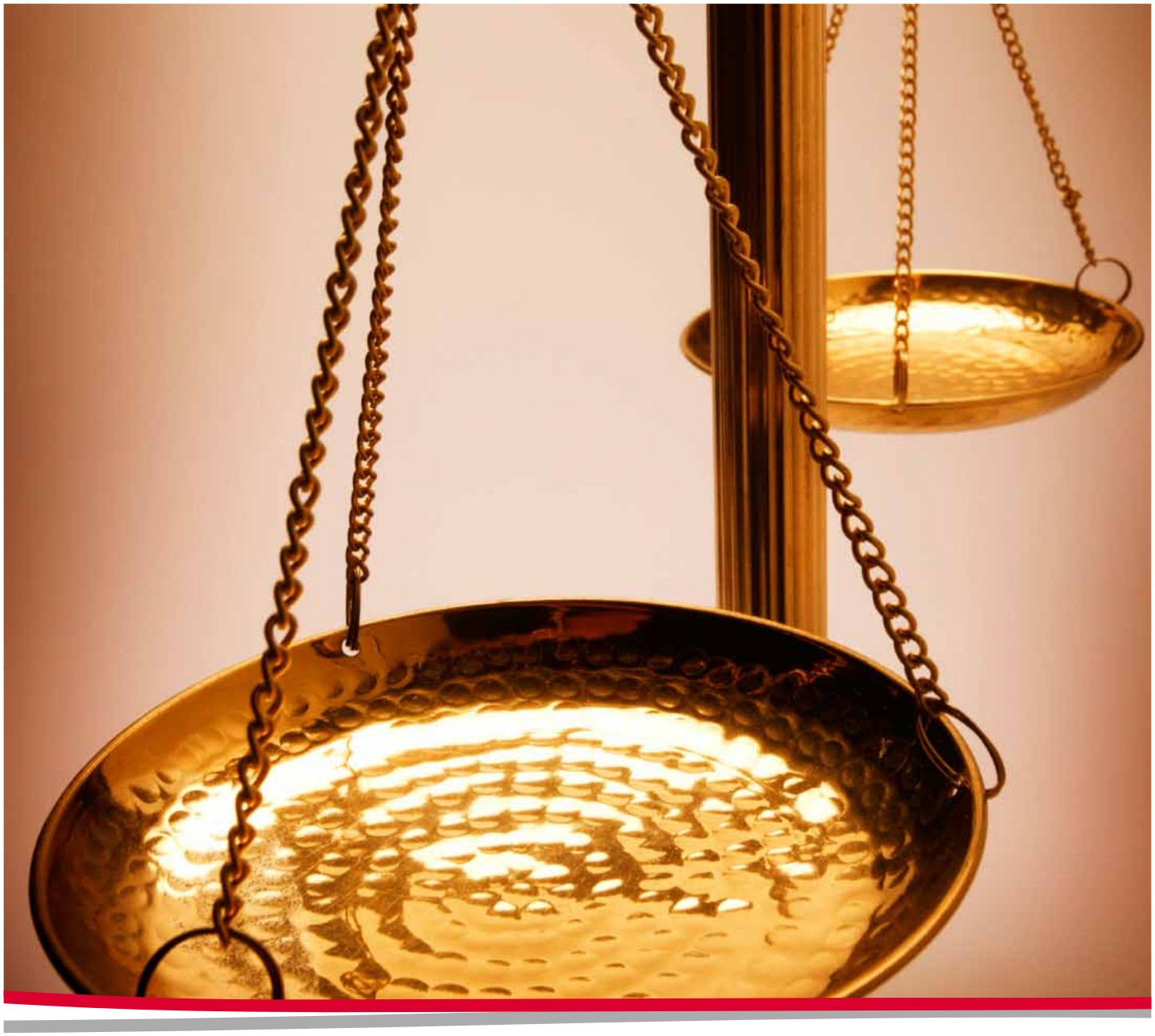

Security of Payment 2011

SOP Roundup for 2011

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Index

NEW SOUTH WALES CASES

QUEENSLAND CASES

VICTORIA CASES

WESTERN AUSTRALIA CASES

NORTHERN TERRITORY CASES

National overview 2011

With no ground breaking decisions, and an across the board decline in the number of adjudications and decisions (except for Western Australia), 2011 was rather a quiet year for security of payment across Australia.

Nevertheless, there were still plenty of interesting decisions — notably *Northbuild Constructions* in Queensland, which confirmed the NSW Court of Appeal's decision in C*hase Oyster Bar v Hamo* that the Supreme Court of Queensland retains the inherent jurisdiction to review adjudicators' decisions, was to be applied in Queensland, and *Seabay Properties* in Victoria which confirmed that an offsetting claim for liquidated damages was an 'excluded amount' under the Victorian Act and therefore not available to a respondent.

In New South Wales a number of decisions clarified the scope of 'jurisdictional error' referred to in *Chase Oyster Bar v Hamo,* but the most talked about decision was in *Downer EDI v Parsons Brinckerhoff* which held, rather surprisingly, that service of a payment claim on an office that had nothing to do with the contract for which the payment claim related was good service because it was an 'ordinary place of business'.

South Australia finally commenced its security of payment legislation on 10 December 2011.

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Developments in 2011

NEW SOUTH WALES

Overview

Minter Ellison's *Security of Payment Roundup 2010* identified *Chase Oyster Bar v Hamo Industries (Chase)* as the most noteworthy decision of 2010. In *Chase* the court found that where an adjudicator committed a jurisdictional error in making their determination under the *Building and Construction Industry Security of Payment Act (NSW) 1999* (**NSW Act**), the court could issue an order setting aside, or quashing, that determination. The court however left largely undefined the nature and scope of the term jurisdictional error.

In the 12 months after *Chase*, courts in various jurisdictions have endeavoured to further define the term. In doing so, the decisions have attempted to clarify the role and task of adjudicators.

In New South Wales, the term jurisdictional error was further defined or clarified to include instances where the adjudicator:

- wrongly found that there was a valid construction contract;
- valued construction work performed outside of New South Wales (even where the goods are sourced in New South Wales and a substantial amount of the construction work under the contract was carried out in New South Wales);
- proceeded to determine an adjudication where a claimant's notice of intention to apply for adjudication of a payment claim was given before the expiry of the statutory period under the NSW Act in which the respondent may pay the payment claim or provide a payment schedule;
- considered new reasons in an adjudication response that were in breach of the natural justice provisions in section 20(2B) of the NSW Act;
- proceeded to determine an adjudication where notice and/or an opportunity to provide a payment schedule had not been afforded to a respondent pursuant to s17(2) of the NSW Act; and
- failed to carry out the task with which they were charged and/or went beyond the scope of the matters in dispute in the adjudication.

Also, as foreshadowed in last year's *Roundup*, this year saw the introduction of the *Building and Construction Industry Security of Payment Amendment Act 2010* (NSW) and the subsequent amendment of the NSW Act on 28 February 2011. The new amendments entitle the claimant to submit a payment withholding request upon the respondent at the time when the claimant issues an adjudication application, thereby avoiding the risk of the respondent being paid by the principal and dispersing those funds prior to the issue of the determination and registration of it by the claimant as an adjudication certificate.

Other issues that have arisen from the various decisions in the past year underline attempts to bring under scrutiny adjudicators' exercise of their statutory powers and highlight the importance of natural justice throughout the adjudication process. These issues are summarised below.

Service

The court, in *Downer EDI Works Pty Ltd v Parsons Brinckerhoff Australia Pty Ltd* [2011] NSWCA 78, established that:

- a respondent may have more than one ordinary place of business for the service of payment claims; and
- the place of business does not need to have a direct connection with the transaction which is the subject of the claim.

Having been upheld on appeal, this somewhat peculiar decision comes as a warning to all potential respondents to security of payment claims to ensure there is an appropriate process for recognising when security of payment documents have been received and that they are promptly acted on.

