' was to be construed broadly and beneficially for the reasons above. It was not confined to a court, tribunal or other body from which there exists an express right of statutory appeal on a question of law.

An adjudication determination is binding upon the parties, has the effect of a judgement of the court and is enforceable as such. His Honour held that it follows that an adjudicator appointed under the Vic Act constitutes a 'tribunal' or 'other body' within the meaning of 'court' in section 3 of the ACA.

Success in underlying proceeding

His Honour held that allowing an appeal by consent was not a mere exercise of 'rubber stamping'. The court maintained a duty to be satisfied that there was at least an arguable error as a precondition to allowing an appeal by consent.

Digby J was satisfied that the adjudicator had made a jurisdictional error and concluded that the judicial review of the adjudication determination had 'succeeded' within the meaning of the ACA.

Rapid Concrete Developments Pty Ltd v Lorem Constructions Pty Ltd [2020] VCC 858

Parties should be mindful that if a reference date under a construction contract is expressed to arise as a single one-off payment on completion of the works, that reference date will only crystallise when everything required of the contractor has been fulfilled (including rectification of defects and outstanding matters) unless there are qualifying words saying otherwise.

FACTS

Lorem Constructions Pty Ltd (**head contractor**) engaged Rapid Concrete Developments Pty Ltd (**subcontractor**) in order to perform certain concreting works. The works were the subject of two quotations (**contract 1 and contract 2**) and four subsequent interactions between the parties, both written and oral, relating to additional works in respect of which the subcontractor submitted that an additional four contracts arose **(additional works payment claims**).

The subcontractor issued nine payment claims under the alleged contracts in the amount of $321,587.57, which remained part paid or unpaid by the head contractor. The subcontractor sought judgment against the head contractor under the Vic Act) for the amounts unpaid.

DECISION

The court ruled in favour of the head contractor and dismissed the subcontractor's application.

Relevant contracts

The court held that the additional works payment claims were variations to contract 1 and contract 2 and not separate contracts, on the basis that (among other things):

- the description of the works in the invoice were referable to the works under the contract;
- there were references to 'further' works in the relevant payment claim; and
- there was evidence that particular additional works were to 'speed up the building works'.

Reference dates

Having determined that there were only two contracts, the court turned to the payment term under those contracts (being *'on completion of works…in accordance with our payment terms being on or before 30 days from invoice date'*) in order to determine the relevant reference date.

Holding that the reference date is distinct from the terms regarding payment of invoices, the court found that the parties intended that the 30-day payment of invoices term was to be separate from the reference date for payment, being on completion of the works. The court upheld the principle that where a reference date is a single or one-off payment claim, the time by which service of that payment claim crystallises is when everything required of the contractor has been fulfilled (including rectification of defects and outstanding matters).

Relying on expert and affidavit evidence of the parties, the court determined that the works were incomplete as at the date of issuance of the payment claims and that therefore no valid reference date existed.

Rudyard Pty Ltd v ASEA 1 Pty Ltd [2019] VCC 1995

The court will take a broad approach to identify a valid payment claim served under the Vic Act. Perfect precision is not required for a payment claim to reasonably identify the construction work for which the claim is served. To fill in any gaps, the court may consider the knowledge of a third party with apparent or ostensible authority to act on the principal's behalf.

FACTS

ASEA 1 Pty Ltd (**respondent**) contracted Rudyard Pty Ltd (**claimant**) to coordinate design work for a residential apartment development. In meetings, the sole director and secretary of the respondent made statements about the respondent's association with a third party, Mr Knight. The claimant purported to serve, by email and by post to Mr Knight, three payment claims on the respondent totalling $343,750 (**payment claims**) dated 24 April 2019, 25 May 2019 and 29 June 2019. Mr Knight did not notify the respondent of the payment claims. When the respondent issued no payment schedule in response, the claimant sought judgment against the respondent under section 16(2) of the Vic Act.

The respondent submitted that judgment should not be given because, among other things, the payment claims:

- were not properly served on the respondent; and
- failed to identify the construction work to which the payments claims related.

DECISION

The court held that the third payment claim was validly served and entered judgment for the claimant for $343,750, with interest compounding monthly.

Service

Neither the contract nor the Vic Act permitted service by email, but in any event, Woodward J held that service by post was effective under both the contract and the Vic Act. This was despite the misspelling of the respondent's name as 'ASEA Pty Ltd' on the payment claims. The court confirmed that it will not permit minor errors to thwart the Vic Act's objective.

Identification of construction work

His Honour rejected the respondent's submissions that it was not apparent from the payment claims what works were performed by the claimant. Citing the test outlined by *Lyons J in John Beever (Aust) Pty Ltd v Paper Australia Pty Ltd* [2019] VSC 126, his Honour held that the court could consider the parties' background knowledge when evaluating whether construction work was sufficiently identified, demonstrated by their past dealings and prior exchanges.

His Honour further held that identification is sufficient if made to a third party with apparent or ostensible authority to act on the respondent's behalf. A history of email and documentation exchanges between Mr Knight and the claimant, with an 'authorisation of engagement' executed by Mr Knight on the respondent's behalf purporting to appoint a superintendent under the contract, evidenced this authority.

While emails to Mr Knight were not valid means of service, they evidenced the respondent's knowledge of the content of the payment claims. Notwithstanding that the first two payment claims were vague, his Honour held that a reasonable observer in the respondent's position (with the knowledge of Mr Knight attributed to it) would have readily comprehended the construction work claimed under the third payment claim. This was sufficient for the respondent to issue a payment schedule as required by the Vic Act.

