Security of Payment Roundup

A summary of developments in security of payment legislation across Australia in 2010

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National overview

Ten years ago Graham Palmer was killed when the vehicle he was driving at his workplace overturned. This tragic accident started a chain of events that has led to a fundamental change in the treatment of adjudicator's determinations throughout Australia.

On 3 February 2010, when resolving the appeal flowing from charges laid as a consequence of Mr Palmer's death, the High Court of Australia said *'Legislation which would take from a State Supreme Court power to grant relief on account of jurisdictional error is beyond State legislative power.'* (*Kirk v Industrial Relations Commission (NSW) [2010] HCA 1*). This paved the way for a series of cases in New South Wales, Victoria and Queensland which challenged adjudicator's decisions on grounds of jurisdictional error.

Previously, the essential criteria founding an adjudicator's jurisdiction were limited to the five factors identified in *Brodyn Pty Ltd v Davenport*. After the *Kirk* decision, on 24 September 2010 the New South Wales Court of Appeal delivered judgement in *Chase Oyster Bar v Hamo Industries Pty Ltd* finding that parts of the cornerstone decision of *Brodyn Pty Ltd v Davenport* were in error.

The decision in *Chase Oyster Bar* opens up the scope for challenging adjudicator's decisions for jurisdictional error although, as each case turns on its own facts, this area of the law remains uncertain. We expect 2011 to bring a flurry of activity, particularly in New South Wales and Queensland, as adjudicator's determinations are challenged for lack of jurisdiction.

Coincidentally, security of payment legislation in New South Wales and Queensland is under active review with the New South Wales government recently introducing a minor amendment.

The level of activity in New South Wales and Queensland has not been seen in all jurisdictions with neither the Australian Capital Territory nor Tasmania reporting decisions since their security of payment legislation commenced operation respectively in late 2009 and early 2010. Victoria, Western Australia and the Northern Territory each have less demanding security of payment legislation resulting in fewer cases. The legislation in South Australia is yet to commence.

Developments in 2010

Australian Capital Territory

The *Building and Construction Industry (Security of Payment) Act 2009 (ACT)* (Act) commenced on 1 July 2010. The local construction industry is adjusting to the Act's application and its practical implications. The Act is yet to be judicially considered in the ACT.

New South Wales

Overview

The most significant decision of 2010 was *Chase Oyster Bar v Hamo Industries [2010] NSWCA 190* (*Chase*). Effectively the court of appeal overturned *Brodyn* and increased the scope for challenging adjudicators decisions.

In *Chase* the court confirmed that where there was jurisdictional error in making an adjudication determination under the *Building and Construction Industry Security of Payment Act* (NSW) 1999 (NSW Act), the court can issue an order setting aside that decision (a prerogative writ of certiorari). As a result of the decision in *Chase*:

- there is further scope to challenge an adjudicator's decisions because courts are no longer prepared to let an adjudicator incorrectly determine their own jurisdiction
- industry participants need to remain compliant with the NSW Act to benefit from the scheme; and
- confidence in successful, expedient enforcement may be reduced and the potential cost, time and complexity associated with use of adjudication under the NSW Act may be increased.

While the amount of litigious activity in 2010 is similar to last year, the issues being litigated have changed. These are summarised below although some decisions are provided for historical value only, given the decision in *Chase*.

Additionally a recent amendment to the NSW Act will, when it commences, require principals to withhold payment from their contractors of the amounts claimed in an adjudication by a subcontractor.

Re-agitation of claims

Minter Ellison's *Security of Payment Roundup 2009* described the boom in supreme court applications where the applicant's arguments were based on whether or not:

- a claim had been re-agitated
- it was an abuse of process to bring the claim, and/or
- a party was estopped from bring claims that had already been determined.

That trend continued in 2010. The decisions handed down by the court turn on their own facts.

A claimant was estopped from bringing an adjudication application, to the extent that it contained claims that had already been determined in a previous claim, although the adjudication could proceed with the re-agitated claims removed: *Urban Traders v Paul Michael [2009] NSWSC 1072*.

The court held that a subsequent payment claim which included a re-agitated claim was only invalid to the extent of the re-agitated claim: *Watpac Constructions (NSW) Pty Ltd v Austin Corp Pty Ltd [2010] NSWSC 168*.

A subsequent payment claim may include work the subject of an earlier claim which has not been valued in the earlier payment claim, but an adjudicator would be wrong to allow payment claims that had already been considered and dismissed in an earlier adjudication: *Watpac Constructions (NSW) Pty Ltd v Austin Corp Pty Ltd [2010] NSWSC 168*.

It is not an abuse of process for a payment claim to contain claims the subject of an earlier adjudication, so long as it is not asserted that any amount is owing on those claims, nor for two separate entities to repeat the same claim in two separate forums: *Allpro Building Services Pty Ltd v C&V Engineering Services Pty Ltd [2009] NSWSC124*.

It is not an abuse of process under the NSW Act if a contractor, submits payment claims the subject of earlier claims if the earlier claims have not been the subject of adjudication or final determination: *CC No 1 v Reed Constructions [2010] NSWSC 294*.

Service issues

Service issues continue to be an area of contention.

- Service of a payment claim is only effective when it is served on the party to the construction contract and not a related party: *Olympia Group Pty Ltd v Tyrenian Group Pty Ltd [2010] NSWSC 319.*
- Service of a payment claim under a contract on a superintendent given authority to receive payment claims on behalf of a principal may constitute valid service under the NSW Act: *The Owners Strata Plan 56587 v Consolidated Quality Projects [2009] NSWSC 1476.*
- The court will generally not interfere with an adjudicator's decision on compliance with time limitations for adjudication proceedings under the NSW Act: *Agusta Industries v Niclad Constructions [2010] NSWSC 925.*

Natural justice/procedural fairness

Several actions were brought by parties who argued that they had been denied natural justice because of the adjudication process or adjudicator's decisions.

- Natural justice only requires that a respondent is made aware of the intention to seek adjudication and has an opportunity to respond: *Agusta Industries v Niclad Constructions [2010] NSWSC 925.*
- An adjudicator making a determination under the NSW Act is bound by the rules of natural justice which requires them to bring an impartial and unprejudiced mind to the resolution. The adjudicator's conduct exhibited a reasonable apprehension of bias, hence the order to prevent enforcement was granted: *Allpro Building Services Pty Ltd v Micos Architectural Division Pty Ltd [2010] NSWSC 453.*
- A party will be denied natural justice if the adjudicator fails to call for submissions on a relevant issue before making a decision: *Watpac Constructions (NSW) Pty Ltd v Austin Corp Pty Ltd [2010] NSWSC 168.*
- Failure to ensure that all relevant documents are before the adjudicator may give rise to a substantial denial of procedural fairness: *Filadelfia Projects v EntirlTy Business Services [2010] NSWSC 473.*
- If an adjudicator does not properly consider and form a view of all the materials provided, the adjudication may be void due to a denial of natural justice or lack of good faith. In this case the adjudicator's decision was void due to a denial of natural justice; the adjudicator failed to exercise his statutory powers in good faith by failing to properly consider the evidence presented by the claimant: *Laing O'Rourke Australia Construction Pty Ltd v H&M Engineering & Construction Pty Ltd [2010] NSWSC 818.*

Interlocutory relief

Relief is granted ordinarily on the condition that the amount in dispute, including the cost of adjudication plus interest, be paid into court pending final resolution of the dispute. In *Filadelfia Projects v EntirlTy Business Services [2010] NSWSC 473*, the plaintiff was not in a position do so, and its sole asset was the development in question. The court decided that in those circumstances it was appropriate to grant relief on the basis of an undertaking by the plaintiff that it would preserve the value of the asset sufficient to secure the adjudicated amount.

The court ordered a stay in proceedings until money was paid into court where relief was sought to avoid the operation of section 25(4) of the Act, so that a contractor would not be denied the benefit of the NSW Act: *Lanmac (NSW-ACT) Pty Ltd v Andrew Bruce Willis [2010] NSWSC 976.*

Jurisdictional issues

- The court found that section 7(2)(b) of the NSW Act (which prohibits a payment claim being made for residential building work) did not apply as the work was not residential building work because the work was for the construction of premises to be occupied by a corporation, and a corporation could not reside in the premises: *Advance Earthmovers Pty Ltd v Fubew Pty Ltd [2009] NSWCA 337.*
- The court was not deprived of jurisdiction to determine a claim because it was not determining the same issue as in the CTTT proceedings: *Advance Earthmovers Pty Ltd v Fubew Pty Ltd [2009] NSWCA 337.*
- Where there is a jurisdictional error in an adjudication determination the court has the power to issue the prerogative writ of certiorari (an order setting aside that decision): *Chase Oyster Bar v Hamo Industries [2010] NSWCA 190.*

Claims

A builder was entitled to bring a claim for lost profits during a period of suspension under section 27(1) of the NSW Act: *Urban Traders v Paul Michael [2009] NSWSC 1072.*

Reform

On 24 September 2010 the *Personal Property Security Legislation 2010* (NSW) (PPSA) commenced. The PPSA deals with security over property and aims to unify these arrangements. At this stage the pre-PPSA status quo for liens under section 11(3) of the NSW Act will be preserved. Claimants will still be entitled to exercise a lien over plant and material when a progress payment becomes due and payable.

The NSW Act was recently amended and will change further in 2011. The NSW Department of Services, Technology & Administration (DSTA) released a discussion paper on the NSW Act and the *Contractors Debts Act 1997 (NSW)* requesting submissions on several proposed amendments, including:

- providing a fixed period for each Reference Date
- amending the form and requirements of payment claims and payment schedules
- amending the adjudication procedure including the time for providing an adjudication response
- a range of measures aimed at assisting subcontractors such as joining principals to an adjudication between head contractor and subcontractor, and holding security and retention on trust.

Read DSTA's discussion paper *here*.

On 29 November 2010, the *Building and Construction Industry Security of Payment Amendment Act (NSW) 2010* (Amendment Act) received assent and is awaiting a start date to be proclaimed. The Amendment Act requires a principal to withhold payment from its contractors of the amount claimed in an adjudication by a subcontractor.

Read Minter Ellison's 6 December Alert on the Amendment Act *here*.

Read the detailed summaries of the cases referred to above in the *NSW cases* section of this report.

Northern Territory

There were no significant changes this year and only one security of payment case was heard.

The Supreme Court, in *GRD Group (NT) Pty Ltd v K&J Burns Electrical Pty Ltd [2010] NTSC 34,* confirmed that it may review an adjudicator's determination not to dismiss an application for want of jurisdiction – arising from a payment claim repeating an earlier claim outside the 90 day period in which an adjudication application must be brought.

Queensland

In FY 09/10 887 adjudication applications were lodged, a slight decrease from the previous year. The total value of adjudicated decisions was almost $92 million. The average claim was $253,000. The Supreme Court made judgements at an average rate of two per month.