Natural justice / procedural fairness

Concern over denial of natural justice throughout the adjudication process is a trend which continues to manifest in actions in court. Recent decisions highlight the need to balance natural justice with practical considerations.

In *Clyde Bergemann v Varley Power* [2011] NSWSC 1039 (**Clyde**), the court made the point that:

- any entitlement to natural justice and good faith must accommodate the scheme of the NSW Act, including the short timeframe for an adjudicator to issue a determination and the magnitude of the task the adjudicator has to perform; and
- the adjudicator's obligation to act in good faith requires that they turn their minds to the statutory task entrusted to them, engage intellectually with the disputes that the parties have framed, and deal with those disputes in a way that is reasoned, and not perverse, arbitrary or capricious.

With regard to denials of procedural fairness arising from a failure of the adjudicator to consider certain issues, the court in *Clyde* held that it is not open to a party to criticise the adjudicator where that party does not draw the issue to the attention of the adjudicator.

This decision, however, must be read in conjunction with *St Hilliers Contracting Pty Ltd v Dualcorp Civil Pty Ltd* [2010] NSWSC 1468 in which it was held that the adjudicator's failure to provide the parties with an opportunity to make submissions on the meaning of an undefined and contentious term in the contract constituted a denial of natural justice.

Similarly, the court in *Owners Strata Plan 61172 v Stratabuild Ltd* [2011] NSWSC 1000 considered that a failure by the adjudicator to have regard to reports that are material to their determination can amount to a failure to accord procedural fairness, consequently invalidating the determination.

Re-agitation of claims

- In the absence of any payment schedule, the mere service of a notice of an intention to make an adjudication application is not sufficient to constitute an election between the remedies in section 15(2)(a), particularly where there is no evidence that the respondent has acted in any way on the basis that the section 17(2) notice was served. In this case, it was found that the claimant had not made an election in the letter that prevented it from bringing its claim in the proceedings: *Cromer Excavations Pty Ltd v Cruz Concreting Services Pty Ltd* [2011] NSWSC 51.
- Where an adjudicator correctly holds that they do not have jurisdiction to determine an adjudication application under section 22 of the NSW Act, the court will not allow a claimant to make a new adjudication application under section 17 of the NSW Act: *Olympia Group (NSW) Pty Ltd v Hansen Yuncken Pty Ltd & Anor* [2011] NSWSC 165.

Other notable decisions

- Despite the existence of an arbitration agreement, arbitration cannot be a substitute for an adjudication under the NSW Act, and a claim under section 15(2)(a)(i) of the NSW Act cannot be arbitrated. The provisions of section 34 of the NSW Act render void any attempt to exclude, modify or restrict the operation of the NSW Act: *Siemens Ltd v Origin Energy Uranquinty Power Pty Ltd* [2011] NSWSC 195.
- An umbrella agreement between an insurer and a builder whereby the builder could be required to fix up residential property of insureds was residential building work as the exclusion for residential building work was not triggered because the work was actually being done for the insurer not the insureds who resided at the premises: *DJE Building Services Pty Ltd v Insurance Australia Limited* [2011] NSWDC 95.
- A payment schedule may indicate why the scheduled amount is less than the claimed amount and the reason for withholding payment under section 14(2)(b) of the NSW Act by referring to material extrinsic to the payment schedule: *Owners Strata Plan 61172 v Stratabuild Ltd* [2011] NSWSC 1000.

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

QUEENSLAND

Statistics

In financial year 2010/2011, 674 adjudication applications were lodged, about 25% less than last financial year. The total value of adjudicated decisions was $68.4 million, down by a third from FY 2010/2011. The average claim was $350,784. The rate of judgments from the Supreme Court has decreased.

Technical issues

Judgments have given additional clarity on:

- the degree to which construction work needs to be identified in a payment claim: *T & M Buckley Pty Ltd v 57 Moss Rd Pty Ltd* [2010] QCA 355; *QCLNG Pipeline Pty Ltd v McConnell Dowell Constructors (Aust) Pty Ltd* [2011] QSC 292;
- when payment claims can be made: each payment claim should be made in relation to a different reference date: *VK Property Group Pty Ltd v AAD Design Pty Ltd* [2011] QSC 54; payment claims cannot be made after termination: *Walton Construction (Qld) Pty Ltd v Corrosion Control Technology Pty Ltd* [2011] QSC 67;
- service of payment claims: payment claims must be served on the party liable to make the payment under a construction contract, unless there is an express contractual provision to the contrary: P*enfold Projects Pty Ltd v Securcorp Limited* [2011] QDC 77;
- the contents of payment schedules: a respondent must put all the reasons it relies on in its payment schedule, and if it does not do so, then it cannot establish jurisdictional error if the adjudicator does not consider reasons raised in an adjudication response: *James Trowse Constructions Pty Ltd v ASAP Plasterers Pty Ltd* [2011] QSC 145; failure to expressly put facts at issue in a payment schedule may amount to an admission of those facts: *John Holland Pty Ltd v Walz Marine Services Pty Ltd* [2011] QSC 39;
- the contents of adjudication responses: it is acceptable to include new material that explains matters raised in the payment schedule in an adjudication response: *Syntech Resources Pty Ltd v Peter Campbell Earthmoving (Aust) Pty Ltd* [2011] QSC 293;
- the detail an adjudicator needs to include in a determination: an adjudicator is not required to set out every detail of the documentation considered: *Northbuild Construction Pty Ltd v Central Interior Linings Pty Ltd* [2011] QCA 222;
- the amount of security to be provided when a successful claimant has been restrained from obtaining an adjudication certificate: the security will extend to the interest accruing in accordance with the adjudicator's determination: *Hansen Yuncken Pty Ltd v Ian James Ericson (2)* [2010] QSC 457; and
- the interaction between enforcement of rights under the Queensland Act and pursuant to the contract: rights may be pursued concurrently: *Vantage Holdings Pty Ltd v JHC Developments Group Pty Ltd* [2011] QSC 155.

Re-agitation of claims

Differences are emerging between re-agitation cases in Queensland and New South Wales, caused by slight differences in the wording of section 32 of the Queensland Act and section 26 of the New South Wales Act. In Queensland, it is possible to make successive payment claims for identical amounts for the same work in circumstances where the second payment claim was made after a further reference date has arisen and in circumstances where a previous adjudication determination has been found to be void: *Spankie v James Trowse Constructions Pty Ltd* [2010] QCA 355.

A claimant is not precluded from making a payment claim for an unpaid amount claimed in a previous adjudication where the merits of the claim have not been determined by the original adjudicator: *VK Property Group Pty Ltd v AAD Design Pty Ltd* [2011] QSC 54.

Jurisdictional challenge

The Queensland Court of Appeal followed the line of reasoning adopted by the New South Wales Court of Appeal in *Chase Oyster Bar v Hamo Industries Pty Ltd,* confirming that the court retains inherent jurisdiction to review adjudicators' decisions in cases of jurisdictional error: *Northbuild Construction Pty Ltd v Central Interior Linings Pty Ltd* [2011] QCA 222.

Since that Court of Appeal judgment in February 2011, there have been a number of cases in which the court has reviewed adjudicators' decisions

for jurisdictional error. In some cases, conduct of the adjudicator was found not to constitute jurisdictional error: *Northbuild v Construction Pty Ltd v Central Interior Linings Pty Ltd* [2011] QCA 222, while in others some of the adjudicator's conduct was regarded as jurisdictional error: *Syntech Resources Pty Ltd v Peter Campbell Earthmoving (Aust) Pty Ltd* [2011] QSC 293; *QCLNG Pipeline Pty Ltd v McConnell Dowell Constructors (Aust) Pty Ltd* [2011] QSC 292.

Even when jurisdictional error is found, the court has a discretion and, unless there has been a substantial breach of the rules of natural justice, will not always exercise its discretion to find the adjudicator's determination void: *Hansen Yuncken Pty Ltd v Ian James Ericson (No. 3)* [2011] QSC 327.