Transurban WGT Project Co v CPB Contractors Pty Limited [2020] VSC 476

The validity of linked claims regimes typically included in PPP and other major project contracts has been called into question as a result of an arguable contravention of the Vic Act.

PPP and other major project contracts often contain linked claims regimes, under which a claim under one contract is contingent on the outcome of an equivalent claim being made under another contract. For example, in PPP projects the downstream D&C contract typically contains a linked claim regime which makes claims under the D&C contract contingent on the outcome of an equivalent claim being made under the upstream Project Deed. Similar arrangements are often used between head contracts and major subcontracts, and between building contracts and development agreements or agreements for lease. In PPP projects linked claims regimes generally:

- require that at the time of making a claim, the downstream contractor is to notify Project Co of whether the claim is a linked claim;
- require Project Co to pursue the related claim upstream against the State pursuant to the upstream contract; and
- regulate the amount to which the contractor is entitled to recover from Project Co, by reference to the amount which Project Co was able to recover from the State upstream.

Although this case did not determine the issue directly, the case nevertheless shows that the fact that downstream relief in relation to linked claims is contingent upon the receipt and amount of upstream benefits arguably invalidates linked claims regimes as 'pay when paid' provisions which are prohibited under the Vic Act.

FACTS

Transurban WGT Project Co (**Project Co**) and CPB Contractors Pty Limited (**CPB Contractors**) are party to the D&C Contract for the Westgate Tunnel PPP Project. Following the discovery of PFAS contamination within and in the vicinity of the project area, CPB Contractors made a number of claims against Project Co in relation to that discovery and the inability to dispose of the PFAS contaminated soil to allow tunnel works to commence.

In accordance with the process for pursuing a dispute in relation to a linked claim under the D&C contract:

- CPB Contractors notified Project Co that it was making linked claims in relation to the PFAS contamination and ultimately initiated arbitral proceedings; and
- Project Co initiated upstream arbitral proceedings against the State in relation to those linked claims.

As typical under downstream PPP contracts, the linked claims regime under the D&C Contract contained a 'suspension clause' which provided that while a linked dispute was on foot, the linked dispute would not be progressed under the D&C Contract while the related dispute under the upstream project agreement was in progress.

Despite this provision being included in the D&C Contract, CPB Contractors sought to pursue the downstream arbitration whilst the upstream arbitration was still on foot, contending that the suspension clause, and the linked claims regime more generally, was invalid because it contravened section 13 of the Vic Act which renders ineffective 'pay when paid' clauses in construction contracts.

This case involved an application from Project Co seeking:

- a declaration that the suspension clause was valid; and
- an injunction restraining CPB from commencing arbitral proceedings on the basis of the application of the suspension clause.

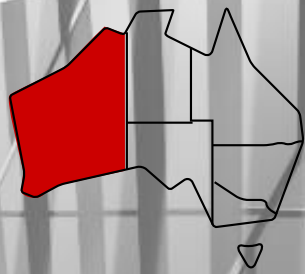
DECISION

The court refused the application by Project Co finding that the subject matter of the proceeding fell within the scope of the arbitration agreement between the parties, reaffirming the position that the court's power to intervene in matters governed by the *Commercial Arbitration Act 2011* (Vic) is very limited. This means that the downstream arbitral tribunal will make a determination as to its jurisdiction to resolve the matter and, to the extent the tribunal finds that it has such jurisdiction, will make an award as to the enforceability of the suspension clause under the veil of confidentiality that arbitration affords disputing parties.

While no decision was made as to the validity of the suspension clause or the linked claims regime more generally, downstream contractors will now be alive to the argument that the commonly used linked claims regime under downstream PPP contracts contravenes section 13 of the Vic Act and are therefore invalid. This argument could be raised by downstream contractors in order to leverage a joinder of the upstream arbitral proceedings and garner enhanced control of the resolution of the dispute.

To the extent that the downstream arbitral tribunal finds in favour of Project Co and absent a joinder of the upstream and downstream arbitral proceedings, Project Co will be required to run two separate arbitrations in relation to the same subject matter, which will result in additional legal fees, additional internal costs, and a heightened risk of inconsistent arbitral awards being granted in each proceeding.

Western Australia



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CASE INDEX

- *Salini-Impregilo S.P.A v Francis* [2020] WASC 72

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

Western Australia overview

EMERGING TRENDS

On 23 September 2020, the Building and Construction Industry (Security of Payment) Bill 2020 (**Bill**) was introduced to State Parliament. The Bill will repeal and replace the State's existing security of payment regime established by the Construction Contracts Act 2004 (**WA Act**). Some examples of what is proposed is set out below. The WA Act will continue to apply until the Bill is passed. The number of adjudications under the WA Act in the 2019/2020 financial year was slightly less than prior years, down from 115 to 106 adjudications. Therefore COVID-19 does not appear to have had a significant impact on adjudications for the first six months of 2020.

DEVELOPMENTS

The *Building and Construction Industry (Security of Payment) Bill 2020* – Some Proposed Changes

Voiding 'unfair' time-bars

- Section 16 of the Bill allows 'unfair' time-bars to be declared void. This will apply to clauses that make payment or an extension of time contingent on a party providing notice (i.e. notice-based time-bars).
- A time bar will be 'unfair' if compliance is not reasonably possible or would be unreasonably onerous. An adjudicator, court, arbitrator or expert would be empowered to determine this.
- The Bill offers some guidance about the factors to consider when determining whether a time-bar is 'unfair', however we expect that the scope and application of this section will take time to develop as courts and tribunals assess what is considered 'unfair' on a case by case basis.