Process issues

Process issues continue to bedevil parties and adjudicators alike. These included:

- making the claim against the correct respondent: *Mansouri v Aquamist Pty Ltd [2010] QCA 209*.
- failing to maintain appropriate records of service of payment claims: *Simcorp Developments and Constructions Pty Ltd v Gold Coast Titans Property Pty Ltd [2010] QSC 162*.
- failing to respond to a claim with a payment schedule – a conditional without prejudice will not be regarded as a payment schedule: *National Vegetation Management Solutions Pty Ltd v Shekar Plant Hire Pty Ltd [2010] QSC 3* and *Tenix Alliance Pty Ltd v Magaldi Power Pty Ltd [2010] QCS 7*.
- failing to strictly adhere to the requirements of the contract: *Leighton Contractors Pty Ltd v Vision Energy Pty Ltd [2010] QSC 353* and *Simcorp Developments and Constructions Pty Ltd v Gold Coast Titans Property Pty Ltd [2010] QSC 162*.
- failing to seek submissions rather than merely rely on the adjudicator's own interpretation of the contract or the law, in denial of natural justice: *Spankie v James Trowse Constructions Pty Ltd (No2) [2010] QSC 166*.

Re-agitation of claims

Arguments based on whether or not a claim had been re-agitated were common – no doubt as a consequence of restrictions imposed on claimants in advancing repetitive claims in 2009. Decisions as to whether or not a claim was re-agitated turn on their own facts.

A claimant was precluded from re-agitating claims in a subsequent adjudication application where the claims had already been determined as not payable, either for want of evidence or because the claimant had not demonstrated an entitlement to be paid: *AE&E Australia Pty Ltd v Stowe Australia Pty Ltd [2010] QSC 135*. Likewise in *John Holland Pty Ltd v Schneider Electric Buildings Australia Pty Ltd [2010] QSC 159* a claimant was precluded from serving an adjudication application where the payment claim to which it related was an attempt to re-agitate issues decided in a previous adjudication.

These cases contrast with the decision in *Spankie v James Trowse Constructions Pty Ltd [2010] QSC 336* where the court found that a successive payment claim could be made for an amount that had been the subject of a previous claim, even though the amount was the same as previously claimed, because the adjudication decision for the first claim was void.

Jurisdictional challenge

Following the decision of the NSW Court of Appeal in *Chase,* decisions about the circumstances in which jurisdictional points might be taken (which depend on the reasoning in *Brodyn*) may be of historical interest only. The cases include *Queensland Bulk Water Supply Authority v McDonald Keen Group P/L (in liq) [2010] QCA 7, Spankie v James Trowse Constructions Pty Ltd [2010] QSC 29*, *Northbuild Construction Pty Ltd v Central Interior Linings Pty Ltd [2010] QSC 95*, *Gisley Investments Pty Ltd v Williams [2010] QSC 178*, *Sheppard Homes Pty Ltd v FADL Industrial Pty Ltd [2010] QSC 228* and *De Neefe Signs Pty Ltd v Build 1 (Qld) Pty Ltd [2010] QSC 279*.

Interestingly, Fryberg J foresaw the probable impact of the High Court's decision in *Kirk* and only relied on the part of *Brodyn* that is not in doubt: *Hanson Yuncken Pty Ltd v Ian James Ericson [2010] QSC 156*.

Defences

While section 19 prohibits a respondent from raising defences on matters arising under a construction contract it does not prohibit all defences, for example estoppel: *Neumann Contractors Pty Ltd v Traspunt No 5 Pty Ltd [2010] QCA 119*.

Enforcement

The court has been prepared to set aside a statutory demand based on a judgement obtained under the Qld Act, but only on the condition that the applicant pay the adjudicated amount into court: *13 Manning Street Pty Ltd v Charlie Woodward Builder Pty Ltd [2010] QSC 151*.

However, the court was not prepared to grant a stay of judgement when the applicant for the stay had taken no steps to institute civil proceedings to enforce its contractual rights: *B J and S Paterson Pty Ltd v Eleventh Trail Pty Ltd [2009] QDC 380*.

Licensing issues under the Qld Act

This year the types of claims which could not be made under the Act were clarified. Granting a licence to use plans is neither construction work nor the supply of related goods and services: *Sheppard Homes Pty Ltd v FADL Industrial Pty Ltd*.

Ground clearance and installation of permanent traffic signs attached to supporting structures are construction work: *National Vegetation Management Solutions Pty Ltd v Shekar Plant Hire Pty Ltd, De Neefe Signs Pty Ltd v Build 1 (Qld) Pty Ltd*.

Reform

The Building Services Authority released a discussion paper seeking feedback on legislative reform as the legislation has been operating for six years.

Read the detailed summaries of above cases and other security of payment cases in Queensland in the *Queensland cases* section of this report.

South Australia

The *Building and Construction Industry Security of Payment Act 2009 (SA) Act* was assented to on 10 December 2009 but the Minister of Consumer Affairs has not yet indicated when a commencement date will be set.

Tasmania

The *Building and Construction Industry Security of Payment Act 2009 (Tas)* (Tas Act) commenced on 17 December 2009. The local industry is adjusting to the application of the Tas Act and its practical implications for industry participants, but the Tas Act is yet to be judicially considered.

Victoria

Although 2010 was a relatively quiet year in Victoria there were several notable developments.

The Victorian Supreme Court upheld the validity of a payment claim despite it being served in a way outside the prescribed procedure of the amended AS 2124-1992 contract and the *Building and Construction Industry Security of Payment Act 2002* (Vic Act), where the payment claim was served early: *Metacorp Pty Ltd v Andeco Construction Group Pty Ltd [2010] VSA 199*. The decision was made on the grounds of protecting natural justice – widening the scope for future claims. This case also confirms that service of a payment claim by email is permissible.

The importance of properly identifying works in a payment claim so that the respondent can understand the claim and respond to it was highlighted in *Gantley Pty Ltd v Phoenix International Group Pty ltd [2010] VSC 106*. The court severed parts of the payment claim that did not comply with the Vic Act.

The Court of Appeal confirmed an earlier decision of the Victorian Supreme Court that the pre-amended provisions of the Vic Act continue to apply to contracts entered into between 31 January 2003 and 30 March 2007: *Phoenix International Group Pty Ltd v Resources Combined No 2 Pty Ltd & Ors [2009] VSCA 309*.

Read the detailed summaries of above cases and other security of payment cases in Victoria in the *Victoria cases* section of this report.

Western Australia

Four cases were decided this year, three about rights of review of adjudicator's decisions and one about implication of terms.

Limited right to review

The State Administrative Tribunal (SAT) confirmed the limited nature of the right to review under section 46 of the WA Act in *MCC Mining (Western Australia) Pty Ltd v Thiess Pty Ltd [2010] WASAT 140* and *Perrinepod Pty Ltd v Georgiou Building Pty Ltd [2010] WASAT 136*. Both cases reiterated that an adjudicator's decision to not dismiss an adjudication application is not reviewable by the SAT.

The court confirmed that there was limited scope for review of adjudicator's decisions in *Ertech Pty Limited v GFWA Constructing Pty Ltd [2010]*. The court stated that *'an application for leave to enforce an adjudicator's determination is not an occasion to revisit the correctness of the decision made by the adjudicator or to open up the merits of any underlying dispute between the parties. The adjudicator's decision determines only whether a payment must be made pending the determination of any substantive dispute'*.

Implication of terms

The SAT in some cases may imply terms of the *Construction Contracts Act 2004* (WA) (CCA) to a contract. In *Longmont Consolidated Pty Ltd and Fleetwood Pty Ltd [2010] WASAT 22 and [2010] WASAT 23* the SAT held that an adjudicator or the SAT may imply the terms set out in Schedule 1 of the CCA into the contract where a standard contract had a payment provision that provided for progress payments to be made for agreed invoices only and was silent on a payment mechanism when the parties are in dispute.

Read the detailed summaries of above cases in the *Western Australia cases* section of this report.

New South Wales cases

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

Advance Earthmovers Pty Ltd v Fubew Pty Ltd [2009] NSWCA 337

Significance

Residential building work performed for a corporation does not fall within the residential building work exclusion set out in section 7(2) of the NSW Act; and the District Court could hear a claim filed in the Consumer, Trader and Tenancy Tribunal (CTTT) provided it does not constitute the same issue.

Facts

Advance Earthmovers Pty Ltd (Advance Earthmovers), the applicant, was contracted by Fubew Pty Ltd (Fubew), the respondent, to prepare an access road on Fubews' property prior to the construction of a residence for Fubew's directors. Fubew paid $15,000 of the $95,000 invoiced by Advance Earthmovers, disputing the remaining amount as being for remedial work for which Fubew was not liable.

Claims

CTTT claim

Fubew filed a claim in the CTTT against Advance Earthmovers for alleged overcharges.

District Court claim

Advance Earthmovers later brought proceedings in the District Court claiming breach of contract, a claim in quantum meruit or a claim under section 15 of the NSW Act for the outstanding amount plus interest (the Act claim). Advance Earthmovers obtained summary judgement against Fubew, but it was set aside by the District Court because, under section 22(3) of the *Consumer, Trader and Tenancy Tribunal Act* (2001) (CTTT Act), a court does not have jurisdiction where an 'issue' is already before the CTTT.

Appeal claim

Advance Earthmovers appealed on the grounds that the primary judge erred in finding that section 22(3) of the CTTT Act applied. The appeal considered whether:

- the District Court, in determining the Act claim, would be hearing the 'same' issue as the CTTT
- a corporation can contract for 'residential building work' and thereby attract the operation of section 7(2)(b) of the NSW Act (which prohibits a contractor making a payment claim in respect of residential building work).

Decision

It was held that:

- the District Court was not deprived of jurisdiction to determine Advance Earthmovers' Act claim because, given the subject matter of the CTTT proceedings, it was not determining the same 'issue'
- the work was not considered 'residential building work' because a corporation could not 'reside' in the premises. Thus, section 7(2)(b) of the NSW Act does not apply and the contractor (Advance Earthmovers) could make the claim under the NSW Act. The summary judgement for Advance Earthmovers was restored.

Agusta Industries v Niclad Constructions [2010] NSWSC 925

Significance

Courts will generally not interfere with the adjudicator's decisions on the validity of compliance with time limitations for adjudication proceedings under the NSW Act. Additionally, natural justice requires only that a respondent is made aware of the intention to seek adjudication and has an opportunity to respond.

Facts

Niclad Constructions Pty Ltd (Niclad) sought adjudication of a payment claim served on Agusta Industries Pty Ltd (Agusta). Niclad served notice on Agusta of its intention to apply for adjudication and 19 days later attempted to send a facsimile of the adjudication application to Agusta but the transmission was interrupted causing a dispute as to the number of pages transmitted. Agusta claimed to have received only the first three pages of the application. Niclad sent a copy of the application to Agusta via express post on 4 February and by registered post on 5 February.

Agusta was informed of Niclad's attempt to send the application by the authorised nominating authority and requested delivery of a copy of the application. Six days after the initial attempt to send the application to Agusta, the authorised nominating authority sent Agusta an announcement of the appointment of the adjudicator with a cover letter and the adjudicator's cover letter.

The adjudicator was satisfied that the adjudication application had been correctly served on Agusta as required by the NSW Act and made a determination within 14 business days after his appointment.