In cases where jurisdictional error is found, the error taints the entire decision with the consequence that the entire decision will be set aside; the court cannot sever a part of the decision: *James Trowse Constructions Pty Ltd v ASAP Plasterers Pty Ltd* [2011] QSC 145.

In *Hansen Yuncken Pty Ltd v Ian James Ericson (No. 3)* [2011] QSC 327, the judge expressed doubt as to the court's power to affect the operation of the Act by substituting a reduced amount for the adjudicated amount because according to the Act an adjudicated amount is one that can be fixed only within the adjudication.

Fraud

In November [2011], a judge at first instance in *Hansen Yuncken Pty Ltd v Ian James Ericson (No. 3)* [2011] QSC 327, observed that manifest fraud in procuring a decision was a distinct ground for the award of certiorari and that the ground of fraud had not been the subject of either *Chase Oyster Bar v Hamo Industries Pty Ltd* or *Northbuild Construction Pty Ltd v Central Interior Linings Pty Ltd* [2011] QCA 222. The High Court in *Kirk* specifically excluded consideration of issues of fraud.

The judge gave equitable relief in respect of fraud and found that the fraud did not taint the whole adjudication decision: *Hansen Yuncken Pty Ltd v Ian James Ericson (No. 3)* [2011] QSC 327.

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

VICTORIA

Although, 2011 was a relatively quiet year in Victoria, one notable development was the decision of *Vickery J in Seabay Properties Pty Ltd v Galvin Construction Pty Ltd* [2011] VSC 183.

The Supreme Court determined that liquidated damages are excluded amounts for the purposes of the *Building and Construction Industry Security of Payment Act 2002* (Vic) (**Victorian Act**). The Victorian Act expressly prohibits a payment claim from including an excluded amount. An excluded amount includes, inter alia, time related costs and any amount claimed in damages for breach of contract. The court held that liquidated damages are captured by this definition.

The court held that, despite the absence of an express provision in the Victorian Act prohibiting a respondent to a payment claim from including excluded amounts in a payment schedule, a respondent was not permitted to do so: *Seabay Properties Pty Ltd v Galvin Construction Pty Ltd* [2011] VSC 183.

This decision was made in the context of the court's interpretation of the Victorian Act. The court emphasised that the intent of the Victorian Act is to maintain cash flow of claimants and create a mechanism for a respondent to pay now and argue later. This decision is likely to have significant implications on the Victorian construction industry and current contract administration practices. Seabay appealed the court's decision but has subsequently gone into liquidation. Accordingly, this decision is the current authority in Victoria.

The court, in the same case, also confirmed that the early submission of a payment claim did not render the payment claim invalid. Vickery J upheld his previous decision in *Metacorp Pty Ltd v Andeco Construction Group Pty Ltd* [2010] VSC 199.

The court upheld a previous ruling confirming that documents prepared in anticipation of an adjudication application under the Victorian Act attracted litigation privilege: *Dura (Aust) Constructions Pty Ltd v Hue Boutique Living Pty Ltd* [2011] VSC 477.

The court also examined the sufficiency of documentation provided in support of an adjudication application: *Claude Neon Pty Ltd v Rhino Signmakers Pty Ltd* [2010] VSC 619.

Finally, the court explored the circumstances in which an adjudicator's determination will be amendable to judicial review, in the context of an adjudicator's determination regarding section 7(2) of the Victorian Act. Importantly, it was noted that adjudicators were in fact exposed to an increased risk of falling into jurisdictional error: *Director of Housing (Vic) v Structx Pty Ltd t/as Bizibuilders and Anor* [2011] VSC 410.

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

WESTERN AUSTRALIA

Statistics

In financial year 2010/2011, 197 adjudication applications were lodged, about 15% more than last financial year. The total value of adjudicated decisions was $308 million, up by a third from FY 2010/2011. The average claim was $1,566,262.25. As distinct from New South Wales and Queensland, the number of applications in Western Australia is still increasing, but the rate of increase is slowing, suggesting the frequency is starting to plateau.

There were four cases decided this year: one by the State Administrative Tribunal (**SAT**), two by the Supreme Court and one by the Court of Appeal. All but one were based on challenges to jurisdiction, and the odd one out concerned the repetition of payment claims, or what has come to be known as recycling of claims, a practice accepted in other states.

Jurisdiction

The question of jurisdiction remains in a state of some flux, although much of the uncertainty was resolved. To challenge a determination, jurisdictional error must have occurred, and there is also the possibility that a denial of procedural fairness, if established, could give rise to an entitlement to quash a determination.

As mentioned above, of the four cases decided this year, three involved questions of jurisdiction.

In the first case, *Thiess Pty Ltd v MCC Mining (Western Australia) Pty Ltd* [2011] WASC 80, it was determined that the power of review granted to the SAT by section 31(2)(a) of the WA Act is confined to jurisdictional error. What is considered to be a jurisdictional error remains uncertain but is not merely an error on the face of the record.

This was confirmed in *Re Graham Anstee-Brook; Ex Parte Mount Gibson Mining Ltd* [2011] WASC 172. This decision did however, also discuss and leave open arguments that, while section 46(3) of the WA Act (limiting the right of review) might restrict the right to review for error of law on the face of the record, it may not restrict a challenge on the basis of procedural fairness.

In *Perrinepod Pty Ltd v Georgiou Building Pty Ltd* 2011] WASCA 217, the court settled that section 31(2)(a) and (b) are alternatives: there is either a decision to dismiss under subparagraph (a); or a determination on the merits. The only type of decision that can be challenged is a decision to dismiss, and there is no ability to challenge an adjudicator's decision to hear an application in the SAT.

Although effectively closing the door on a respondent's ability to challenge a decision to hear an application under section 46(1) of the WA Act, the Court of Appeal confirmed through its (obiter) comments about the availability of judicial review and suggestions that prerogative relief, such as writs of certiorari, could be available to challenge a decision to entertain an application.

Recycling of payment claims

The concept or recycling payment claims still seems to be troubling the jurisdiction. Claims not forwarded to adjudication within the 28-day time limit under the Act will be prohibited from participating in the process. This is distinct from the east coast regime where, provided those claims were not the subject of a previous adjudication determination, the claims can be recycled.

There is a difference emerging between the re-agitation, or recycling, of claims cases in Western Australia, the Northern Territory and the eastern states (mostly Queensland and New South Wales).

In Queensland, it is possible to make successive payment claims for identical amounts for the same work: *Spankie v James Trowse Constructions Pty Ltd* [2010] QCA 355. A claimant is not precluded from making a new claim for an amount claimed in a previous claim where the merits of the claim have not been determined by a previous adjudicator *VK Property Group Pty Ltd v AAD Design Pty Ltd* [2011] QSC 54.

This is similar (but not identical) to the position in New South Wales which only prohibits claims from

being re-agitated, or recycled, if they have been the subject of a previous determination (see for example *Urban Traders v Paul Michael* [2009] NSWSC 1072 and *CC No1 v Reed Constructions* [2010] NSWSC 294).

In Western Australia, however, the SAT, in *Georgiou Group Pty Ltd v MCC Mining (Western Australia) Pty Ltd* [2011] WASAT 120, has this past year stated firmly that (at paragraph 3):

'… the mandatory time limit within which it was thereafter necessary to make an application for adjudication, non-compliance with which required the application to be dismissed, would be rendered otiose if a claim for the same work could be repeated…'

and concluded that no repeated claims for the same work, regardless of whether they have been to adjudication or not, are permitted. It is not certain, however, and this decision could only be obiter on the question of whether a final payment claim may recycle previous claims.

This reasoning, that claims cannot be repeated on the basis that the time limits would be otiose, is confusing in the context of the other jurisdictions which have similar time limits (section 17(3) and section 21(3) of the New South Wales and Queensland equivalents respectively) but not the same difficulty.