New adjudication process

The Bill is intended to adjust the adjudication process in Western Australia to bring it in line with the "east coast model". In brief overview, the new adjudication process will require the following:

- A party must make an adjudication application within 20 business days of receiving a payment schedule.
- If no payment schedule has been provided, the claiming party must give written notice (within 20 business days of the due date for the progress payment) of its intention to apply for adjudication and the respondent must then be given 5 business days from receipt of the notice to provide a payment schedule before an adjudication application can be made.
- any adjudication response must be served within 10 business days from the date of the adjudication application.
- The adjudicator must determine the application within 10 business days, however, this time can be extended by the parties' consent by up to an additional 20 business days.

Significantly, the new process requires adjudication responses to be strictly limited to reasons given in the payment schedule; if no schedule is provided, no adjudication response is permitted.

Retention Trusts

The Bill establishes a deemed retention trust regime to provide security for contractors and sub-contractors. It gives 'first priority' to the money in the retention trust over other security interests. This is referred to as 'ring-fencing' and prevents the money from being claimed by other creditors. All contracts with a value of over $20,000 must establish a deemed retention trust (excluding contracts with Government Principals). The Bill also creates a statutory right to payment parallel to the right to payment under contract which is another feature of the "east coast model". For example:

- Contrary to the WA Act, claims can only be made up the chain of contract.
- Claims must be made on or after the contract date and within 6 months of works.
- Payment schedules must be issued within 15 business days of a payment claim being received.
- Payment is due 20 business days after a payment claim is received by a principal from a head contractor.

Payment is due 25 business days after a payment claim is received by a contractor from a sub-contractor.

Salini-Impregilo S.P.A v Francis [2020] WASC 72

Where a claimant pursues multiple adjudications at the same time, it is important to consider whether the adjudications are being conducted simultaneously and, if so, if the criteria in the WA Act has been satisfied, being:

- if the parties consent (**Consent Criteria**); or
- if the adjudicator is satisfied that it will not adversely affect their ability to adjudicate fairly, quickly, informally and inexpensively (**Object Criteria**).

A failure to satisfy the criteria will amount to jurisdictional error, which will invalidate the determination.

FACTS

Geodata Engineering Pty Ltd (**consultant**) was engaged by Salini-Impregilo (**contractor**) under a construction contract for the provision of services for the Forrestfield Airport Link Project.

A dispute arose between the contractor and the consultant in respect of two interim payment claims. The consultant applied for adjudication under the WA Act to resolve the disputes and, subsequently, applied to have the disputes determined simultaneously under the WA Act.

Following the adjudicator's determination, the contractor commenced judicial review proceedings on several grounds. This update focuses on the contractor's allegation that the adjudicator made a jurisdictional error by adjudicating two applications simultaneously.

DECISION

The court dismissed the contractor's application for judicial review. While the court was not satisfied that the adjudicator adjudicated the applications simultaneously, the decision contains important commentary on simultaneous adjudications nonetheless.

The WA Act permits simultaneous adjudications if the Consent Criteria or Object Criteria are met. Failing to meet at least one of these criteria will result in a jurisdictional error.

The court noted that, to determine if adjudications were simultaneously conducted, it is necessary to determine when the adjudication began. Adjudication was held to begin when the adjudicator commenced evaluative work regarding the merits of the dispute and ended when the adjudicator stopped evaluating the merits and made a determination. Accordingly, simultaneous adjudication of two disputes will occur when there is a temporal overlap in the period of adjudication between the two disputes.

The court found that there was no evidence that the adjudicator engaged in any evaluation work on the merits of the second application before the first application was dismissed. The court was not satisfied of any temporal overlap in the periods of adjudication of the two disputes.

Despite the finding that there was no simultaneous adjudication, the court went on to consider whether, if there had been simultaneous adjudication, the adjudicator complied with the necessary criteria in the WA Act.

As the parties did not consent to simultaneous adjudication, the adjudicator would have been required to satisfy the Object Criteria. The court was not satisfied the Object Criteria was met as this would have required some investigation on the adjudicator's behalf, which was not undertaken. Therefore, if there had been simultaneous adjudication, the adjudicator would not have had the power to do so and this would have resulted in a jurisdictional error.

Australian Capital Territory

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CASE INDEX

- *Justar Property Group Pty Ltd v Chase Building Group (Canberra) Pty Ltd* [2020] ACTSC 231
- *On Forbes Developments Pty Ltd v Chase Building Group (Canberra) Pty Ltd* [2020] ACTSC 163

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

Australian Capital Territory overview

EMERGING TRENDS

While 2020 was a relatively quiet year for ACT courts in relation to Security of Payment (with just two Security of Payment related decisions being handed down by ACT courts last year), each decision provides intriguing clarifications, and practical implications for parties to construction contracts.

DEVELOPMENTS

In 2020, the decisions before the ACT courts clarified that:

- the word 'receipt' for the purpose of section 29 of the ACT SOP Act includes 'constructive receipt' by way of set-off, however:
  - a clear and unequivocal communication of the set-off is required; and
  - under the ACT Act, a purported set-off is unlikely to be effective as 'constructive receipt' where the respondent is simultaneously seeking to dispute the unpaid amount; and
- a set-off must be against a final and binding amount owed, as a set-off against an arguable contractual claim is likely to be void as an attempt to contract out of the ACT SOP Act.