Agusta submitted that it had not received a copy of the adjudication application and had been denied an opportunity to respond. It submitted that it had therefore not received natural justice. Agusta also submitted that the adjudicator, by accepting that Agusta had received a copy of the adjudication application and proceeding to its determination, had not complied with section 20(1)(a) of the Act and so had invalidly determined the adjudication application. Section 20(1)(a) provides that a respondent may lodge an adjudication response within five business days of receiving a copy of the adjudication application. Prior to this time, pursuant to section 21(1), an adjudicator is not to determine an adjudication application.

Decision

The court held that there had not been denial of natural justice. Agusta had numerous indications that Niclad was seeking adjudication and so had numerous opportunities to react, seek a copy of the adjudication application or lodge an adjudication response.

Following the decision in *Brodyn Pty Ltd v Davenport [2004] NSWCA* 394 the court held that section 20(1)(a), like all requirements of notice under the NSW Act, is not a basic and essential requirement to the existence of authority to make a valid determination, so long as the adjudicator considered the matter and *bona fide* addressed the requirements. The adjudicator had ample evidence to reach his conclusion on the matter of service, so judicial review was not available. This part of the decision may well have ended differently after the *Chase* decision – which would have made judicial review available.

Allpro Building Services Pty Ltd v C&V Engineering Services Pty Ltd [2009] NSWSC1247

Significance

It is not an abuse of process for:

- a payment claim to contain claims the subject of an earlier adjudication, so long as it does not assert that any amount is owing in respect of those claims, and
- two separate entities to repeat the same claim in two separate forums.

Facts

C&V Engineering Services Pty Ltd (C&V Engineering), the defendant, was engaged by Allpro Building Services Pty Ltd (Allpro Services), the plaintiff, to supply steel under a construction contract.

C&V Engineering served a payment claim on Allpro Services referencing:

- four invoices previously determined in an earlier adjudication (earlier adjudication), and
- four invoices issued by the C&V Engineering's associate company (Steel).

Allpro Services alleged that, amongst other things:

- the inclusion in the payment claim of invoices determined in the earlier adjudication created issue estoppel, was an abuse of process, and accordingly it was entitled to injunctive relief to prevent the matter proceeding to adjudication, and
- it was an abuse of process for C&V Engineering to press for payment of the Steel invoices in one forum because Steel had commenced proceedings for two of the four invoices in another forum (the District Court).

Decision

The court dismissed the proceedings and held that:

- the payment claim's inclusion of the four invoices determined in the earlier adjudication did not give rise to issue estoppel or an abuse of process because C&V Engineering had valued the invoices pursuant to their adjudicated value and did not assert C&V Engineering had any amount still owing to it, and
- repetition of a claim by two separate entities in separate forums is not in itself an abuse of process. An abuse of process typically refers to one person prosecuting vexatious or multiple claims, not multiple entities prosecuting a single action.

Allpro Building Services Pty Ltd v Micos Architectural Division Pty Ltd [2010] NSWSC 453

Significance

An adjudicator making a determination under the NSW Act is bound by the rules of natural justice which requires them to bring an impartial and unprejudiced mind to the resolution.

Facts

Allpro Building Services Pty Ltd plaintiff (Allpro Services) applied for, amongst other things, an order to prevent the enforcement of a determination of an adjudicator (second defendant), which was made under the NSW Act. Allpro Services claimed it was denied natural justice because there was an appearance of bias by the second defendant. The second defendant was in a legal dispute with Allpro Services at the time of the adjudication over fees in another adjudication and had expressed certain views as to the continuances and tactics of Allpro Services.

Decision

Einstein J found that the conduct of the adjudicator exhibited a reasonable apprehension of bias and granted the order to prevent enforcement. Whether the conduct exhibited a reasonable apprehension of bias is to be determined having regard to the views of a fair-minded bystander.

CC No 1 v Reed [2010] NSWSC 294

Significance

A contractor will not be precluded, as an abuse of process under the NSW Act, from submitting subsequent payment claims in respect of the subject matter of earlier claims if the earlier claims have not been the subject of adjudication or final determination.

Facts

Reed Constructions Australia Pty Ltd (Reed Constructions) undertook construction work at a large retail redevelopment pursuant to a building contract with CC No 1 Pty Ltd (CC No1).

Reed Constructions submitted various payment claims for variations. Reed Constructions subsequently submitted a further payment claim for, amongst other things, preliminaries in respect of the earlier variation claims. CC No1 issued a payment schedule which showed a scheduled amount of 'nil'. Reed Constructions then lodged an adjudication application for the subsequent payment claim. CC No1 sought to restrain the prosecution of the adjudication of the subsequent payment claim as an abuse of the processes of the NSW Act as it contained repetitive claims.

Decision

The Court dismissed the proceedings and held that:

- there had been no abuse of process, and
- repetition of the subject matter of earlier payment claims alone is not an abuse of process.

Repetitive use of the payment claim process will amount to an abuse of process where a contractor submits subsequent payment claims in relation to the same subject matter, as was determined in a prior adjudication or final determination. In these circumstances, there had been no adjudication or final determination of the earlier payment claims and therefore no abuse of process.

Also, there wasn't a strict re-agitation of the earlier claimed amounts as the amount Reed Constructions claimed for preliminaries was a distinct cost not included in the earlier variation claims. There was a genuine omission of the preliminaries from the earlier claims, and the subsequent claims sought payment of an additional amount in respect of the same item of work.

Chase Oyster Bar v Hamo Industries [2010] NSWCA 190

Significance

The NSW Court of Appeal overturned the authority of *Brodyn Pty Ltd v Davenport (Brodyn)* and increased the scope for challenging adjudications.

The court confirmed that where jurisdictional error has been made in an adjudication determination under the NSW Act, the court has the power to issue the prerogative writ of certiorari (an order setting aside that decision).

Facts

Chase Oyster Bar, the plaintiff (Chase) contracted with Hamo Industries the defendant (Hamo) for fitout work. Hamo served a payment claim on Chase but no payment schedule was provided in response and payment was not made by the due date. Hamo then made an adjudication application under the NSW Act, but did not notify Chase of the adjudication within the time limits set out in section 17(2)(a) of the NSW Act. The adjudicator proceeded to hear the matter and made a determination that Hamo was entitled to payment of the claimed amount plus interest.

Chase argued that compliance with the NSW Act was essential if the adjudicator was to have jurisdiction, and that the adjudicator's finding amounted to jurisdictional error.

The existing position – the *Brodyn* approach

The court considered the *Brodyn* decision which substantially limited the grounds for challenging an adjudicator's determinations. *Brodyn* found that once the 'basic and essential' requirements for an adjudicator to be empowered to make a decision are satisfied — provided that the adjudicator acts in good faith and gives the level of procedural fairness required under the legislation — the decision would not be overturned by a court no matter how wrong the decision.

The 'basic and essential requirements' were:

- there was a construction contract
- a payment claim has been served
- an adjudication application has been made
- there has been acceptance by an adjudicator; and
- a decision on the amount owing, due date and interest payable has been made.

On this basis the court would have been unable to review the adjudicator's determination in *Chase*.

The *Chase* decision – a wider scope for challenge

In *Chase*, the court, exercising its supervisory jurisdiction, set aside the determination on the basis of jurisdictional error. It emphasised that the NSW Act provides for a precise sequence of time stipulations which are critical to ensuring the prompt resolution of payment disputes. The adjudicator did not have jurisdiction to determine an 'application' that did not comply with the mandatory time limits specified under the NSW Act.

The court also stated that *Brodyn* was incorrect insofar as the court was not required to consider and determine the existence of jurisdictional error by an adjudicator, and the court was not able to set aside or quash a decision of an adjudicator for jurisdictional error. Further, it confirmed that the NSW Act does not expressly or impliedly limit the power of the court to review an adjudicator's determination for jurisdictional error.

Therefore, in addition to the grounds for review available under *Brodyn*, judicial review and common law relief in the nature of certiorari is now available to claimants to challenge an adjudicator's decision. This is similar to the position adopted in Victoria in *Schiavello and Grocon*.

Filadelfia Projects v EntirlTy Business Services [2010] NSWSC 473

Significance

Interlocutory relief for an adjudicator's determination pursuant to the NSW Act, is available subject to undertaking to not do anything to reduce the value of the assets which are securing payment.

Facts

Filadelfia Projects (Filadelfia) entered into a head contract as principal with Zebicon Pty Ltd as builder. EntirlTy Business Services (EntirlTy) was engaged by the builder as a subcontractor. Filadelfia sought relief from a determination of the adjudicator (second defendant). The adjudicator found, based on the evidence put before it, that there was a construction contract in existence between Filadelfia and EntirlTy and as such the NSW Act applied.

Filadelfia asserted that:

- not all relevant documents were put before the adjudicator and, if they had been, the adjudicator may have taken a different view as to whether there was a construction contract in existence
- failure to ensure that all relevant documents were before the adjudicator may give rise to a substantial denial of procedural fairness.

Decision

McDougall J granted the relief. The court confirmed that:

- the existence of a construction contract is a basic and essential requirement for a valid adjudication determination (re *Brodyn*) and there was a serious question to be tried on whether there was in fact a construction contract in existence between the relevant parties
- there may have been a substantial denial of procedure fairness as to whether the relevant documents were before the adjudicator, whereas in fact they were not.

Relief is ordinarily granted on condition that the amount in dispute, including the cost of the adjudication and some interest, be paid into court pending final resolution of the dispute. In this case, Filadelfia was unable to do so, and its sole asset was the development in question. In these circumstances it was appropriate to grant relief on the basis of an undertaking by Filadelfia that it would preserve the value of the asset sufficient to secure the adjudicated amount.

Laing O'Rourke Australia Construction Pty Ltd v H&M Engineering & Construction Pty Ltd [2010] NSWSC 818

Significance

If an adjudicator does not properly consider and form a view of all the materials provided, the adjudication may be void due to a denial of natural justice or lack of good faith.

Facts

Laing O'Rourke Australia Construction Pty Ltd (Laing O'Rourke) and H&M Engineering & Construction Pty Ltd (H&M Construction) were parties to an adjudication under the NSW Act.

The principal issue was whether the adjudicator denied natural justice to Laing O'Rourke by failing to consider fundamental issues raised on the claims. One of the disputed issues was whether certain of H&M Construction's claims were 'global claims' (ie. claims where the claimant doesn't attribute a specific loss to a specific breach of contract, but instead alleges a composite loss as a result of all the breaches).

Whilst H&M Construction denied the claims were global claims, both parties made submissions and referred to various authorities about how to best deal with such claims. Laing O'Rourke provided an expert report on the manner of computing the losses and four statutory declarations.

The adjudicator found in favour of H&M Construction, but in respect of the material submitted by Laing O'Rourke in defence of the claims which asserted the failure to demonstrate any nexus between the alleged disruptive matters and the loss, the adjudicator simply stated:

'I don't see any point in using the label 'global claim' … I don't find the authorities cited by the (plaintiff) of any assistance.'

To determine whether there has been a denial of natural justice, the scheme of the NSW Act must be taken into account. The denial must be material and the provisions of section 22(2) of the Act must be complied with; namely to 'consider' certain specified matters. To consider something requires *'an active process of intellectual engagement'*.

The comment made by the adjudicator on the submissions gave no hint that the adjudicator had considered them in the manner required.