As a further aside on this issue, none of the decisions in Western Australia have yet addressed whether claims already sent to adjudication in one instance (and therefore prohibited from being recycled in subsequent progress claims) may, however, be recycled in the final payment claim which usually expresses a clear intention to resolve all outstanding claims, even those the subject of previous progress claims.

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

NORTHERN TERRITORY

One significant security of payment case was heard, being an appeal from the Supreme Court decision of *GRD Group (NT) Pty Ltd v K&J Burns Electrical Pty Ltd* [2010] NTSC 34. In *K&J Burns Electrical Pty Ltd v GRD Group (NT) Pty Ltd* [2011] NTSCA 1 the Court of Appeal set aside the orders by the Supreme Court in the 2010 decision and confirmed that for the purposes of the *Construction Contracts (Security of Payments) Act 2004* (NT) (**NT Act**) a valid payment claim must comply with any requirements in the relevant construction contract. If it does not, then there is no payment claim under the contract and time periods for adjudicating a payment dispute do not run under the NT Act.

> *Read the detailed summary of above case in the Northern Territory cases section of this report.*

AUSTRALIAN CAPITAL TERRITORY

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

SOUTH AUSTRALIA

The *Building and Construction Industry Security of Payment Act 2009* (SA) (**SA Act**) commenced on 10 December 2011. The local construction industry will need to adjust to the application of the SA Act, and we expect that, as in the other states, the SA Act will be judicially considered in due course.

The *Building and Construction Industry Security of Payment Regulations 2011* (SA) (**SA Regulations**) commenced on the same date as the SA Act. The SA Regulations clarify that the SA Act will apply to project management, contract management and consultancy services related to construction work. The SA Regulations also set out the eligibility criteria for adjudicators. There are currently no authorised nominating authorities listed in South Australia; however, this will change once applications are processed by Consumer and Business Services.

TASMANIA

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

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'.

Clyde Bergemann v Varley Power [2011] NSWSC 1039

Significance

An adjudicator will not act outside jurisdiction if a party's claim for a progress payment exceeds the amount the party is entitled to under the relevant contract. If required to consider issues of law, an adjudicator will not fall into jurisdictional error simply because of an error of law in determining those questions of law. Any error in the adjudicator's construction of the relevant contract is not a jurisdictional error, because it is made in undertaking the very task given to the adjudicator. The obligation of the adjudicator to act in good faith and to afford natural justice must accommodate the scheme of the NSW Act.

Facts

Clyde Bergemann, the plaintiff, (**Clyde**), was contracted to do some works. Clyde subcontracted part of the works to Varley Power, the first defendant, (**Varley**). Following completion of the subcontracted works, Varley served a payment claim of about $3.955 million. Clyde provided a payment schedule with a scheduled amount of $300,000. The dispute was referred to adjudication where the adjudicator determined that Varley was entitled to a progress payment of $2.5 million. Clyde commenced proceedings on the basis that the adjudicator had:

- committed jurisdictional error in finding a contractual entitlement to an amount that exceeded the maximum amount payable in accordance with the terms of the contract; and
- denied Clyde natural justice, as the adjudicator had failed to exercise his statutory powers in good faith by failing to address something that Clyde had not raised in the payment schedule and/or the adjudicator did not provide sufficient reasons for his conclusion.

Decision

Clyde's challenge to the adjudicator's determination was unsuccessful. On the issue of jurisdictional error, the court held:

- if a determination depends on resolution of the relevant terms of a contract, it is implicit in the jurisdiction conferred on the adjudicator by the NSW Act to decide such a question;
- stipulating that an amount must be claimed in accordance with the terms of the contract is not a condition of jurisdiction, but a description of the mechanical part of the task to be performed by the adjudicator; and
- part of the adjudicator's task is to identify the contractual provisions that are relevant to quantification of the progress payment, to decide the proper construction of those provisions and to apply them to the facts.

The court affirmed the established body of law concerning whether or not there had been a denial of natural justice and/or failure by the adjudicator to act in good faith:

- any entitlement to natural justice and good faith must accommodate the scheme of the NSW Act, including the short timeframe for an adjudicator to issue a determination and the magnitude of the task the adjudicator has to perform;
- the adjudicator's obligation to act in good faith requires that they turn their minds to the statutory task entrusted to them, engage intellectually with the disputes that the parties have framed, and deal with those disputes in a way that is reasoned, and not perverse, arbitrary or capricious;
- an adjudicator's reasons need not be lengthy or detailed;
- it is not sufficient to put lengthy but diffused submissions before the adjudicator and expect the adjudicator to review every detail that may be gleaned from all material; and
- if Clyde did not draw a matter to the attention of the adjudicator, it is not open to Clyde to criticise the adjudicator for having failed to deal with it.

The court found that the adjudicator had complied with the above principles in making his determination.

Cromer Excavations Pty Ltd v Cruz Concreting Services Pty Ltd [2011] NSWSC 51

Significance

Where a party seeks to claim payment under the NSW Act in circumstances where no payment schedules have been provided, the mere service of a notice of an intention to make an adjudication application is not sufficient to constitute an election to make that application.

Facts

Cromer Excavations Pty Ltd, the plaintiff, (**Cromer**) submitted tax invoices to Cruz Concreting Services Pty Ltd, the defendant, (**Cruz**) for demolition and excavation work which Cromer claimed to have carried out for Cruz pursuant to a quotation which Cromer submitted to Cruz. No payment schedules were served by Cruz.

Cromer issued a letter to Cruz stating that Cromer had elected to apply for adjudication of the payment claims unless Cruz served a payment schedule or paid the amount of the payment claim within five business days. No payment schedule was served or amount paid by Cruz. Despite the statement in the letter, Cromer brought proceedings in court to recover the debt due and did not proceed to an adjudication.

Cruz submitted that:

- there was no construction contract between the parties to bring into consideration the provisions of the NSW Act;
- there was no evidence of when the invoices were served; and
- Cromer, in the letter, had made an election under section 15(2)(a) of the NSW Act to make an adjudication application in relation to the payment claim, such that it could not resile from that election and bring proceedings to recover the unpaid portion of the claimed amount as a debt due.

Decision

Davies J held that there was an arrangement under which Cromer undertook to carry out construction work and to supply goods and services for Cruz, is not a construction contract, for the purposes of section 4 of the NSW Act.

The matter of when the invoices were served was irrelevant as no payment schedules had been issued in any event.

Following McDougall J in *Rojo Building Pty Limited v Jillcris Pty Limited* [2007] NSWSC 880, Davies J held that the mere giving of notice under section 17(2) does not, without anything more, amount to an election between the remedies in section 15(2)(a), particularly where there is no evidence that Cruz had acted in any way on the basis that the section 17(2) notice was served, whether by providing the payment schedule that section 17(2)(b) provides for, or otherwise. Therefore, Cromer had not made an election in the letter that prevents it from bringing its claim in the proceedings.

DJE Building Services Pty Ltd v Insurance Australia Limited [2011] NSWDC 95

Significance

The existence of an arrangement under the NSW ct involving the performance of residential building work does not exclude any discrete construction contract within the arrangement from the operation of the NSW Act.

Facts

Insurance Australia Limited, the defendant, (**IAL**) engaged DJE Building Services Pty Ltd the plaintiff, (**DJE**) under a building services contract (**BSC**) to perform work on residential property. The residential property was the subject of a claim by the owners of the property (**Owners**) under an insurance policy with IAL. Under the terms of the BSC, DJE entered into a standard form home building contract (**HBC**) with the Owners.

The BSC provided that IAL was liable to pay DJE for the work carried out by DJE to the property. The HBC governed the work performed by DJE at the property, but under the HBC the Owners had no obligation to pay DJE – that obligation rested with IAL under the BSC.

DJE performed the work and submitted a payment claim to IAL under the BSC (**payment claim**). Following a failure by IAL to provide a payment schedule as required under the NSW Act, DJE made an application for summary judgment.