It was also highlighted that:

- it is critically important to indisputably know who the parties to a contract are, and that respondents should always respond to payment claims even where they consider they have not entered into a contract with the claimant; and
- parties seeking to overturn an adjudication decision in the ACT for jurisdictional error should seek both:
  - prerogative relief (in the nature of certiorari quashing the adjudicator's decision); and
  - leave to appeal under section 43 of the ACT SOP Act.

FUTURE

With the most recent amendment to the ACT SOP Act having commenced in 2019, and there being no public indication by the ACT Government of any focus on the further development of the ACT SOP Act, it appears that for now the current framework is here to stay.

However, as the ACT's population continues to grow, the construction industry will play a critical role in the development of the residential and densification needs of the city and surrounding region. It will be interesting to follow of the development of the Security of Payment framework in the ACT over the coming years of anticipated growth in the industry.

Justar Property Group Pty Ltd v Chase Building Group (Canberra) Pty Ltd [2020] ACTSC 231

Unlike security of payment legislation in other jurisdictions, the ACT Act provides a limited right to appeal adjudication decisions for an error of law. Appellants must be able to show that the error or law is either *'manifest on the face of the adjudication decision'*, or that there is *'strong evidence'* that determining the question will add substantially to the certainty of the law. Cases which have limited significance beyond their own facts are unlikely to meet this threshold.

This case also highlights the importance of knowing who the parties to a contract are, and that respondents should always respond to payment claims even where they consider they have not entered into a contract with the claimant.

Finally, this case reinforces that parties seeking to overturn an adjudication decision in the ACT for jurisdictional error should seek both prerogative relief (in the nature of certiorari quashing the adjudicator's decision) and leave to appeal under section 43 of the ACT Act.

FACTS

The applicant, Justar Property Group Pty Ltd (**developer**), owned land that it proposed to develop. An employee of a related entity of the developer, Maxon Group Pty Ltd (**Maxon**), approached Chase Building Group (Canberra) Pty Ltd (**builder**) to work on the project. The Maxon employee made it clear that the land was owned by the developer, although subsequent correspondence from the builder confirming the arrangement was addressed to Maxon.

A payment claim under the ACT Act was served on the developer. The developer did not serve a payment schedule in response. The builder then served a notice of its intention to apply for adjudication under the ACT Act. The developer again failed to serve a payment schedule on the builder.

An adjudicator determined that the builder was entitled to the whole of the claimed amount. As the developer had not served a payment schedule, the developer was not entitled to file an adjudication response. The developer sought to challenge the adjudicator's decision on the basis that there was no contract between the developer and the builder. The developer claimed that, instead, Maxon was the relevant contracting party.

The application for leave to appeal

Section 43(3)(b) of the ACT Act gives parties a limited right to appeal to the Supreme Court on questions of law arising out of an adjudication decision. The Supreme Court must not grant leave to appeal unless the court considers that the determination of the question of law concerned could substantially affect the rights of a party to the adjudication decision (section 43(4)(a)) and there is either:

- a manifest error of law on the face of the adjudication decision (section 43(4)(b)(i)); or
- strong evidence that the adjudicator made an error of law and that the determination of the question may add, or may be likely to add, substantially to the certainty of the law (section 43(4)(b)(ii)).

The developer argued that the adjudicator had made an error of law in finding the existence of a construction contract between the developer and the builder.

DECISION

Leave to appeal was not granted as the court held that neither of the tests set out in section 43(4)(b) had been satisfied.

Manifest error on the face of the adjudication decision: section 43(4)(b)(i)

The court applied the test in *Westport Insurance Corporation v Gordian Runoff Ltd* [2011] HCA 37, holding that (while the error need not be *'egregious'*) it must be apparent on the face of the adjudicator's reasons.

The court held it was open to the adjudicator to find that the proper contracting party was the developer. Importantly, as the developer had not provided an adjudication response, the adjudicator was entitled to accept the uncontradicted evidence of the builder. Accordingly, the court held that there was no manifest error of law on the face of the adjudication decision.

Strong evidence of an error of law and substantial contribution to the certainty of the law: section 43(4)(b)(ii)

The court accepted that there was strong evidence that the adjudicator made an error of law in concluding that there was a construction contract between the developer and the builder. The court did not accept, however, that there was strong evidence that final determination of the question may add, or be likely to add, substantially to the certainty of the law.

In deciding whether determination of the question would have added substantially to the certainty of the law, the court noted:

- *'strong evidence'* that could be considered was not restricted to evidence on the face of the record;
- the fact that the question would be determined by the Supreme Court was not enough (on its own) to *'add substantially to the certainty of the law'*; and
- the decision would have to have significance beyond the factual circumstances of the case to *'add substantially to the certainty of the law'*.

Jurisdictional error

Importantly, the court proceeded on the basis that both the existence of a construction contract and the identity of the parties were *'jurisdictional facts'*. This would mean that if an adjudicator correctly determines that a construction contract exists, but misidentifies the parties, the adjudicator will fall into jurisdictional error and the adjudication will be open to challenge.