Decision

The adjudicator's decision was void because:

- there was a denial of natural justice
- the adjudicator failed to exercise his statutory powers in good faith, due to the adjudicators failure to properly consider the evidence presented by Lang O'Rourke with respect to 'global claims'.

This failure was evidenced by his statement (above) which showed he had not properly considered whether the claims were in fact 'global claims', or whether any such claims had been properly established.

Although an adjudicator is not required to address, in minute detail, every aspect of the parties submissions, their reasons should be detailed enough for the parties to understand that their contentions have been considered.

An adjudicator may reject evidence but he must at least explain why it was not persuasive. In this case, the adjudicator did not provide any explanation and there was no evidence that he had turned his mind to the issue.

Lanmac (NSW-ACT) Pty Ltd v Andrew Bruce Willis & Ors [2010] NSWSC 976

Significance

The court may order a stay in proceedings until money is paid into court where relief is sought to avoid the operation of section 25(4) of the NSW Act so that a contractor is not denied the benefit of the NSW Act.

Facts

Lanmac (NSW-ACT) Pty Ltd (Lanmac) sought an injunction to prevent the CMS Group, from enforcing an adjudication determination made against it. No undertaking had been made regarding the preservation of assets and Lanmac had not sought to set aside the judgement.

Section 25(4) of the NSW Act requires a plaintiff, seeking to set aside a judgement for the enforcement of an adjudication determination, to pay into court as security, the unpaid portion of the adjudicated amount pending the final determination of those proceedings.

Decision

Einstein J followed Bergin J in *Tombleson v Dancorell Pty Ltd [2007] NSWSC 1169* who held that pleadings of a plaintiff attempting to prevent a defendant from enforcing a judgement by injunctive relief, rather than seeking to set aside the judgement, should be analysed to see whether it is an abuse to seek those orders. If the court is satisfied that the application is to circumvent section 25(4) of the NSW Act, the court will order a stay of proceedings until money is paid into the court. Bergin J commented that this is to diminish the drafting of innovative pleadings to ensure that section 25(4) of the NSW Act is not triggered.

The court held that by seeking injunctive relief Lanmac was attempting to circumvent section 25(4) of the NSW Act. The proceedings were stayed until Lanmac pays into court the adjudicated amount or provides a bank guarantee in respect of that amount.

Olympia Group Pty Ltd v Tyrenian Group Pty Ltd [2010] NSWSC 319

Significance

Receipt of a payment claim by facsimile occurs when the payment claim is received into the memory of fax machine as evidenced by a transmission confirmation report. Service of a payment claim is only effective when it is served on the party to the construction contract and not a related party.

Facts

Tyrenian Group Pty Ltd, the defendant, (Tyrenian) and Olympia Group (NSW) Pty Limited (Olympia NSW) were parties to a subcontract for mechanical works. Tyrenian alleged that it served a payment claim on Olympia Group Pty Ltd, the plaintiff, (Olympia Group) by facsimile on 31 January 2010. Olympia Group was a related company of Olympia NSW. Tyrenian produced a transmission confirmation receipt as evidence of successful transmission of the payment claim to Olympia Group. Olympia Group claimed that it was not the party to the contract and that in any event receipt of the payment claim did not occur until 2 February 2010.

Decision

Hammerschlag J held that, despite anomalies with the evidence produced by Tyrenian and evidence that there was no physical emanation of the payment claim until 2 February 2010, Olympia Group was served on 31 January 2010.

However, the evidence proved that the contract was between Tyrenian and Olympia NSW, and not Olympia Group, and a declaration was issued to that effect. Accordingly, an order was made restraining Tyrenian from making any adjudication application under the NSW Act for the payment claim.

The Owners Strata Plan 56587 v Consolidated Quality Projects [2009] NSWSC 1476

Significance

The service of a payment claim under a contract, on a superintendent given authority to receive payment claims on behalf of a principal, will constitute valid service of a payment claim under the NSW Act if it includes a statement required under the NSW Act.

Facts

The Owners Strata Plan 56587 plaintiff (Strata Plan) contracted with Consolidated Quality Projects defendant (CQP) to complete remedial works on common property. CQP served a payment claim on Strata Plan by delivering the claim to the superintendent. Strata Plan failed to provide a payment schedule and the claim was referred to adjudication. The adjudicator (second defendant) determined Strata Plan was liable to pay CQP the amount of the payment claim. Clause 23 of the contract provided that each progress claim was to be given to the Superintendent. CQP's previous 25 payment claims were purported to be under the contract and under the NSW Act and addressed to Strata Plan, care of the superintendent's postal address. The issue before the court was whether service to the superintendent was valid to satisfy section 31 of the NSW Act.

Decision

The progress claim served on the superintendent constituted a valid service of the payment claim on the principal as it was served under clause 23 of the contract which satisfied the requirements of section 31 of the NSW Act. The court held that, in the alternative, the previous course of dealings highlighted an arrangement of serving payment claims in a dual capacity under the contract and under the Act which constituted valid service.

Urban Traders v Paul Michael [2009] NSWSC 1072

Significance

A claimant is:

- estopped from bringing an adjudication application to the extent that it contains claims which have already been determined in a previous adjudication decision
- entitled to claim for lost profits during a period of suspension pursuant to section 27(1) of NSW Act.

Facts

Urban Traders, the plaintiff, (Urban Traders) and Paul Michael, the defendant, (builder) entered into a construction contract for a building at Bayview. The builder served a payment claim on Urban Traders for $1,172,706 (payment claim 18). Urban Traders responded with a payment schedule for effectively nil. The dispute was referred to adjudication where the builder was awarded $379,475.71.

Urban Traders did not pay the adjudicated amount, after which the builder suspended the work under the contract pursuant to section 27(1) of the NSW Act, and served further payment claims on Urban Traders.

In response to payment claims 20 and 21, Urban Traders issued a payment schedule for $nil. The builder sought adjudication for payment claim 21, which Urban Traders contested that:

- payment claim 21 was, and an adjudication founded upon it would be, an abuse of process because it improperly re-agitated issues already set out in payment claim 18 and determined in the earlier adjudication
- the earlier adjudication created an estoppel preventing the re-agitation of claims determined by it, and
- to the extent that payment claim 21 included a claim for lost profits during the period of suspension pursuant to section 27(1) of the Act, it was not a payment claim 'for construction work'.

Decision

The court held that the earlier adjudication created an estoppel which prevented the builder from re-agitating issues determined in the earlier adjudication in a subsequent adjudication; this re-agitation amounted to an abuse of process. However, removing the re-agitated claims did not prejudice the adjudicator determining the rest of payment claim 21 and on this basis the adjudication could proceed.

The court also held that the builder was entitled to claim for loss of profits caused by a suspension pursuant to section 27(2A) of the NSW Act. The court reasoned that '[t]he right to suspend work would lose much of its efficacy if a proprietor could, with impunity and without cost, react to the suspension by withdrawing the work from the builder.'

Watpac Constructions (NSW) Pty Ltd v Austin Corp Pty Ltd [2010] NSWSC 168

Significance

A subsequent payment claim:

- which includes a re-agitated claim is only invalid to the extent of the re-agitated claim
- may include work the subject of an earlier claim which has not been valued in the earlier payment claim.

A party will be denied natural justice if the adjudicator fails to call for submissions on a relevant issue (here backcharges) before making a decision.

Facts

Watpac Constructions (NSW) Pty Ltd, the plaintiff, (Watpac) challenged the validity of an adjudication determination made in favour of Austin Corp Pty Ltd, the defendant (Austin) on the basis that it was re-agitating issues from a previous determination (issue estoppel). Watpac Constructions also argued that it suffered a substantial denial of natural justice because the adjudicator dealt with a setoff for backcharges claimed by Watpac on a basis for which Austin had not contended and Watpac had not been given an opportunity to put submissions (natural justice issue).

Decision

The court found that Austin was not estopped from claiming variation work where the later payment claim raised fresh claims whilst re-agitating earlier and rejected claims. Issue estoppel extends to the ability to restrain a claimant enforcing its rights under a subsequent determination. A new payment claim may include work the subject of an earlier claim which has not been valued in the first payment claim. An invalid payment claim:

- is repetitious, is resubmitted after completion of work, and submitted to 'create' a fresh reference date
- claims an amount previously claimed and adjudicated on, and which the adjudicator determined nothing was payable.

This decision analysed many of the cases that had considered prior claims and arguably limits the class of 'invalid' claims. Watpac had been denied natural justice because the adjudicator did not call for submissions on the back charges (ie natural justice issue) and therefore denied Watpac an opportunity to make its submission before making a decision.

The second adjudicator was wrong to allow payment claims that had already been considered and dismissed in the first adjudication. While the NSW Act does not necessarily invalidate a payment claim which re-agitates old issues, the Anshun principle of extended issue estoppel, and the Supreme Court's power to control abuse of process, apply to payment claims.

Northern Territory cases

In this section, the *Construction Contracts (Security of Payment) Act (NT) 2004* is referred to as the 'NT Act'.

GRD Group (NT) Pty Ltd v K & J Burns Electrical Pty Ltd [2010] NTSC 34

Significance

Following the decision in *AJ Lucas Operations P/L v Mac-Attack Equipment Hire P/L* (2009) 25 NTLR 14, the Supreme Court confirmed it may review an adjudicator's determination not to dismiss an application for want of jurisdiction — arising from a payment claim repeating an earlier claim outside the 90-day period in which an adjudication application must be brought under the NT Act.

Facts

K & J Burns Electrical Pty Ltd, the defendant, (Burns) entered into a subcontract with GRD Group (NT) Pty Ltd, the plaintiff, (GRD) to undertake electrical works for a lump sum price. During the course of the subcontract, Burns submitted invoices to GRD for progress payments, which included claims for variations.

Disputes arose between Burns and GRD, which resulted in claims by GRD for back charges for remedial works and liquidated damages for late completion.

Burns served GRD with a summary invoice (SI) listing the previous 13 invoices rendered and amounts owing. It also set out a summary of the amounts held in retention. The SI only included amounts that had been invoiced previously.

Burns lodged an application for adjudication under the NT Act for non-payment of the SI. The adjudicator determined in favour of Burns.

GRD sought a declaration from the Supreme Court that the adjudicator's determination was void and of no effect, and requested a stay of the judgement on the grounds that:

- the adjudicator had no jurisdiction to entertain the application because it was not served within 90 days of the dispute arising as required by sections 33(1)(a)(ii) and 28(1) of the NT Act
- the adjudicator had no jurisdiction to entertain the application as it was not possible to fairly make a determination because of the complexity of the matter (section 33(1)(a)(iv)(A)); and
- the adjudicator did not have jurisdiction because the SI was not a valid payment claim.

Decision

Mildren J found in favour of GRD and held that the adjudicator did not have jurisdiction to entertain the application, in as much as the SI was repeating claims in earlier invoices, because it was out of time.

Mildren J referred to *AJ Lucas* (Supra) where the Court of Appeal held that section 48(a) of the NT Act does not prevent the court from declaring that an adjudicator's determination is void for jurisdictional error where the adjudicator wrongly construed the NT Act. His Honour also noted that section 48(3) may not deny non-jurisdictional error either, but did not go on to explore this issue.