In response to DJE's application, IAL argued that the combined agreements between DJE, IAL and the Owners constituted an arrangement that was excluded under the NSW Act as a result of section 7(2)(b), ie it was one for the carrying out of residential building work (within the meaning of the *Home Building Act 1989* (NSW)) on part of premises that the party for whom the work was carried out for resided in or proposed to reside in.

Decision

The court observed that the combined agreements between the three parties may have constituted an arrangement which itself might have been excluded by virtue of section 7(2)(b) of the NSW Act. However, the existence of that arrangement did not negate the validity of the BSC as a discrete construction contract for the purposes of the NSW Act. Consequently, the court determined that DJE was entitled to submit a payment claim under the NSW Act to IAL for work it performed under the BSC and awarded DJE summary judgment.

Downer EDI Works Pty Ltd v Parsons Brinckerhoff Australia Pty Ltd [2011] NSWCA 78

Significance

What is an appropriate place for service of payment claims in light of the definition of ordinary place of business? This case emphasised that payment claims may be served at a respondent's office that is not necessarily aware of any impending claim.

Facts

Downer EDI Works Pty Ltd, the plaintiff, (**Downer EDI**) engaged Parsons Brinckerhoff Australia Pty Ltd, the defendant, (**Parsons**) to provide design consultancy services which were administered by Parsons from its site office at Glendale, NSW.

In April 2010, Parsons sent a payment claim by facsimile under the NSW Act to Downer EDI at its head office in Melbourne and the project office at Broadmeadows. The document was not sent to the Glendale site office.

At first instance

The NSW Supreme Court considered whether the Melbourne office or the Broadmeadows office was Downer EDI's ordinary place of business under section 31 of the NSW Act. Hammerschlag J held that a respondent can have more than one ordinary place of business. On the facts, his Honour held that the Melbourne office of Downer EDI was an ordinary place of business as it was not only the registered office under the *Corporations Act 2001* (Cth), but was also a place where the person usually engages in activities which form a not insignificant part of the person's business. Hammerschlag J noted that the Melbourne office was the seat of Downer EDI's CEO and CFO and where business management, support services and finance support services are provided for the national operations of the business.

Interestingly, the court further suggested that the Broadmeadows office would also qualify as an ordinary place of business on the basis that Downer EDI administers and undertakes projects which are not an insignificant part of its ordinary business. The court held that there did not need to be a direct connection between the transaction which is the subject of the security of payment claim and the place of a respondent's ordinary place of business. On this basis, it did not matter that the project was not administered from the Broadmeadows office.

Downer EDI appealed the decision to the NSW Court of Appeal.

Appeal

The Court of Appeal substantially agreed with Hammerschlag J and dismissed the appeal with costs. The court held that a respondent may have more than one ordinary place of business and that it need not have the closest connection with the relevant works. However, the court also suggested that ordinary place of business may be limited to the place or places where the person ordinarily carries on that business and does not necessarily extend to every place where the respondent carries on any kind of business.

This decision highlights the importance for potential respondents to security of payment claims to ensure there is an appropriate process for recognising

when security of payment documents have been received and that they are promptly acted on.

It also highlights the need for:

- construction contracts to make clear the address and appropriate facsimile number for the provision of security of payment claims; and
- mail rooms, courier desks and reception areas to recognise the significance of receiving security of payment claims, and to promptly pass these on to the appropriate persons to ensure sufficient time to respond under the NSW Act.

Hanave Pty Ltd v Nahas Construction (NSW) Pty Ltd [2011] NSWSC 1476

Significance

An adjudicator of a payment claim under the NSW Act does not fall into error by taking into account a report by a third party, where the report contains a disclaimer stating that it should not be relied on by anyone other than the person for whom it was prepared.

Facts

Hanave Pty Ltd, the plaintiff, (**Hanave**) and Nahas Construction, the respondent, (NSW) Pty Ltd (**Nahas**) entered into an agreement to design and build a mixed use 17 level building in Sydney. Nahas served a payment claim on Hanave pursuant to section 13 of the NSW Act, which was supported by a report from a quantity surveyor, JPQS Pty Ltd (**JPQS report**). The report contained a disclaimer that stated that it was prepared exclusively for Nahas and should not be relied on by any third party for any purpose (**disclaimer**).

Hanave served a payment schedule for an amount that was much less than the claimed amount, and the matter went to adjudication.

The adjudicator considered the JPQS report and an engineer's report (**Voss report**) submitted by Hanave, and decided in favour of Nahas, preferring the JPQS report. He also noted that Nahas was entitled to rely on the JPQS report, and that Hanave did not contend otherwise.

Hanave challenged the adjudicator's decision on the basis that he failed to make a bona fide attempt to discharge his statutory function and that he denied it natural justice by:

- relying on the JPQS report notwithstanding the inclusion of the disclaimer in it; and
- failing to provide adequate reasons why he did so in light of the inclusion of the disclaimer.

Hanave submitted that JPQS Pty Ltd did not intend its report to be relied on by anyone except Nahas.

Decision

Hammerschlag J held that:

- JPQS' intention as expressed in the disclaimer does not affect the admissibility of the JPQS report;
- the adjudicator made no error in considering the JPQS report, as his preference for the JPQS report over the Voss report in his determination was not relying on it in the sense contemplated by the disclaimer; and
- the adjudicator provided adequate reasons for considering the JPQS report.

H M Australia Holdings Pty Limited v Eldebrand Pty Limited t/as Domus Homes & Anor [2011] NSWSC 604

Significance

A contract is not a construction contract for the purposes of the NSW Act if it provides only for the coordination of services being provided by others where those services fall within the NSW Act. The inclusion of a bonus provision calculated with reference to the value of work carried out will not fall foul of the NSW Act.

Facts

H M Australia Holdings Pty Limited, the plaintiff, (**H M Australia**) and Eldebrand Pty Limited t/as Domus Homes, the defendant, (**Eldebrand**) entered into a contract under which Eldebrand was to provide project management services for H M Australia (**Contract**).

Pursuant to the Contract, Eldebrand provided a variety of services including coordinating a survey and geotechnical investigation, finalising the architectural brief, coordinating the provision of a cost estimate by the builder, assisting with the selection of finishes

and coordinating with consultants and the builder to deliver the project. Eldebrand was to be paid a fixed fee plus a bonus payment of 50% of all savings affected below the $3,450,000 target mark. The building works were completed for $390,752 below the target mark.

Eldebrand submitted a payment claim in respect of the bonus payment. H M Australia failed to issue a payment schedule in respect of the payment claim. Eldebrand made an adjudication application, and the adjudication was determined in favour of Eldebrand.

H M Australia sought a declaration that the adjudication determination was void by reason of jurisdictional error. The grounds of the challenge included the following:

- that there was no construction contract between the parties to which the NSW Act applied; and
- in the alternative, if there was a construction contract between the parties, it was not one to which the NSW Act applied.

H M Australia submitted in the alternative that by virtue of section 7(2)(c) of the NSW Act the bonus was calculated otherwise than by reference to the value of work which ousted the jurisdiction of the NSW Act.

Decision

The court confirmed that, following the decision in *Chase Oyster Bar v Hamo Industries* [2010] NSWCA 190, it may quash an adjudicator's determination on the basis of a jurisdictional error, including a jurisdictional fact.

The court held that there was no construction contract between the parties as the contracted project management obligations did not encompass any of the matters listed in section 6(1)(b) of the NSW Act. None of the obligations Eldebrand had under the contract required anything more than an obligation to coordinate the services of those carrying out the relevant related services falling within the NSW Act and that this was not sufficient to fall within the NSW Act. On these grounds the court ordered that the adjudication is void and should be set aside.

The court also held that the bonus was calculated with reference to the value of work carried out and does not fall foul of the NSW Act.

Jantom Construction Pty Ltd v S&V Quality Interiors (NSW) Pty Ltd [2011] NSWSC 670

Significance

A claimant's notice of intention to apply for adjudication of a payment claim cannot be given before the expiry of the statutory period under the NSW Act in which the respondent may pay the payment claim or provide a payment schedule.