Application for prerogative relief

During closing submissions, the developer made alternative submissions seeking prerogative relieve in the nature of certiorari (quashing the adjudicator's decision) on the basis of jurisdictional error. This application was ultimately denied as having been made out of time, and an extension of time was refused on the basis that it would be procedurally unfair to the builder. Noting the court's conclusion on jurisdictional error above, it appears possible that (had it been brought in time) the developer's application for prerogative relief would have been successful. This highlights the importance, when challenging an adjudicator's decision in the ACT for jurisdictional error, of considering both prerogative relief and an appeal under section 43 of the ACT Act.

On Forbes Developments Pty Ltd v Chase Building Group (Canberra) Pty Ltd [2020] ACTSC 163

Section 29 of the ACT Act allows a claimant to suspend work until certain unpaid amounts are 'received'. Receipt can include constructive receipt by way of set-off, however, a clear and unequivocal communication of the set-off is required. A purported set-off is unlikely to be effective as constructive receipt where the respondent is simultaneously seeking to dispute the unpaid amount.

A set-off must also be against a final and binding amount owed. Set-off against an arguable contractual claim is likely to be void as an attempt to contract out of the ACT Act.

FACTS

Background

The plaintiff, On Forbes Developments Pty Ltd (**developer**), entered into a contract with the defendant, Chase Building Group (Canberra) Pty Ltd (**builder**) for the builder to design and construct an apartment building in Canberra.

Several disputes arose between the parties, including a claim for liquidated damages by the developer and a variation claim by the builder. The builder issued a payment claim pursuant to the ACT Act, including a claim for amounts in respect of variations. The developer responded by way of a payment schedule, stating that the developer proposed to pay nothing due to the outstanding liquidated damages. The builder proceeded to adjudication and was awarded an amount for variations (**adjudicated amount**). The adjudicator did not make a decision in respect of the liquidated damages.

The developer failed to pay the adjudicated amount to the builder. As a result, the builder suspended the construction work under section 29 of the ACT Act.

Meanwhile, in a fairly convoluted set of proceedings:

- the developer referred its liquidated damages claim to binding expert determination under the contract (which was determined in the developer's favour);
- the developer issued a statutory demand under the *Corporations Act 2001* (Cth) seeking payment of the full amount of the liquidated damages determined by the expert;
- the developer commenced proceedings in the Supreme Court of the Australian Capital Territory seeking to overturn the adjudicator's decision; and
- the builder commenced proceedings in the Federal Court seeking to set aside the developer's statutory demand.

The adjudicated amount was ultimately paid into the court (but not to the builder), after the developer was ordered to do so as part of the developer's Supreme Court proceedings.

The Supreme Court hearing

The hearing concerned the relatively narrow issue of when the builder's entitlement to suspend work under section 29 of the ACT Act ended. Section 29 provides that a builder may suspend work during the period 'ending 3 business days after the day the claimant receives the amount payable'.

The developer argued that the amount payable was 'received' when the developer set off that amount against the liquidated damages owed to it. The developer claimed that this occurred on either the date of the expert's determination, the date the adjudicated amount was paid into court, or alternatively on one of the various dates on which the developer amended its originating application to the court.

The builder claimed that 'receipt' for the purpose of section 29 of the ACT Act required actual receipt of the amount payable and was not satisfied by the developer exercising a right of set-off. The builder also claimed that (in any event) the developer's right of set-off was void under section 42 of the ACT Act as an attempt to contract out of the ACT Act. In the alternative, the builder claimed that there was no 'receipt' of the adjudicated amount until the date of the hearing, as that was the first date on which the developer gave an 'unqualified acknowledgment' of its set-off.

DECISION

The adjudicated amount was 'received' on the date of the hearing, being the first time it was clearly and unequivocally set off against the liquidated damages.

'Receipt' of the adjudication amount

Crowe AJ held that 'receipt' for the purpose of section 29 of the ACT Act included 'constructive receipt' by way of set-off. His Honour concluded that the builder's submission (that 'actual' receipt was required) would create a 'commercial quandary' and could lead to 'unjust outcomes' where the developer had a good countervailing claim.

'Contracting out' and the right of set-off

The court accepted the developer's submission that section 42 of the ACT Act 'had no work to do in the circumstances of the case'. Crowe AJ held that the developer was relying on a 'final and binding' expert determination to support its right of set-off, rather than an 'arguable' claim of set-off under the contract. His Honour noted that giving effect to the expert determination was 'implicitly required' under section 38 of the ACT Act (which preserves parties' rights under the contract).

His Honour did appear to accept, however, that a set-off based on an 'arguable' contractual claim (rather than an established debt) would be inconsistent with section 42 of the ACT Act.

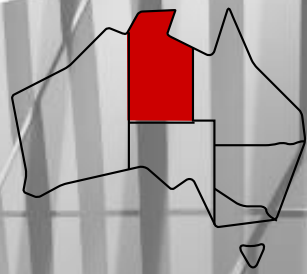
Timing of receipt

The court ultimately held that the adjudicated amount was only 'received' on the date of the hearing. His Honour held that the set-off was only 'put beyond doubt' by consent orders made on that date.

In reaching this decision, his Honour rejected the contention that the adjudicated amount was set off on the making of the expert determination, or on payment of the amount into court. His Honour held that 'something more than the crystallisation of a countervailing contractual claim' was required. What was required was 'some clear and unequivocal communication' which acknowledges the discharge of the adjudicated amount.

Due to the convoluted nature of the various proceedings in both the Supreme Court and the Federal Court (which resulted in 'starkly inconsistent' positions being taken by the developer in relation to the amounts owing), his Honour determined that no such 'clear and unequivocal' communication had occurred before the date of the hearing.