The decision of Mildren J is currently the subject of a reserved decision of the Northern Territory Court of Appeal.

Queensland cases

In this section, the *Building and Construction Industry Payments Act 2004 (Qld)* is referred to as the 'Qld Act'.

13 Manning Street Pty Ltd v Charlie Woodward Builder Pty Ltd [2010] QSC 151

Significance

A statutory demand based on a judgement obtained under the Qld Act was set aside on condition that the applicant pay the adjudicated amount into court.

Facts

13 Manning Street Pty Ltd, the applicant, (Manning Street) was obliged to pay Charlie Woodward Builder Pty Ltd, the respondent, (builder) $76,000 following an adjudicator's decision. The builder registered the adjudication certificate with the District Court and served a statutory demand on Manning Street.

The builder commenced proceedings under section 459H of the *Corporations Act 2001* seeking to have the statutory demand set aside on the grounds that it had an offsetting claim (a genuine claim that the company has against the builder by way of counterclaim, set-off or cross-demand) against the builder.

The court was required to consider whether Manning Street's entitlement to bring civil proceedings under section 100 of the Qld Act amounted to an offsetting claim.

Decision

Fryberg J ruled Manning Street was entitled to have the statutory demand set aside. His Honour held Manning Street had presented enough material to show that it had a genuine cross claim against the builder.

His Honour noted it would be against the intent of the Qld Act if he set aside the statutory demand without any conditions. Manning Street was therefore required to pay the amount of the debt into the District Court pending the outcome of its proposed proceedings.

AE & E Australia Pty Ltd v Stowe Australia Pty Ltd [2010] QSC 135

Significance

A claimant was precluded from re-agitating variation claims, in a subsequent adjudication application where those claims had already been determined as not payable, either for want of evidence or because the claimant had not demonstrated an entitlement to be paid.

Facts

AE & E Australia Pty Ltd, the applicant, (AE&E) engaged Stowe Australia Pty Ltd, the respondent, (Stowe) to perform electrical, instrumentation and controls works at the Condamine Power Station.

In December 2009 Stowe served a payment claim for $3,884,216. AE&E served a payment schedule. The claim was referred for adjudication, where it was determined $983,666 was payable.

The adjudicator stated that Stowe had not been able to substantiate certain variation claims, and therefore the adjudicator would not value the variation because Stowe had not demonstrated an entitlement.

In April 2010 Stowe served a further payment claim which included amounts for variations that had been included in the December 2009 claim.

AE&E sought declaratory relief and an injunction to prevent Stowe from making an adjudication application for the April 2010 claim on the grounds of:

- issue estoppel, as the original adjudicator had determined the amounts claimed for the variations were not established Stowe was precluded from re-agitating the variations that had not been established, and
- abuse of process.

Decision

Stowe was restrained from serving an adjudication application for the variation claims within the April 2010 claim. Applegarth J stated that the original adjudication application attracted the principles of issue estoppel because the original application had been rejected for want of evidence.

His Honour stated that, had it been required of him, he would have found an abuse of process based on the following grounds:

- due to the principle of issue estoppel, the adjudication application was 'foredoomed to fail', and
- Stowe was merely seeking from another adjudication a better result than it got from the first.

B J and S Paterson Pty Ltd v Eleventh Trail Pty Ltd [2009] QDC 380

Significance

This case demonstrates the court's reluctance to interfere with the adjudication process, particularly where a respondent has not taken any steps to enforce its rights under section 100.

Facts

In its payment claim BJ and S Paterson Pty Ltd, the plaintiff (Paterson) identified the construction work as 'residential development – Lillis Road, Gympie'.

In the adjudication application Eleventh Trail Pty Ltd, the defendant (Eleventh Trail) argued, unsuccessfully, that the payment claim was void because it did not properly identify the construction work.

Paterson obtained an adjudication certificate which was registered as a judgement.

Eleventh Trail applied for a permanent stay of the judgement on the basis that the payment claim was void because it failed to properly identify the construction work.

Decision

The court found that the work was adequately identified to anyone with knowledge of the project. The description, albeit brief, did not prejudice Eleventh Trail. The judge was influenced by the fact that Eleventh Trail had not exercised its rights under section 100 before seeking the stay.

De Neefe Signs Pty Ltd v Build 1 (Qld) Pty Ltd; Traffic Technologies Traffic Hire Pty Ltd v Build 1 (Qld) Pty Ltd [2010] QSC 279

Significance

The decision highlights the difficulty in challenging an adjudicator's decision in the absence of any failure by a party to comply with the steps outlined in section 21(2).

It also demonstrates the importance of the interplay between the licensing regime under the Queensland Building Services Authority Act 1999 and the Qld Act.

Facts

Build 1 (Qld) Pty Ltd, the respondent (Build 1) was engaged to install permanent signs for the North-South By-pass Tunnel. The signs were attached to supporting structures.

On 22 March 2010 Build 1 served De Neefe Signs Pty Ltd and Traffic Technologies Traffic Hire Pty Ltd, the applicants (DeNeefe and Traffic) with a document endorsed as a payment claim. DeNeefe and Traffic did not respond with a payment schedule.

On 12 April 2010 Build 1 delivered a notice under section 21(2). Section 21(2) of the Qld Act requires the notice to be given within 20 business days of the due date for payment.

DeNeefe and Traffic claimed the notice was premature because it was served before the payment date specified in the contract, and therefore invalid.

At adjudication, the payment claim was found to have been issued in accordance with the Qld Act and Build 1's section 21(2) notice was valid.

DeNeefe and Traffic applied for a declaration that the adjudication was void on the basis that the section 21(2) notice had been given prematurely. This argument was based on an allegation that work performed under the contract was excluded from the definition of building work by the QBSA Regulation.

Decision

Fryberg J dismissed the application, finding Build 1's payment claim and the adjudication application were valid. His Honour determined:

- the work under the contract was not excluded from the definition of building work by regulation 5, as the signs were attached to a supporting structure. The exclusion of work relating to the 'construction, maintenance and repair' of a tunnel did not extend to structures 'associated with the tunnel'. Consequently clause 4.1 of the contract was void to the extent that it provided for payment of the claim later than 15 days after its submission, contrary to the provisions of section 67W of the *Queensland Building Services Authority Act 1999*. Consequently, as the default payment period of 10 days under section 15(1)(b) applied to the contract, he found that the section 21(2) notice was given within the prescribed period, and
- the adjudicator was entitled to make a decision.

Gisley Investments Pty Ltd v Williams [2010] QSC 178

Significance

An email is a valid payment schedule. Compliance with section 21(3)(c)(i) was not a basic and essential requirement of the Qld Act making it a matter for the adjudicator to determine (wrongly, in this case).

Facts

A dispute arose regarding a payment claim made by Williams, the respondent, (Williams). Gisley Investments Pty Ltd , the applicant, (Gisley) responded via email disputing the amount. The email response was made within the time frame allowed under the Qld Act but was not marked as a payment schedule.

In February 2010, believing that a valid payment schedule had not been served, Williams took the matter to adjudication. Gisley did not respond to the application and the adjudicator found in favour of Williams.

Williams sought judgement. Gisley sought:

- a declaration from the court that the adjudicator's decision was void as the adjudication application had been made out of time, and
- an injunction restraining Williams from enforcing the judgement.

Decision

Douglas J dismissed the application. His Honour concluded that the email was a payment schedule; and it complied with the requirements of the Qld Act by:

- identifying the payment claim to which it related
- stating the amount Williams proposed to pay (nothing), and
- explaining why the amount claimed would not be paid.

The issue then became whether the adjudication application premised (wrongly) on the absence of the payment schedule was validly made.

Douglas J concluded that it was a valid adjudication application, because it complied with section 21(3)(c)(i) which was a procedural requirement, not an essential requirement, of the Qld Act. As it was a procedural requirement the adjudicator could decide if there was compliance.

His Honour noted that Williams's failure to apply earlier for an adjudication decision was based on the imprecision of Gisley's email failing to identify itself as a payment schedule explicitly on its face. His Honour concluded that since the real object of the Qld Act had been achieved, there was no good reason to nullify the adjudicator's decision. Furthermore the adjudicator had made a bona fide attempt to exercise the relevant power with no substantial denial of natural justice.

Hansen Yuncken Pty Ltd v Ian James Ericson trading as Flea's Concreting [2010] QSC 156

Significance

This interlocutory application discusses the extent of the court's supervisory jurisdiction and whether prerogative remedies can be excluded by the Qld Act.

Facts

An adjudicator decided that Ian James Ericson, the respondent, (Mr Ericson) was entitled to be paid $4.8 million. Hansen Yuncken Pty Ltd, the applicant, (Hansen Yuncken) filed proceedings challenging the adjudicator's decision.

Mr Ericson made an application to strike out parts of Hansen Yuncken's statement of claim. The statement challenged the adjudicator's decision on the grounds of:

- denial of natural justice on the basis that the material sent to the adjudicator was not copied to it
- denial of natural justice on the basis that some of the evidence served in the adjudication application was not raised in the initial payment claim, denying the applicant an opportunity to raise the matters in the adjudication response as they were not (and could not have been) in the payment schedule, and
- fraud, in that the respondent put evidence before the adjudicator which the respondent knew to be false.

Decision

McMurdo J dismissed the strike out application, concluding that any discussion of fraud was a matter for trial.

On the availability of prerogative remedies, Mr Ericson's submission that the jurisdiction of the court could not co-exist with the intended operation of the Qld Act was inconsistent with the line of authority emerging out of the Courts of Appeal in Queensland and interstate.

This may be revisisted on the basis of the Chase desicion.

John Holland Pty Ltd v Schneider Electric Buildings Australia Pty Ltd [2010] QSC 159

Significance

The claimant was prevented from serving an adjudication application where the payment claim attempted to re-agitate issues decided in a previous adjudication.

Facts

Schneider Electric Buildings Australia Pty Ltd, the respondent, (Schneider) made a payment claim dated 14 September 2009 which was referred to adjudication.

In its adjudication response (and in the payment schedule) John Holland Pty Ltd, the applicant, (John Holland) contended that there was no valid reference date on which Schneider could base its claim.

In November 2009, the adjudicator decided that he did not have jurisdiction to decide the matter because Schneider had served more than one payment claim for the same reference date.

In March 2010, Schneider made another payment claim. John Holland in response submitted that the claim was invalid on the basis of issue estoppel, because an adjudicator had already determined that Schneider did not have a valid reference date upon which to make any further claims.

John Holland sought an injunction to restrain Schneider from serving it with an adjudication application for the March 2010 claim.

Decision

Applegarth J granted the injunction, restraining Schneider from serving any adjudication applications for the March 2010 claim. His Honour noted that the Qld Act should be construed as indicating an intention to prevent repetitious re-agitation of the same issues.

His Honour noted that the Qld Act precluded a claimant from making an adjudication application where a previous adjudication decision had been made specifically on the value of construction works or goods or services.

Applegarth J extended the scope of what might constitute re-agitation to include the issue of reference dates which had been determined in a prior adjudication.

Leighton Contractors Pty Ltd v Vision Energy Pty Ltd [2010] QSC 353

Significance

This case is an example of where a clause of a construction contract did not operate to finally resolve the parties' entitlements and did not supersede an adjudication decision.