Facts

S&V Quality Interiors (NSW) Pty Ltd, the first defendant, (**S&V**) delivered a payment claim to Jantom Construction Pty Ltd, the plaintiff, (**Jantom**) on 9 March 2011. S&V subsequently gave notice of its intention to apply for adjudication of a payment claim before 23 March 2011. The adjudicator made a determination in favour of S&V on 11 April 2011.

Decision

Hammerschlag J set aside the adjudication determination as the purported notice of intention to apply for adjudication was given too early and therefore not valid. Jantom had up to and including 23 March 2011 to provide a payment schedule or pay the claim and failing which S&V could on the next day give notice of its intention to apply for adjudication of the payment claim.

As a valid notice is an essential prerequisite for a valid adjudication application and the valid subsequent appointment of the adjudicator, the adjudication application was ineffective and the adjudication determination was made without jurisdiction.

Olympia Group (NSW) Pty Ltd v Hansen Yuncken Pty Ltd & Anor [2011] NSWSC 165

Significance

Where an adjudicator correctly holds that they do not have jurisdiction to determine an adjudication application the court will not allow a claimant to make a new adjudication application under section 17 of the NSW Act. The NSW Act will not apply to a construction contract that deals with construction work outside of New South Wales under section 7(4) of the NSW Act,

even though goods are sourced in New South Wales and a substantial amount of construction work is carried out in New South Wales for the contract.

Facts

Olympia Group (NSW) Pty Ltd, the plaintiff, (**Olympia**) and Hansen Yuncken Pty Ltd, the first defendant, (**Hansen**) entered into a contract in which Olympia agreed to refurbish a building in Jervis Bay in connection with the redevelopment of HMAS Creswell. The area of the HMAS Creswell is a territory of the Commonwealth, which is governed by the laws of the Australian Capital Territory.

Olympia issued a payment claim under section 13 of the NSW Act including amounts payable to its subcontractors based in New South Wales for work performed in New South Wales. Hansen responded with a payment schedule under section 14 of the NSW Act and Olympia made an adjudication application pursuant to section 17 of the NSW Act.

Hansen wrote to the nominating authority requesting that the nominated adjudicator consider whether he has the jurisdiction to determine the adjudication application in light of section 7(4) of the NSW Act, which provides that the NSW Act does not apply to a construction contract to the extent that it deals with construction work carried out outside New South Wales and related goods and services supplied in respect of such work.

The adjudicator accepted his nomination but, without waiting for an adjudication response, caused the nominating authority to write to both parties to say that he did not have jurisdiction based on the location of the construction site outside of New South Wales.

Olympia claimed that:

- the adjudicator did have jurisdiction to determine the claim as the relevant construction work, or at least a substantial part of it, was carried out in NSW;
- the adjudicator failed to determine its claim within the time prescribed by section 21(3) of the NSW Act, and so Olympia is entitled to withdraw the original adjudication application (section 26(2)(a)) and make a new application under section 17; and
- alternatively, if the adjudicator did determine its claim under section 22 of the NSW Act, that determination was void.

Decision

Olympia's claim was dismissed. Ball J held that the adjudicator's decision was not a determination of the type contemplated by section 22 of the NSW Act. Rather it was a decision whether the NSW Act applied to the claim by Olympia having regard to where the relevant construction work was carried out, which goes to whether the adjudicator can exercise jurisdiction. It is not a question the determination of which would form part of the exercise of that jurisdiction.

As the adjudicator had failed to determine the application within the prescribed time, Olympia would be entitled to make a new adjudication application under section 17 but was not permitted to do so as the adjudicator had correctly considered that he did not have jurisdiction to determine the claim as the contract dealt with construction work or at least related goods and services supplied in respect of that work located outside New South Wales. The fact that goods were sourced in New South Wales and a substantial amount of work was carried out in New South Wales in connection with the contract does not necessarily mean that the contract dealt with construction work in New South Wales.

Owners Strata Plan 61172 v Stratabuild Ltd [2011] NSWSC 1000

Significance

- A payment schedule may indicate why the scheduled amount is less than the claimed amount and the reason for withholding payment under section 14(2)(b) of the NSW Act by referring to material extrinsic to the payment schedule.
- An adjudication response may include additional submissions but not reasons which are prohibited by section 20(2B) of the NSW Act.
- A failure by the adjudicator to have regard to reports that were relevant to the adjudication can amount to a failure to accord procedural fairness that invalidates the determination where the reports are material to the result.

Facts

Owners Strata Plan 61172, the plaintiff, (**Owners SP**) and Stratabuild Ltd, the first defendant, (**Stratabuild**) entered into a contract for construction work at a development in Rozelle. In response to a payment claim from Stratabuild, Owners SP served a payment schedule that:

- indicated its reasons for withholding payment being that there were defects in painting work carried out by Stratabuild and the likely cost of rectifying those defects would exceed the claim;
- stated that 'testing has been undertaken in relation to the quality and compliance of said painting works' with 'the results of that testing [being] that the said painting works are substantially defective'; and
- annexed a document entitled Defect Identification/ Resolution Register (**defect register**) quotation from Skillco Design & Construct for the cost of rectification (**Skillco Quotation**).

Owners SP subsequently relied on a technical report on paintwork (**Bayliss Report**) and the Skillco Quotation, which were both annexed to its adjudication response.

The adjudicator considered that Owners SP's adjudication response could not include reasons for withholding payment unless those reasons were already in its payment schedule. Accordingly, the adjudicator did not consider the Bayliss Report or the Skillco Quotation (as it was based on the Bayliss Report) when making his determination pursuant to section 20(2B) of the NSW Act.

Owners SP claimed that the adjudicator's decision not to consider the Bayliss Report and the Skillco quotation involved a jurisdictional error, or failure to accord procedural fairness, and sought a declaration that the adjudication determination in favour of Stratabuild was void or an order quashing the determination.

Decision

Macready AsJ held that the determination was void. His Honour found that the references to the testing, the Defect Register and the Skillco Quotation in the payment schedule were appropriately worded and specific enough to sufficiently indicate the reasons for withholding payment. The Bayliss Report thus did not contain additional reasons, but was an additional submission which is not prohibited under section 20(2B) of the NSW Act.

As the adjudicator had confused the use of the words 'reasons' and 'submissions' in the NSW Act, the adjudicator misapprehended the nature of or limits on his functions and powers, which was a jurisdictional error.

The adjudicator's failure to consider the Bayliss Report and the Skillco Quotation that were relevant to the adjudication was also a failure to comply with his statutory obligations. Such failure to afford procedural fairness was an error that invalidated the determination because the reports were material to the result.

Power Serve Pty Ltd v Powerline's Clearing Group Pty Ltd [2011] NSWSC 1180

Significance

The requirement for consideration by an adjudicator under section 22(2) of the NSW Act does not limit the jurisdiction to those circumstances only where the adjudicator provides a legally or technically correct answer.

Facts

Power Serve Pty Ltd, the plaintiff, (**Power Serve**) terminated its construction contract with Powerline's Clearing Group Pty Ltd, the defendant, (**Powerline**) pursuant to Power Serve's contractual right to terminate without default.

Powerline subsequently served a payment claim under the NSW Act for the value of all work done, less payments, including some $1.5 million for work that had not been the subject of previous claims.

At adjudication, Power Serve submitted that the contract:

- released Power Serve from any claim that was not notified to Power Serve in accordance with the contract (Powerline was obliged to make written claims for payment at specified times); and
- barred claims made after 28 days of notice of practical completion.

Powerline argued that the relevant contractual provisions were void because the parties could not contract out of the NSW Act (section 34 of the NSW Act).

Adjudication

The adjudicator determined in favour of Powerline. In seeking judicial review, Power Serve submitted that the adjudicator had acted beyond its jurisdiction under the NSW Act.