Northern Territory



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CASE INDEX

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

Northern Territory overview

EMERGING TRENDS

2020 was a quiet year for challenges to adjudication decisions in the NT. However, it is important to note that there were still some significant amendments to the *Construction Contracts (Security of Payment) Act 2004* (NT) (**NT Act**) which came into effect on 3 February 2020. The aim of the changes is to improve the efficiency of the adjudication system and to make it easier to have payment disputes resolved quickly.

DEVELOPMENTS

The key changes to the NT Act in 2020 were:

- a new definition of 'payment claim' was included which clarified that a payment claim can be made:
  - by either a contractor or a principal; and
  - in circumstances where the construction contract has expired or been terminated;
- a payment claim cannot include matters that have previously been the subject of an adjudication determination under the NT Act;
- the period of time available for a claimant to bring an adjudication claim was shortened from 90 days to 65 working days;
- the period of time available for a respondent to respond to an adjudication application was increased from 10 working days to 15 working days;
- 'Working Days' was amended to exclude all days between 25 December and 7 January;
- the introduction of a new definition of 'High Value Contracts' and the ability of the parties to High Value Contracts to contract out of the operation of the NT Act.

FUTURE

As discussed in the Overview for Western Australia, the *Building and Construction Industry (Security of Payment) Bill 2020* (WA) was introduced in September 2020. It proposes an overhaul of WA's security of payment regime, aligning with the 'East Coast' regime currently operating in Qld, NSW, Victoria, SA and the ACT.

The NT Act is closely based on WA's existing security of payment regime outlined in the *Construction Contracts Act 2004* (WA). If the proposed amendments in WA pass, NT will be the last jurisdiction operating under the 'West Coast' model. It will be interesting to see whether NT follows suit in revising its security of payment arrangements.

South Australia

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CASE INDEX

- *Ausenco Operations Pty Ltd & Anor v Ferretti International Ottoway Pty Ltd & Anor* [2020] SASC 46
- *Commercial Fitouts Australia Pty Ltd v Miracle Ceiling (Aust) Pty Ltd & Ors* [2020] SASC 11
- *Wärtsilä Australia Pty Ltd v Primero Group Ltd* [2020] SASC 162

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

South Australia overview

EMERGING TRENDS

2020 was a modest year for decisions in respect of the *Building and Construction Industry Security of Payment Act 2009* (SA) (the South Australian SOP Act). After an active few years including a number of Full Court and High Court appeals the 2020 cases largely turned on the facts rather than creating any new law. There was a relatively high degree of judicial consistency in approach to decisions and more cases are being heard through the District Court which has established a dedicated construction list. Despite the release of an amending Bill for consultation in December 2019, and substantial industry input on that draft, another year has passed without amendment to the SOP Act – 2021 may be the year.

DEVELOPMENTS

The cases of most note in 2020 were:

Wärtsilä Australia Pty Ltd v Primero Group Ltd [2020] SASC 162: which concerned the provision of documents relevant to an adjudication via a link to a OneDrive account. On the facts the Court found that the documents were not capable of being accessed via the link on the reference date and set aside the adjudication decision. In reaching its decision the Court found that the mere provision of a link via email did not amount to provision of the documents or making them available for inspection. The Court held that the documents were not provided or available for inspection until they could be completely downloaded by the recipient. The Court was not swayed by the fact Wärtsilä's difficulties in downloading the documents appeared to be related to its own system rather than any deficiency created by Primero.

In *Ausenco Operations Pty Ltd & Anor v Ferretti International Ottoway Pty Ltd & Anor [2020] SASC 46,* the adjudication determination was set aside by the Court on the basis of jurisdictional error arising from denial of procedural fairness. The adjudicator rejected Ausenco's offsetting claim for liquidated damages on the basis that the 'Date for Delivery' which founded the operation of liquidated damages could not be ascertained. Whilst Ferretti did challenge Ausenco's entitlement to liquidated damages it did not directly raise the ground ultimately relied on by the adjudicator. The Court determined that in the absence of seeking further submissions on the issue it was not open for the adjudicator to reach a determination which departed from the matters raised by the parties. The Court was satisfied that the failure to provide procedural fairness was sufficiently material, being the primary basis for rejecting the liquidated damages claim, to merit setting aside the determination.

In Commercial Fitouts Australia Pty Ltd v Miracle Ceiling (Aust) Pty Ltd & Ors [2020] SASC 11, the Court confirmed that while section 13(4)(b) operates as a six month long stop date on payment claims, a payment claim will be valid if any portion of the claim relates to work performed within 6 months of the service of the claim. On the facts the Court held that all claims for work performed within the six months has been paid however made it clear that it will a matter of fact in each case whether particular payments have been appropriated to particular invoices.

FUTURE

Substantial amendments to the South Australian SOP Act have been on the cards for some time. The 2017 Bill lapsed and the 2019 Bill has not progressed following consultation closing in early 2020. Whilst reform has stalled, changes are expected and will likely include further alignment with the NSW SOP Act (including abolishing reference dates) and material changes to the ANA system.

As the South Australian SOP Act stands we expect that reference date arguments will continue to be fertile grounds for jurisdictional challenges.

It is anticipated that the implementation of a dedicated construction list in the District Court of South Australia will continue to see a greater number of security of payment cases being heard in that Court.