Facts

On 24 February 2010 Vision Energy Pty Ltd, the respondent, (Vision) submitted progress claim 13 as a payment claim.

On 10 March 2010 Leighton Contractors Pty Ltd, the applicant, (Leighton) served a payment schedule stating a negative scheduled amount. On 23 March 2010 Vision lodged an adjudication application under section 21. On 19 April 2010 the adjudicator determined that Vision was entitled to a progress payment of $1,232,938.57. The decision was served on Leighton on 22 April 2010. On 5 May 2010 an adjudication certificate was issued.

Concurrently, on 9 April 2010 Leighton sent Vision a release and waiver under clause 36 of the construction contract. Vision did not sign the release. On 19 April 2010 Vision sent a letter stating that it was willing to execute the release excluding all matters the subject of the adjudication. Leighton provided an amended release and waiver. On 4 May 2010 Vision issued a prescribed notice disputing the amount claimed in the release and waiver. So, in accordance with the contract, the release and waiver became binding on the parties except for the matters in the prescribed notice which were the subject of the adjudication.

Leighton argued that it had been released from any interim entitlement that Vision might have had against it pursuant to the adjudication of the progress claim, by operation of section 100.

Decision

Her Honour, Wilson J found that the adjudication decision stood. She distinguished this case from *John Holland Pty Ltd v Roads and Traffic Authority of NSW* noting that while clause 36 operated to finally resolve the parties entitlements, the process allowed Vision to carve out exceptions and dispute aspects of the release and waiver. As Vision disagreed with the release and waiver, and followed the process under the construction contract, the release and waiver only operated to finalise those matters exclusive of the adjudication decision.

Mansouri v Aquamist Pty Ltd [2010] QCA 209

Significance

This case demonstrates that a court will be reluctant to issue a summary judgement if there is a factual dispute or uncertainty about the formation of the construction contract.

Facts

Aquamist Pty Ltd, the respondent, (Aquamist) carried out excavation and earthworks on land owned by Mansouri, the appellants, (Mansouri). Aquamist served a payment claim on Mansouri. Mansouri did not deliver a payment schedule. Aquamist obtained a summary judgement under the Qld Act.

Mansouri appealed on the grounds of a factual dispute about the existence of the construction contract — Aquamist had contracted with their son, not with them.

Decision

The Court of Appeal set aside the summary judgement and ordered the matter to trial. The court held that summary judgement in adjudication matters is only appropriate if there is a high degree of certainty of the existence of the construction contract and the identities of the parties to that contract.

National Vegetation Management Solutions Pty Ltd v Shekar Plant Hire Pty Ltd [2010] QSC 003

Significance

The decision highlights the risk of relying on a 'without prejudice' communication as a payment schedule. There is a distinction between a proposal to make a payment within the meaning of section 18 and a general offer to make a payment in full and final satisfaction of a claim. Land clearing is construction work under the Qld Act.

Facts

National Vegetation Management Solutions Pty Ltd the applicant (NVMS) was engaged by Shekar Plant Hire Pty Ltd the respondent (Shekar) to carry out land clearing work in preparation for a proposed electricity transmission line.

NVMS served a payment claim on 31 August 2009. Shekar's solicitors replied on 7 October 2009 with a letter headed 'Without Prejudice'. The letter disputed the amount claimed by Shekar and offered NVMS the option of accepting a lesser amount. NVMS commenced proceedings for a debt pursuant to section 19(2)(a)(i).

Decision

Wilson J gave judgement for the full amount. She found that the land clearing works were 'construction work' under Schedule 2 of the Qld Act.

Her Honour determined the without prejudice offer was not a payment schedule, it was simply an offer which was open for acceptance, with no scope for the respondent to recover the money.

Neumann Contractors Pty Ltd v Traspunt No 5 Pty Ltd [2010] QCA 119

Significance

This case demonstrates the risk of endorsing all progress claims as claims under the Qld Act. The court found that the prohibition against raising defences in section 19 does not catch all possible defences.

Facts

Traspunt No 5 Pty Ltd, the respondent, (Traspunt) contracted with Neumann Contractors Pty Ltd, the applicant, (Neumann) to perform engineering work. Over a long contracting history Traspunt made 72 progress payment claims, all but five of which were endorsed under the Qld Act. Neumann never delivered a payment schedule.

Traspunt had not pursued its rights under the Qld Act until it made the summary judgement application. Transpunt obtained summary judgement for the unpaid payment claim. Neumann appealed.

Decision

The appeal was allowed and the summary judgement was set aside on the basis of disputed facts and defences to be raised at a hearing. The court found that the prohibition against raising defences in section 19 does not catch all defences, in particular those based on estoppel.

Northbuild Construction Pty Ltd v Central Interior Linings Pty Ltd & Ors [2010] QSC 95

Significance

This case highlights the court's reluctance to impugn an adjudicator's decision based on the mere appearance that an adjudicator has failed to correctly discharge his duties (both explicit and implied) under the Qld Act.

Facts

In September 2008 Northbuild Construction Pty Ltd, the applicant (Northbuild) and Central Interior Linings Pty Ltd, the first respondent (Central) entered into a contract. By August 2009 the contract had been terminated.

Central made an adjudication application for money owing on works completed prior to termination. The adjudicator found in their favour.

Northbuild challenged the adjudication on the basis that the adjudicator had failed to discharge his duties under the Qld Act so the decision should be declared void. Northbuild contended that the adjudicator:

- 'failed to descend to particularity in the manner in which he approached his task' in that he had not valued every variation individually or decided every issue over each variation, and
- took a broad brush approach to valuing the variations.

Northbuild also submitted that the adjudicator had failed to act in good faith or accord Northbuild natural justice, as he had failed make a determination to the best of his ability on all the material available.

Central submitted that the relevant question for the court was whether the adjudicator had complied with the Qld Act and not whether there had been an error of fact or law.

Decision

Martin J dismissed the application. His Honour did not accept that the adjudicator had failed to make a genuine attempt to exercise his duties under the Qld Act, finding that the decision was reasoned and reasonable.

That the adjudicator had not accepted much of Northbuild's evidence was not a failure to exhibit good faith or to afford natural justice. His Honour commented that proving such a deficiency is no easy task and concluded that the adjudicator is 'not required to set out every detail of every part of a report provided by a party to an adjudication'.

Given the limited time an adjudicator has to render a decision, the Qld Act is intended to allow for an abbreviated valuation method and this did not signal a lack of bona fides.

Queensland Bulk Water Supply Authority v McDonald Keen Group P/L (in liq) [2010] QCA 7

Significance

This decision demonstrates the difficulty of challenging an adjudicator's decision on the ground that the adjudicator did not act in good faith. The Court of Appeal upheld the judgement at first instance.

Facts

An adjudicator decided that the sum of $11 million was owed by Queensland Bulk Water Supply Authority, the appellant (QBWSA) to McDonald Keen Group P/L (in liq), the respondent (McDonald Keen). McDonald Keen filed the adjudication certificate as a judgement.

At first instance the court concluded that the adjudication decision was valid and that the adjudicator had not breached his duty to act in good faith, nor denied QBWSA natural justice.

Decision

The court concluded that whether a narrow approach to questions of good faith was taken — requiring an examination of the 'actual state of mind of the decision maker, requiring personal fault and conscious intent to be recreant to his duty' — or a broad approach — not limited to the actual state of mind of the decision maker — the adjudicator had made a genuine attempt to exercise his powers in accordance with the provisions of the Qld Act and had made a genuine attempt to understand and apply the construction contract.

Sheppard Homes Pty Ltd v FADL Industrial Pty Ltd [2010] QSC 228

Significance

This case shows that granting a licence to use plans is neither a construction contract nor supply of related goods or services. It also discusses the inherent jurisdiction of the court to set aside an adjudicator's decision made in excess of jurisdiction.

Facts

Sheppard Homes Pty Ltd, the applicant, (builder) applied to set aside an adjudication decision. The application related to four referral contracts entered into by the parties. The builder, entered into an unusual contract with FADL Industrial Pty Ltd, the respondent (FADL). Under the contract FADL was referred to as a 'consultant'. FADL referred residential building clients to the builder for the purposes of constructing residences, the details of which were contained in contemporaneous building contracts.

FADL provided drawings to the builder for the construction of the houses. The amount payable by the builder to FADL was to be calculated with reference to the price payable under the building contract.

Payments were to be made when each drawing was supplied by FADL under the building contract. FADL was not paid so it served a payment claim under the Qld Act and the matter subsequently went to adjudication.

Decision

Fryberg J declared the adjudication decision void. His Honour declared that the contracts subject of the adjudication were not construction contracts as the services performed by FADL did not fall within the scope of 'related goods and services' described in the Qld Act.

His Honour rejected the respondent's submission that the court was bound by the adjudicator's jurisdictional decision. The court always has jurisdiction to determine whether an inferior tribunal had exceeded its jurisdiction and that the Qld Act did not purport to remove this jurisdiction.

Simcorp Developments and Constructions P/L v Gold Coast Titans Property P/L; Gold Coast Titans Property P/L v Simcorp Developments and Constructions P/L [2010] QSC 162

Significance

This case demonstrates the importance of maintaining careful records of service of payment claims. It also demonstrates the fine line a party treads when it amends a standard form contract in an attempt to impose preconditions on entitlement to progress payments.

Facts

On 26 June 2009 the Gold Coast Titans Property Pty Ltd (Titans) entered into a construction contract with Simcorp Developments and Constructions Pty Ltd (Simcorp). The relationship deteriorated and Titans terminated the contract in February 2010.

There were two proceedings before the court. Simcorp sought discontinuance of the first, which was about several payment claims, on the basis that it would take too long to resolve whether the claims had been validly served.

The second action, brought by Titans, concerned the validity of payment claim 13. Several issues were in contention including:

- whether the payment provisions in the contract (which amended the standard conditions by the insertion of a regime of providing preconditions prior to a payment claim being made under the Qld Act) amounted to contracting out, and
- whether the contract provided a reference date for which claims were to be made.

Decision

Douglas J granted Simcorp's application for discontinuance and awarded Titans indemnity costs because it had incurred considerable expense and delay due to Simcorp's inability to easily prove the normally straight forward issue of service.

His Honour found that payment claim 13 was invalid because:

- a reference date was capable of being worked out under the contract, and
- the preconditions to entitlement to progress payments were not inconsistent with the Qld Act and therefore did not attract the operation of section 99.

Spankie v James Trowse Constructions Pty Ltd [2010] QSC 29

Significance

The decision highlights the difficulty in challenging an adjudicator's decision on the grounds that the adjudicator did not act in good faith or accord natural justice. None of the adjudicator's errors were sufficient to justify a finding that the adjudicator had not acted in good faith.

Facts

Spankie, the applicant (Spankie) engaged James Trowse Constructions Pty Ltd, the respondent (James Trowse) to undertake construction works on the Homestead Tavern. James Trowse obtained judgement for $910,600 following an adjudication.

Spankie challenged the judgement. The court ordered Spankie to pay the adjudicated amount into court and stayed the enforcement of the judgement pending the determination of the substantive issues.

Spankie sought a declaration that the adjudication decision was void and that the judgement be set aside.