Decision

The court dismissed Power Serve's application to prevent Powerline from enforcing the adjudication determination. The court held that:

- the jurisdiction of the adjudicator requires him to consider the matters listed in section 22(2) of the NSW Act (including the provisions of the NSW Act and the contract);
- consideration requires the adjudicator to turn their mind to the specified matters and grapple with them in a reasoned way; and
- it is not the case that the adjudicator's jurisdiction is only exercised where the matters are considered in a way which leads to the legally or technically correct answer.

Siemens Ltd v Origin Energy Uranquinty Power Pty Ltd [2011] NSWSC 195

Significance

Despite the existence of an arbitration agreement, arbitration cannot be a substitute for an adjudication under the NSW Act, and a claim under section 15(2)(a)(i) of the NSW Act cannot be arbitrated.

Facts

Origin Energy Uranquinty Power Pty Ltd, the plaintiff, (**Origin**) was the principal under a contract with Siemens Ltd, the respondent, (**Siemens**) for the supply of gas turbines and associated services relating to the construction of the Uranquinty Power Station.

The contract between the parties prescribed a dispute resolution regime that permitted either party to refer a dispute to arbitration in the event without prejudice meetings failed to resolve the dispute. Dispute was defined under the contract in very broad terms.

Siemens submitted two payment claims under the NSW Act. Origin failed to provide a payment schedule as required under the NSW Act, asserting that it failed to do so because of the misleading and deceptive conduct of Siemens. Siemens then brought proceedings under section 15(2)(a)(i) of the NSW Act to recover the amount claimed as a debt due (**recovery proceedings**).

Origin sought a stay of the recovery proceedings under section 8 of the *Commercial Arbitration Act 2010* (NSW) (**Commercial Arbitration Act**).

The court was required to determine:

- whether the parties had agreed to submit the dispute raised by Siemen's claim to arbitration; and
- whether the disputes under the NSW Act could be determined by arbitration.

Decision

The court decided that the dispute arose under the NSW Act and it was also covered by the arbitration clause, whereby the parties had agreed to refer the dispute to arbitration. The arbitration clause was broad in its terms, and the parties intended that all disputes concerning the contract would be referred to arbitration.

However, this dispute could not be determined by arbitration because:

- section 8(1) of the Commercial Arbitration Act provides that if an arbitration agreement has been entered, such agreement must be enforced unless the agreement is '… inoperative or incapable of being performed' because of the operation of the NSW Act;
- the arbitrator's power to determine certain statutory claims does not extend to cases where the entitlement to progress payments and the right to recover payments arise under the NSW Act; and
- the provisions of section 34 of the NSW Act render void any attempt to exclude, modify or restrict the operation of the NSW Act.

Steel Building Systems Pty Ltd v Beks Constructions (NSW) Pty Ltd [2010] NSWSC 1404

Significance

The court has the power to set aside the decision of an adjudicator where the adjudication application does not comply with section 17(2) of the NSW Act.

Facts

Beks Constructions (NSW) Pty Ltd, the defendant, (**Beks**) erected buildings for Steel Building Systems Pty Ltd, the plaintiff, (**Steel Building Systems**).

Beks sent two payment claims to Steel Building Systems at an incorrect fax number. Steel Building Systems claimed it did not receive them and did not provide any payment schedule.

Beks then faxed to Steel Building Systems the notices required under section 17(2) of the NSW Act giving notice of its intention to apply for adjudication.

Beks then lodged an adjudication application, and an adjudication determination was issued and registered as a judgment. In the determination, the adjudicator stated that the adjudication application had been properly made under the NSW Act.

Steel Building Systems claimed it did not receive the payment claims or the section 17(2) notices, and sought a declaration that the determination was void and orders restraining the enforcement of the judgment.

Decision

Following the Court of Appeal in *Chase Oyster Bar v Hamo Industries* [2010] NSWCA 190, Macready AsJ held that the court has the power to find that an adjudication application has not been made in compliance with section 17(2) of the NSW Act, and the court is not bound by the adjudicator's decision to the contrary.

On the facts, Macready AsJ exercised this power and found:

- there was no service of the payment claims and the section 17(2) notices on Steel Building Systems, as Beks had sent the faxes to incorrect numbers; and
- Steel Building Systems was not given an opportunity to provide a payment schedule as required under section 17(2).

The adjudication application therefore was not made in accordance with the NSW Act and the adjudication determination should be set aside.

St Hilliers Contracting Pty Ltd v Dualcorp Civil Pty Ltd [2010] NSWSC 1468

Significance

If an adjudicator fails to carry out the task with which he is charged, he may fall into jurisdictional error and the determination may be quashed by a court order of certiorari.

Facts

Dualcorp Civil Pty Ltd, the defendant, (**Dualcorp**) undertook subcontract works for St Hilliers Contracting Pty Ltd, the plaintiff, (**St Hilliers**). St Hilliers issued a payment schedule under the NSW Act that included a claim for liquidated damages.

In a subsequent adjudication application, Dualcorp argued that it was not liable for liquidated damages because it had been delayed by variations which entitled it to an extension of time. Further, Dualcorp argued that St Hilliers was not entitled to liquidated damages because of the prevention principle, asserting there was no mechanism to extend time for variations.

The adjudicator accepted Dualcorp's submission and determined amongst other things, that:

- the works had been varied;
- Dualcorp had been delayed by the variations (notwithstanding lack of evidence); and
- a clause in the contract setting the due date for payment of payment claims was void for uncertainty because the term 'month' was not defined (notwithstanding that neither party had so submitted).

St Hilliers sought a declaration that the adjudication determination was void due to jurisdictional error.

Decision

The court found that the adjudicator had fallen into jurisdictional error by failing to carry out the task given to her by the NSW Act in two ways:

- the adjudicator found that Dualcorp had been delayed simply because St Hilliers had offered no alternative explanations. The court said this disclosed no logical or rational reasoning process and reflected a failure to make a bona fide attempt to carry out the function with which the adjudicator was charged; and
- the failure to provide the parties with an opportunity to make submissions on the meaning of the term month constituted a denial of natural justice.

The court issued an order of certiorari quashing the adjudication determination.

The court further commented that the practice of providing adjudicators with massive amounts of surplus material will in particular cases amount to an abuse of process and may be dealt with accordingly.

Queensland cases

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

Hansen Yuncken Pty Ltd v Ian James Ericson trading as Flea's Concreting & Anor (No 2) [2010] QSC 457

Significance

In addition to providing security for an adjudicated amount, a party challenging an adjudication will also be required to provide security for the interest accruing on the adjudicated amount.

Facts

In July 2009, an adjudicator accepted a claim by Ian James Ericson trading as Flea's Concreting (**Ericson**) and determined that Hansen Yuncken Pty Ltd (**Hansen Yuncken**) should pay $4,803,866.60. Hansen Yuncken challenged the adjudicator's decision and the court granted an injunction restraining Ericson from obtaining an adjudication certificate. Hansen Yuncken provided bank guarantees to the court securing the adjudicated amount.

Ericson subsequently sought an order requiring Hansen Yuncken to provide further security of $1,392,000 representing the interest accruing on the adjudicated amount from the date of the injunction until the trial date.

Decision

McMurdo J ordered Hansen Yuncken to provide the further bank guarantee. He noted that the purpose of the Qld Act was to secure payment and that consequently the balance of convenience favoured Ericson who should not be exposed to any risk of non-payment.

Hansen Yuncken Pty Ltd v Ian James Ericson trading as Flea's Concreting & Anor (No 3) [2011] QSC 327

Significance

The case considers the effect of fraud on an adjudication decision under the Act, the circumstances under which such a decision may be subject to a prerogative writ and the effect of the fraud on the substantive remedy granted by the adjudicator.

Facts

Hansen Yuncken Pty Ltd (**Hansen Yuncken**) and Ian James Ericson trading as Flea's Concreting (**Ericson**) entered into a subcontracting arrangement.