Ausenco Operations Pty Ltd & Anor v Ferretti International Ottoway Pty Ltd & Anor [2020] SASC 46

This case adds to an existing body of case law relating to procedural fairness in adjudications in circumstances where submissions were not heard on matters forming the basis of a determination. The practical implications of the decision may lead to an increase in adjudicators requesting parties to make further submissions to matters not originally contended by either party.

FACTS

The plaintiffs (Ausenco Operations Pty Ltd and Downer EDI Engineering Power Pty Ltd, trading as Ausenco Downer Joint Venture **(ADJV**)) and the first defendant (Ferretti International Ottoway Pty Ltd (**Ferretti**)) entered into a written contract for Ferretti to fabricate and supply piping for the construction of mining infrastructure (**contract**).

Approximately 10 months later, Ferretti served ADJV with a payment claim in the sum of $678,081 for works done under the Contract. ADJV responded by serving a payment schedule stating the sum payable was 'Nil' and included a claim that it was entitled to set off $201,110 by way of liquidated damages.

Under clause 9.8 of the contract, Ferretti was liable to pay liquidated damages to ADJV if Ferretti failed to deliver the fabricated piping, or a separable portion of it, *'by the respective Date for Delivery'*. A matter of contention was whether the fabricated piping had been delivered late or not.

Pursuant to the SA Act, the matter went before an adjudicator. The adjudicator determined that, whilst Ferretti was not entitled to the full amount in the payment claim, it was entitled to $410,118. This sum was subsequently paid by ADJV.

The adjudicator concluded that the dates relied upon by ADJV in its claim for liquidated damages, being dates contained in the purchase order and purchase change orders, were not the 'Date[s] for Delivery' for the purposes of clause 9.8 of the contract. The adjudicator rejected ADJV's claim that it was entitled to liquidated damages on the basis that he was not able to identify the 'Date of Delivery' contemplated by the contract.

ADJV lodged Supreme Court proceedings contending that the adjudicator failed to afford it procedural fairness in that he rejected its claim for liquidated damages on a basis not contended for by either party, and in respect of which neither party was given an opportunity to make submissions. ADJV submitted that the adjudicator thus fell into jurisdictional error.

DECISION

The court found the adjudicator had fallen into jurisdictional error warranting orders that the adjudicator's determination be set aside, and that monies paid by ADJV to Ferretti be repaid.

Justice Doyle emphasised that an adjudicator is not 'left at large' to make a determination on any ground that he or she considers appropriate under the provisions of the contract. Rather, the parties to the adjudication are entitled to proceed on the basis of the parties' definition of the dispute between them through the payment claim, payment schedule, adjudication application and adjudication response.

The quick and efficient nature of an adjudication was said to make it essential that the parties be able to readily ascertain what is in issue and confine their responses and submissions accordingly.

In this matter, Ferretti did not put any submission to the effect that a *'Date for Delivery'* (as defined in the contract) had not been, or could not be, ascertained for the purpose of clause 9.8 of the contract. Neither party made submissions in relation to this issue.

The court held that the adjudicator ought to have requested submissions from the parties (as he was entitled to under section 21(4) of the SA Act) in relation to this matter before deciding the issue adversely to ADJV.

Without such a request for further submissions, the adjudicator was constrained to a consideration of the matters raised by the parties. Accordingly, the adjudicator had failed to afford the parties procedural fairness when he determined the matter on considerations not contended by either party.

However, even where jurisdictional error has been established through a failure to afford procedural fairness, the plaintiff must establish a substantial or material failure in order to justify the court's discretionary intervention.

It was found that ADJV was denied an opportunity to make submissions which had a real prospect of influencing the result in relation to the issue of liquidated damages. The denial of procedural fairness was considered to be substantial given it related to an issue that was decisive of ADJV's entitlement to a claimed amount of $201,110, which was a *'material sum'*.

Commercial Fitouts Australia Pty Ltd v Miracle Ceiling (Aust) Pty Ltd & Ors [2020] SASC 11

In assessing whether the work the subject of a payment claim was performed within six months of the claim, the court will look to the substance of the claim and payments made. In particular, the court examined the nature of payments made to determine whether they related to specific invoices or, alternatively, whether the relationship was truly one of a running account.

Having found that the only invoice which related to work performed within six months of the claim had been paid, the court concluded that the payment claim could not relate to that work. It followed that section 13(4)(b) of the SA Act precluded the claim and the adjudication decision was made in want of jurisdiction.

The decision reinforces the need for parties to carefully assess whether the work the subject of the payment claim was performed within six months of the claim, as opposed to whether other work which had been paid for, or is not otherwise the subject of the claim, had been performed in that period.

FACTS

The first defendant, Miracle Ceiling (Aust) Pty Ltd (**Miracle**) performed construction work under a construction contract with the plaintiff, Commercial Fitouts Australia Pty Ltd (**Commercial Fitouts**). On 22 March 2019, Miracle served on Commercial Fitouts a payment claim for payment of $43,113.

The payment claim referred to invoices numbered 67 to 79. However, only invoice 79 pertained to construction work performed within the six-month period prior to 22 March 2019. Section 13(4)(b) of the SA Act states that a payment claim may be served only within a six-months period after the construction work to which the claim relates was carried out. Invoice 79 related to payment of $3,784 and was dated 25 September 2018. Commercial Fitouts had paid this exact amount to Miracle on 27 September 2018.

Commercial Fitouts argued that the payment claim captured work performed under invoice 67, 70, 72 and 74, and that all of this work was performed more than six months before the date of the payment claim. As such, it contended that the claim was not brought within time and there was a want of jurisdiction for the adjudication.