Decision

McMurdo J found that while errors made by the adjudicator were 'fairly open to criticism,' he was not persuaded that the adjudicator's reasoning lacked a genuine attempt to exercise the powers under the Qld Act.

His Honour found that Spankie had failed:

- to establish the adjudication decision was not reached in all aspects of good faith, and
- to persuade him that the adjudicator had failed to accord procedural fairness; as the adjudicator had made provision within the decision to protect the applicants (by requiring compliance with the contract as a condition to payment).

The application for a declaration was dismissed.

Spankie & Northern Investment Holdings Pty Limited v James Trowse Construction Pty Limited & Ors (No. 2) [2010] QSC 166

Significance

This case is an example of an adjudicator's decision being found to be of no effect when the adjudicator applied his own interpretation of a provision of the contract without offering the parties the opportunity to persuade him that his interpretation was incorrect.

Facts

The adjudicator interpreted a clause of the contract, although neither party had made specific submissions about how it should be interpreted, and based his conclusion on his own interpretation. Spankie and Northern Investment Holdings Pty Limited, the applicants, submitted this was a denial of natural justice.

James Trowse Construction Pty Limited & Ors, the respondent submitted that the adjudicator's interpretation of the clause was correct and should be read in the context of the documents provided to him.

Decision

McMurdo J declared the adjudicator's decision to be void. While accepting that the adjudicator's reasons had to be read in the context of the documents put to him, his Honour concluded that the adjudicator had interpreted the clause on a ground which had not been advanced by either party. The adjudicator should have sought submissions from the parties pursuant to section 25 of the Act.

By denying the parties the opportunity to persuade him that his interpretation of the clause was incorrect, the adjudicator had denied natural justice.

Spankie v James Trowse Constructions Pty Limited [2010] QSC 336

Significance

The court found that a successive payment claim may be made for the same amount that has been the subject of a previous claim.

Facts

On 31 August 2009 James Trowse Constructions Pty Limited, the respondent, (James Trowse) made a payment claim which was the subject of an adjudication. In a judgement delivered on 19 May 2010, McMurdo J declared the adjudicator's decision void.

On 31 May 2010 James Trowse submitted another payment claim for the two items previously claimed.

Spankie, the applicant, (Spankie) sought a declaration that the second payment claim was void.

Decision

Peter Lyons J dismissed the application, determining:

- the 'natural reading' of section 17(6) favoured the view that a second payment claim could be made for an amount previously claimed if a second reference date had passed, and
- James Trowse was not precluded by section 32 of the Qld Act from making a second payment claim as the earlier adjudication had been quashed.

Consequently, James Trowse was entitled to make a second payment claim for an identical amount under the Qld Act.

His Honour noted the judgement of Hammerschlag J in *University of Sydney v Cadence Australia Pty Ltd, who held that the provisions of the equivalent NSW Act allowed a claimant one opportunity to have a payment claim adjudicated. The current proceedings were distinguished from Cadence on the basis that the first adjudication in this case had been declared void.*

T & T Building Pty Ltd v GMW Group Pty Ltd [2010] QSC 211

Significance

This case highlights the importance of ensuring payment schedules are served within the time required.

Facts

In January 2008 T & T Building Pty Ltd, the applicant, (T&T Building) contracted to construct a building for GMW Group Pty Ltd, the respondent, (GMW). The contract provided for monthly progress claims.

T&T Building alleged that in July 2009 the contract was varied by way of an agreement to allow payment claims to be submitted fortnightly.

A dispute arose about the payment of progress claims 20-25 submitted between September and early November 2009. GMW had delivered payment schedules, but not in the timeframe required by the allegedly varied payment regime. T&T Building sought judgement for approximately $4.89 million.

GMW denied there was a variation to the payment regime and asserted that the claims subject to the application were invalid or had been subject of a valid payment schedule.

Decision

Martin J found in favour of T&T Building for the full amount claimed. His Honour found that there had been a variation to the contract which allowed T&T Building to submit fortnightly payment claims, meaning that the payment schedules had been delivered out of time.

Tenix Alliance P/L v Magaldi Power P/L [2010] QSC 7

Significance

This case highlights the importance of issuing a clear, unambiguous and unconditional payment schedule. Conditional without prejudice offers are not payment schedules.

Facts

In June 2009 Tenix Alliance P/L, the applicant,(Tenix) entered into a construction contract with Magaldi Power P/L, the respondent, (Magaldi Power) for work at the Millmerran Power Station.

In early October 2009, Tenix made a payment claim with three elements: a progress claim, a claim for variations and a claim for prolongation costs (including future delay costs). Magaldi Power delivered a document described as a payment schedule which offered to pay certain amounts if conditions were met.

Tenix submitted that it was not a payment schedule because it did not state the amount that Magaldi Power proposed to pay, nor did it provide reasons for non-payment of the claimed amount. Tenix applied for judgement.

Magaldi Power argued that the payment claim was invalid because it was not submitted on the relevant reference date or because it included prolongation costs not yet incurred.

Decision

Fryberg J gave judgement for Tenix because:

- the payment claim was valid because there was no requirement that it be served on the reference date, it could be served after, but in respect of, the reference date
- although a claim for future delay costs cannot be made under the Qld Act, the inclusion of those costs did not invalidate the whole claim (although judgement was not given for future delay costs)
- the payment schedule was invalid because it did not, when properly construed, make the respondent's assessment of the claim clear (it offered payment on certain conditions).

Thiess Pty Ltd and John Holland Pty Ltd v Civil Works Australia Pty Ltd [2010] QSC 187

Significance

If a respondent to a payment claim under the Qld Act attempts to avoid payment by relying on the operation of clauses within the relevant contract, it must ensure the argument is raised in its payment schedule.

Facts

Theiss Pty Ltd and John Holland Pty Ltd, the applicants, (Theiss) and Civil Works Australia Pty Ltd, the respondent, (CWA) entered into a construction contract requiring CWA to perform excavation works.

CWA served a payment claim claiming $1,367,860. Theiss responded with a payment schedule proposing to pay nil. CWA applied for adjudication.

The adjudicator decided that Theiss should pay the amount of the payment claim. In arriving at his decision the adjudicator expressly disregarded submissions made for the first time in the adjudication response which referred to various clauses in the contract.

Decision

The court rejected the submission that section 26(2)(b) requires the adjudicator to consider the terms of the construction contract notwithstanding that the effect of any of the terms were not included in the payment schedule.

The court found that Theiss had made new and independent assertions contrary to the prohibition to do so in section 24(4) and that section 26(2)(b) did not require that they be considered.

Victoria cases

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

Asian Pacific Building Corporation Pty Ltd v Aircon Duct Fabrication Pty Ltd (No 2) [2010] VSC 340

Significance

The court has no power to stay the operation of an adjudication determination on the ground of alleged impecuniosity.

Facts

Asian Pacific Building Corporation Pty Ltd, plaintiff (Asian Pacific) entered into two construction contracts with Aircon Duct Fabrication Pty Ltd, defendant, (ADF) in 2008, for air-conditioning at the Olson Hotel and the Blackman Hotel projects.

Towards the end of 2009, ADF issued two payment claims under the Vic Act for monies due on each project. Upon Asian Pacific refusing payment, both claims proceeded to adjudication, where ADF was awarded $127,727.92 for the Blackman project and $543,686.65 for the Olsen project.

Ultimately, the amount awarded to ADF at the Olsen adjudication was declared void and set aside. The amount awarded at the Blackman adjudication was partially declared void, with $105,647.75 remaining due and payable.

Asian Pacific sought an order to stay the operation of the orders made in respect of the Blackman adjudication on the basis of the alleged impecuniosity of ADF (ie. if Asian Pacific was successful at the trial it might not be able to recover the amount paid to ADF on an interim basis), or alternatively an injunction.

Decision

Vickery J held that the court had no power to grant the stay of the declaration requested by Asian Pacific, nor the injunction sought.

The court was not satisfied that ADF would not be in a position to repay Asian Pacific should it be ordered to make such payment at the final hearing. So, given that ADF was entitled to be paid the Blackman adjudication amount, ADF should be paid from the amount paid into court by Asian Pacific.

Brady Constructions Pty Ltd v Everest Project Developments Pty Ltd [2009] VSC 622

Significance

This is an example of an application of the legal test for an interlocutory injunction.

Facts

This case is an appeal from a VCAT decision in which Brady Constructions Pty Ltd, the appellant, (Brady) was refused an interlocutory injunction to restrain Everest Project Developments Pty Ltd, the respondent, (Everest) from calling upon an unconditional bank guarantee of $1.2 million.

The dispute centred on an adjudicator's determination under the Vic Act that no liquidated damages was payable by Brady Constructions to Everest. Even though of the liquidated damages claim was rejected Everest advised Brady Constructions that it intended to call on the guarantee for the amount of the liquidated damages claim.

Decision

The court allowed the appeal and remitted the matter for further hearing by a differently constituted division of VCAT.

Applying the test set down in *Bradto Pty Ltd v State of Victoria [2006] 15 VR 65*, the court was satisfied that there was a 'serious question to be tried' and that the 'balance of convenience' was in favour of granting the injunction.

According to Osborn J, the Tribunal failed to consider critical material considerations affecting the real prospect of a risk of injustice. That is, Brady established a strong case that if the injunction was not granted, and the bank guarantee was called up, Everest would not be able to repay the bank guarantee.

Gantley Pty Ltd v Phoenix International Group Pty Ltd [2010] VSC 106

Significance

This case highlights the importance of properly identifying works in a payment claim. It allows for a payment claim to be severed, which parties partially non-compliant with the Vic Act.

Facts

Phoenix International Group Pty Ltd, the defendant, (Phoenix) was engaged by Gantley Pty Ltd,

Resources Combined No.2 Pty Ltd and Jetoglass Pty Ltd, the plaintiffs, (Gantley) to construct various dwellings. In May and July 2009, Phoenix served payment claims on Gantley for each project, and in response Gantley in each case served 'nil' payment schedules under the Vic Act.

The matter went to adjudication. Gantley argued that the payment claims were contrary to the Vic Act and invalid as they did not properly identify the construction work to which the claims related. The adjudicator determined however that the sums claimed by Phoenix were valid and were due to it. Gantley issued proceedings in the Supreme Court to review the adjudicator's decision.

Decision

Vickery J decided that a payment claim that does not reasonably specify the work done, which is the subject of the payment claim, will be invalid because one of the basic and essential requirements of the Vic Act will not have been met. Any adjudication founded on an invalid payment claim will itself be invalid, at least to that extent.

His Honour found that the disputed payment claims were invalid and ordered the adjudication determinations to be void. In determining the degree of specificity, it is necessary to identify the work sufficiently for the respondent to a payment claim to understand the basis of the claim and provide a considered response. The standard is that of a reasonable person who is in the position (and has the knowledge) of the recipient. His Honour held that severance of part of a payment claim, which is non-compliant with the Vic Act, is possible. His Honour also held that service of a progress claim under the Vic Act after termination of the contract is valid where:

- the contract expressly or impliedly allows this, or
- there is an accrued right to a progress payment before termination for work done prior to termination.

The fact that the amended Vic Act now provides for a 'final progress payment' demonstrates that the intention of the previous version of the Vic Act was to allow for a final progress claim.