Miracle submitted that the payment claim was not precluded by section 13(4)(b), on the basis that all payments made under the contract were made on a running account meaning the court should find invoice 79, being the most recent invoice the subject of the payment claim, was in fact unpaid despite the specific payment of that invoiced amount.

The court identified the key issue before it as being whether each payment related to a specific invoice or whether each payment was to be treated as reducing the overall balance due.

DECISION

The court determined that the adjudication decision was made in want of jurisdiction.

In his decision, Stanley J noted that the test of whether a payment claim satisfies the requirements of section 13 of the SA Act is *'decided objectively'*.

The payment claim issued by Miracle identified 13 separate invoices. Nine of those invoices had been paid by Commercial Fitouts, including invoice 79. Stanley J stated that, because those invoices had already been paid, the reference to them in the payment claim did not make the work captured by those invoices subject of the payment claim.

Stanley J held there were two reasons for this. First, section 13(2) of the SA Act requires a payment claim to identify with reasonable specificity the work which is subject to the payment claim. Secondly, the circumstances of payments between Commercial Fitouts and Miracle implied an appropriation of the payments made by Commercial Fitouts to Miracle; the communications between the parties indicated that specific payments had been made in respect to specific invoices.

Whilst there were, at times, part payments made by Commercial Fitouts, Stanley J did not accept Miracle's submission that this meant that a running account was in place. The principles for ascertaining which debt a payment will be appropriated to state that, where a debtor fails to communicate the appropriation of a debt, it can be implied. In this case, the implication that the payments by Commercial Fitouts were appropriated was reinforced by the circumstances in which the payment was made, including that the amount of invoice 79 was specifically paid on 27 September 2018.

Having found that the construction work to which invoice 79 related was not the subject of the payment claim, it followed that the payment claim was not made within six months of the performance of the work claimed as prescribed by section 13(4)(b) of the SA Act.

Wärtsilä Australia Pty Ltd v Primero Group Ltd [2020] SASC 162

Documentation provided via a hyperlink to OneDrive was insufficient to satisfy a contractual requirement to 'provide' and make 'available to be inspected' certain documents under a subcontract agreement.

Provision of documents by cloud-based storage systems where electric files are remotely stored by third parties, such as OneDrive and Dropbox, presents a risk that the documents are unable to be accessed, read or downloaded by the intended recipients. Where significance is placed on parties accessing and downloading documents, such as where it constitutes a milestone under a contract, regard should be had to the risks of technical difficulties and questions around when documentation is said to be 'provided'. As in this case, this can have an effect on whether a valid reference date for a milestone payment has arisen for the purposes of s 8 of the Building and Construction Industry Security of Payment Act 2009 (SA) (SOP Act).

FACTS

Wärtsilä Australia Pty Ltd (**Wärtsilä**) was engaged by AGL to construct the Barker Inlet power station on Torrens Island. Wärtsilä subcontracted Primero Group Ltd (**Primero**) to perform various civil, mechanical and electrical works for the power station. In March 2020, Primero served Wärtsilä with a payment claim under the SOP Act. Wärtsilä disputed the payment claim, contending that there was no available reference date. An adjudicator determined that the payment claim was valid and supported by a reference date of 28 February 2020.

Wärtsilä sought judicial review of the adjudicator's decision on the basis that the adjudicator's determination was invalid as the relevant milestone works were not completed by 28 February 2020.

To be entitled to a progress payment, Primero was required to achieve what was known under the contract as *'SW Completion'*. SW Completion required that, amongst other things, certain Manufacturer's Data Reports (MDRs) be *'provided'* to Wärtsilä and other MDRs be *'made available for inspection'* by Wärtsilä. On 28 February 2020, Primero sent Wärtsilä an email containing a hyperlink to OneDrive where those documents had been uploaded, however, Wärtsilä was unable to download the documents.

Wärtsilä argued that the provision of documents by hyperlink was not contemplated by the subcontract and, because the documents were not able to be downloaded, there was no provision of documentation as required by the contract by 28 February 2020.

Primero argued that SW Completion had been achieved on the basis that the subcontract did not expressly provide how the MDRs were to be provided. Primero contended that electronic provision of the MDRs, consisting of more than 100,000 pages, was practical and in accordance with commercial good sense. Primero also invoked the provisions of the *Electronic Communication Act 2000* (SA) (**EC Act**) to argue that the contractual obligation for the provision of documents is satisfied by electronic communication.

DECISION

Stanley J held that the hyperlink did not amount to provision of the documents because the hyperlink was merely a means by which Wärtsilä was permitted to download documents stored in the cloud. The documents were not capable of being fully accessed, read and downloaded on 28 February 2020.

Drawing upon the judgments of *McMurdo J in Conveyor & General Engineering v Basetecx Services & Anor* [2014] QSC 30 (referred to in our Security of Payment Roundup 2014) and *Clarke v Australian Computer Society Inc* [2019] FCA 2175, Stanley J saw a distinction in the concepts of *'leaving'* or *'sending'* and *'providing'* or *'making available'*, with the latter connoting something bilateral. Until Wärtsilä downloaded the documents, they had not been provided and did not amount to making the document available for inspection.

In obiter, Stanley J noted that the relevant sections of the EC Act prescribe circumstances for its operation, including that it is reasonable to expect that the information would be readily accessible when sent via electronic communication. As such, Stanley J held that the EC Act did not relevantly apply to the email containing the OneDrive hyperlink.

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