Metacorp Pty Ltd v Andeco Construction Group Pty Ltd [2010] VSC 199

Significance

The court upheld the validity of a payment claim despite it being served in a way outside the prescribed procedure of the amended AS 2124-1992 contract (contract) and the Vic Act. Further, the court held that natural justice was denied.

Facts

Metacorp Australia Pty Ltd, the plaintiff, (Metacorp) engaged Andeco Construction Group Pty Ltd, the defendant, (Builder) to construct a mixed use development in North Melbourne. Metacorp sought review of an adjudication determination which held that a payment claim was valid. It argued that essential formalities of the payment claim necessary to bestow jurisdiction on the adjudicator had not been satisfied, and procedural fairness had not been afforded.

Decision

The court held that service of the payment claim one day earlier than prescribed in the contract did not invalidate it because:

- the Vic Act provides the right to serve a payment claim to persons 'who claim to be entitled' to a payment claim. Actual entitlement is irrelevant, provided service is bona fide
- the Vic Act does not expressly require service of a payment claim on or after the relevant reference date
- it was sent on a Saturday so service was not effected until Monday
- service is not 'received' where an email is accessible. The recipient needs to observe the computer notification, gain access, and open it, and
- acceptance of the subsequent certificate arranging payment supports the fact that no issue had been taken with the service of the payment claim.

The court noted that, where service is premature, the 10-day time limit for issuing a payment schedule under the Vic Act still runs from the prescribed date. Furthermore, service to the superintendent, rather than the party 'liable to make the payment' under the Vic Act, was valid. The superintendent had actual and ostensible authority to receive the payment claim as all previous payment claims had been submitted to them.

The court also held that service via email did not invalidate the payment claim because:

- s50 of the Vic Act (on the mode of service) is facultative, not mandatory, and is silent on service by email, and
- the contract states that notice 'may be served' via post, indicating discretion.

The court further reasoned that it would be absurd to invalidate a payment claim where the plaintiff was able to properly respond within the statutory time limit.

The court also held that natural justice was denied as the adjudicator ignored Metacorp's request to file further submissions on a new issue raised in the Builder's further submissions. Relief for natural justice is discretionary so the matter was adjourned for the parties to prepare submissions.

In *Metacorp Australia Pty Ltd v Andeco Construction Group Pty Ltd & Ors (No 2) [2010] VSC 255*, the court exercised its discretion and quashed the adjudication determination. The case was remitted to adjudication where Metacorp will have the opportunity to file further submissions.

Phoenix International Group Pty Ltd v Resources Combined No 2 Pty Ltd & Ors [2009] VSCA 309

Significance

This decision confirmed the earlier decision of the Court that the pre-amended provisions of the *Building and Construction Industry Security of Payment Act 2002* (Vic) continue to apply to contracts entered into between 31 January 2003 and 30 March 2007.

Facts

The *Building and Construction Industry Security of Payment Act 2002* (Vic) (Old Act) came into force on 31 January 2003, with a series of amendments being made to the Act on 30 March 2007 (New Act)

Phoenix International Group Pty Ltd, the applicant, (Phoenix) entered into construction contracts with Resources Combined No 2 Pty Ltd (first respondent**)** and the two other respondents during 2006. The contracts with the first and second respondent were terminated in February 2009 and with the third respondent in February 2010.

Several months after termination, Phoenix submitted 'payment claims' to the respective respondents. The respondents refused to pay on the grounds that the claim did not conform with the Old Act. The claim proceeded to adjudication, where the adjudicator found in favour of Phoenix.

Following the adjudication, the respondents neither made payment of the determined amount, nor gave security to Phoenix. It was in those circumstances that Phoenix, pursuant to section 28 of the New Act, applied to the court for an order to recover from the respondents the amount of the adjudication as a debt.

Vickery J, at first instance, found in favour of the respondents on the basis that Phoenix followed the incorrect procedure in failing to give the required notice under section 27 of the Old Act. Vickery J held that the provisions of the Old Act continue to apply to contracts entered into between 31 January 2003 and 30 March 2007, and the provisions of the New Act apply to contracts entered into after that date. In this case, the provisions of the Old Act apply because the contracts were entered into before 30 March 2007.

Phoenix International Group Pty Ltd appealed that decision.

Decision

The Court of Appeal held that refusal to accede to the application for leave to appeal would not cause such injustice that leave should be granted. Accordingly, the Court of Appeal followed Vickery J's reasoning and dismissed the application for appeal.

Western Australia cases

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

Ertech Pty Ltd v GFWA Contracting Pty Ltd [2010] WASC 181

Significance

This is an example of the difficulties a party will face in opposing the granting of leave to enforce a determination of an adjudicator under the CCA.

Facts

An adjudicator made a determination under the CCA in favour of Ertech Pty Ltd, the plaintiff, (Ertech). Under this determination GFWA Contracting Pty Limited, the defendant, (GFWA) was required to pay a specified amount by a fixed date. That amount was not paid. The dispute between the parties was referred to arbitration under the terms of the building contract, and directions were made by the arbitrator in those proceedings. In the meantime, Ertech applied to the Supreme Court for leave to enforce the adjudicator's determination. GFWA sought that Ertech's application be adjourned sine die, dismissed or a suspension order be made pursuant to the *Civil Judgements Enforcement Act 2004 (WA)* (CJEA) pending determination of the arbitration proceedings.

Decision

Acting Master Chapman cited with approval Beech J's view in *O'Donnell Griffin Pty Ltd v John Holland Pty Ltd [2008] WASC 58* that 'an application for leave to enforce an adjudicator's determination is not an occasion to revisit the correctness of the decision made by the adjudicator, or to open up the merits of any underlying dispute(s) between the parties. The adjudicator's decision determines only whether a payment must be made pending the determination (by agreement, arbitration or litigation) of any substantive dispute'. Acting Master Chapman was content that the arbitrator could make an order for the return of any sum paid under the determination considered appropriate. In considering whether the enforcement of the judgement should be suspended under the CJEA, Acting Master Chapman referred to the legislative intent behind the CCA of 'paying now and arguing later', citing with approval Keane J's comments on the subject of the equivalent legislation in Queensland *(the Building and Construction Industry Payments Act 2004 (Qld))* in *RJ Neller Building Pty Ltd v Ainsworth [2008] QCA 397.*

On the evidence presented, the court was not persuaded that the arbitration proceedings would be rendered nugatory should the suspension order not be made. Accordingly, the court declined to make an order suspending the enforcement of the determination.

Longmont Consolidated Pty Ltd and Fleetwood Pty Ltd [2010] WASAT 22 and [2010] WASAT 23

Significance

In a standard contract with a provision for making progress payments for agreed invoices, only where the contract is silent on a payment mechanism when the parties are in dispute, an adjudicator or the State Administrative Tribunal (SAT) may imply the terms set out in Schedule 1 of CCA into the contract.

Facts

Longmont Consolidated Pty Ltd, the applicant (Longmont) commenced two applications for adjudication concerning its claim for transport costs and spotter costs under a construction contract. Both adjudication applications concerned the interpretation of a payment provision which required:

- Longmont to submit estimates of work performed and projected for performance by the 20th of each month
- Fleetwood Pty Limited, the respondent (Fleetwood) to review the estimates with Longmont, and upon approval to return them for submission with Longmont's invoice on the 1st of the following month
- Fleetwood to pay the approved invoice amount within 30 days after receipt of a correct invoice.

The adjudicator dismissed both adjudication applications on the basis that Longmont's applications were out of time. Longmont applied for review of the adjudicator's dismissal.

Decision

On an application for review, the SAT found that:

- the payment mechanism in the contract only operated when an approved invoice was submitted but was silent when an invoice was not approved. The contract did not specify 'when and how' to respond to a payment claim and the due date for payment the claim.
- the payment provision covers estimates of work

performed and projected for performance for approval, but it did not provide for making a payment claim
- the provisions of Schedule 1 of the CCA are implied into the contract under sections 16, 17 and 18 of the CCA
- alternatively, the payment provision purported to modify or restrict the operation of the CCA and had no effect by virtue of section 53 of the CCA.

As no payment claim was ever made, the adjudication application was dismissed on the basis that it was not made within 28 days of a payment dispute arising.

MCC Mining (Western Australia) Pty Ltd v Thiess Pty Ltd [2010] WASAT 140

Significance

This case reaffirms the previous position taken by the State Administrative Tribunal (SAT) in *Match Projects Pty Ltd and Arccon (WA) Pty Ltd [2009] WASAT 134* (Match Case) that the CCA only confers a right of SAT review for dismissed adjudication applications by an adjudicator. There is no right of SAT review for decisions by adjudicators not to dismiss an adjudication application.

Facts

MCC Mining (Western Australia) Pty Ltd, the applicant, (MCC) applied to the SAT for review of an adjudicator's determination not to dismiss Theiss Pty Ltd's, the respondent, (Theiss) adjudication application. MCC sought to demonstrate that the Match Case (which decided that an adjudicator's decision not to dismiss an adjudication application was unreviewable by the SAT) was wrong.

MCC sought an order to refer the question of whether the SAT could hear such applications to the Court of Appeal. It submitted that this was more time and cost effective, and in the public interest. MCC also argued that section 43 of the CCA (which provides that leave of the court is required before enforcement of an adjudicator's determination) was substantially similar to the terms of section 33 of the *Commercial Arbitration Act 1985*. Therefore, as is the case for arbitral awards, there must be circumstances where it is possible to set aside an adjudicator's determination.

Decision

The SAT dismissed MCC's application and found that:
- the Match Case decision be upheld and section 46(1) of the CCA does not confer a right of review by the SAT of an adjudicator's refusal to dismiss an adjudication application
- unlike an arbitral award, an adjudicator's determination does not finally determine the rights of the parties. The considerations for determining whether to grant leave to enforce an adjudicator's determination and an arbitral award are not necessarily the same
- even though an applicant may apply for a prerogative writ for jurisdictional error for an adjudicator's decision not to dismiss an adjudication application, section 46(1) of the CCA should not be construed to extend the SAT's ability to review a decision not to dismiss an application for adjudication
- rather than referring the question of law to the Court of Appeal, the appropriate course was for MCC to seek leave to appeal SAT's dismissal of its application for review.

Perrinepod Pty Ltd v Georgiou Building Pty Ltd [2010] WASAT 136

Significance

This case confirms that a decision of an adjudicator not to dismiss an adjudication application is not reviewable by the State Administrative Tribunal (SAT).

Facts

Perrinepod Pty Ltd, the applicant applied for a review of a decision of an adjudicator under the CCA not to dismiss the adjudication application, pursuant to section 31(2)(a) of the CCA for complexity. The adjudicator proceeded to make a determination on the merits.

Decision

The application was dismissed as the SAT concluded that its right of review was limited to a decision to dismiss an adjudication application on the grounds set out section 31(2)(a) of the CCA without making a determination on the merits.

The right of review under section 46(1) is limited to a 'decision'. The SAT held that the word 'decision' in this context can only mean a decision to dismiss an application consistent with its reasoning in *Match Projects Ltd v Arccon (WA) Pty Ltd [2009] WASAT 134*.

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