Ericson made a payment claim for the actual costs of the work with a mark up of 5% for overheads and 7% for profit. The total claim was for $4.8 million, of which $3.7 million was for labour costs. Ericson included a letter to the adjudicator (but not Hansen Yuncken) offering to make 24 to 30 folders which further substantiated the basis on which the labour costs were calculated available for inspection.

The adjudicator found in Ericson's favour. He did not take up the offer to inspect, but referred to it in his decision.

When Hansen Yuncken reviewed Ericson's voluminous supporting materials (after the adjudicator had made his determination) it discovered that the claimed labour costs were not the actual costs incurred by Ericson. Hansen Yuncken applied to have the adjudicator's decision set aside on the basis of fraud.

Decision

McMurdo J held that Ericson's failure to supply the letter to Hansen Yuncken had been a breach of the rules of natural justice. However, as the adjudicator's determination would have been no different had the breach not occurred, his Honour declined to exercise the discretion to find the decision void.

His Honour found that in making its claim and adjudication, Ericson had made reference to costs actually incurred by him in providing the services. His Honour rejected the possibility that Ericson had innocently misrepresented the actual costs he incurred. He found that the part of the determination that related to the labour costs had been obtained by fraud.

His Honour decided that the equitable relief in respect of the fraud should not extend beyond the fraud and that Ericson should not be fully denied the Act's beneficial operation. Consequently, McMurdo J ordered that Hansen Yuncken pay the adjudicated amount less the fraudulent overcharges for labour costs.

HVAC (Qld) Pty Ltd v Xception Pty Ltd [2011] QDC 22

Significance

An application under the Qld Act for the recovery of moneys subject to a payment claim is to be determined as a summary judgment application. While a respondent is not entitled to raise an applicable defence under the contract, it is not precluded from raising any defence.

Facts

HVAC (Qld) Pty Ltd (**HVAC**) and Xception Pty Ltd (**Xception**) entered into a construction contract for the supply, delivery and installation of mechanical services by HVAC.

HVAC made a final payment claim for $569,985.94. The claim was:

- emailed by HVAC to the director in circumstances where a payment claim would usually be sent to other staff of Xception, six days prior to the usual agreed date for sending invoices;
- emailed to HVAC's director for his review;
- to be followed by a CD with revised variations and supporting documentation; and
- included an offer that there be a walk through to evaluate the claim.

The walk through was to take place after the date for serving the payment schedule under the Qld Act.

HVAC sought summary judgment against Xception contending that the claim was made under the Qld Act and that HVAC's failure to reply with a payment schedule entitled it to relief.

Xception argued that the factors mentioned above showed that the claim was only a review document and that Xception's subsequent reliance

on the Qld Act contravened section 52 of the *Trade Practices Act 1974* (Cth) (**TPA**). Whether the conduct was misleading and deceptive could not be ascertained through summary proceedings.

Decision

Jones DCJ applied *Neumann Contractors Pty Ltd v Transpunt No 5 Pty Ltd* [2010] QCA 119 to find that section 20 of the Qld Act, which precludes a respondent from relying on defences under the contract or from lodging a counterclaim, did not prohibit defences such as that sought to be made under section 52 of the TPA.

James Trowse Constructions Pty Ltd v ASAP Plasterers Pty Ltd & Ors [2011] QSC 145

Significance

Any aspect of an adjudication decision evidencing jurisdictional error, including a failure to accord natural justice, cannot be severed, with the consequence that the entire decision must be set aside. A determination made on a basis for which neither party has contended will trigger this consequence.

Facts

James Trowse Constructions Pty Ltd (**James Trowse**) entered into a subcontract with ASAP Plasterers Pty Ltd (**ASAP**). A dispute over a progress payment arose and the adjudicator delivered a determination in favour of ASAP, including in relation to a variation (**variation**).

James Trowse applied to have the determination set aside alleging that the adjudicator had decided the dispute about the variation on a basis which neither party had raised and thus it was denied the opportunity to make submissions on this point.

ASAP contended that section 26(2) of the QLD Act only required the adjudicator to consider the matters listed in that section in good faith and did not compel the adjudicator to correctly interpret James Trowse's submissions.

Decision

Atkinson J affirmed that a substantial failure to accord natural justice would be a jurisdictional error which would render the adjudication void. The entire decision was set aside. Her Honour accepted James Trowse's argument that deciding a dispute on a basis for which neither party contends is a failure to accord natural justice, due to the unsuccessful party being unable to make submissions.

Atkinson J rejected ASAP's argument that any aspect of an adjudication decision that was subject to a jurisdictional error could be severed from the rest of the decision. She found that there is no mechanism available to sever any unlawful finding from an adjudicated amount, particularly in the case of jurisdictional error, as the common law doctrine of severance cannot remedy the decision. The statutory scheme in Queensland provides that an adjudicator must determine the amount of a progress payment as one total amount.

John Holland Pty Ltd v Walz Marine Services Pty Ltd & Ors [2011] QSC 39

Significance

A respondent must respond to issues of fact raised in a payment claim in its payment schedule, otherwise it may be taken to have made implied admissions and be prevented from raising those issues in its adjudication response.

Facts

Walz Marine Services Pty Ltd (**Walz**) issued a payment claim to John Holland Pty Ltd (**John Holland**) for delay and disruption costs styled as variations, for over $2.2 million. The contract gave Walz an entitlement to claim for delay and disruption costs where the delay was caused by inclement weather events after certain thresholds had been exceeded.

John Holland contended in its payment schedule that on the proper construction of the contract, Walz was not entitled to claim delay costs. In its payment schedule John Holland did not dispute that the thresholds had been exceeded. However, John Holland made that submission in its adjudication response.

The adjudicator considered John Holland's submissions were barred by virtue of section 24(4) of the Qld Act, as they were reasons for rejecting the claim that were not included in the payment schedule. The adjudicator treated the absence of an express challenge of the occurrence of inclement weather events meeting the thresholds by John Holland as implied admissions.

The adjudicator allowed Walz's payment claim in the sum of $1.1 million.

Judgment

Wilson J dismissed the application for review. Her Honour held the adjudicator was correct in not considering John Holland's reasons for withholding made for the first time in its adjudication response and was right to treat the absence of an express challenge by John Holland to factual premises in the payment claim as an implied admission.

Northbuild Construction P/L v Central Interior Linings P/L & Ors [2011] QCA 22

Significance

The Court of Appeal confirmed that the court retains inherent jurisdiction to review adjudicator's decisions in cases of jurisdictional error.

Facts

Central Interior Linings Pty Ltd (**Central Interior**) had been successful in an adjudication application against Northbuild Construction Pty Ltd (**Northbuild**).

Northbuild challenged the adjudicator's decision. Its complaint was, in essence, that the adjudicator failed to consider Northbuild's case because of the size and difficulty of the task, had therefore failed to make a decision in good faith and had denied Northbuild natural justice. Martin J at first instance rejected that complaint, finding that the adjudicator had made a genuine attempt to determine the adjudication in accordance with the Qld Act, and dismissed the application.

Northbuild appealed. In addition to challenging Martin J's decision about the bona fides of the adjudicator's decision, Northbuild asserted that Martin J had erred in proceeding on the basis that the decision could not be set aside for jurisdictional error.

Decision

The Court of Appeal dismissed the appeal.

The court confirmed that while adjudication decisions under the Qld Act are not reviewable under the *Judicial Review Act 1991* (Qld) the court retains a supervisory jurisdiction over adjudicators.

The court indicated that under this jurisdiction an adjudicator's decision may be challenged on the basis of non-compliance with an essential statutory pre-condition or on the grounds of error of law on the face of the record or jurisdictional error.

White JA commented that, in seeking to establish jurisdictional error in the context of good faith, the enquiry should focus on whether the adjudicator has performed the function demanded by the Qld Act, keeping in mind that the Qld Act requires and facilitates rapid decision making by a person with recognised expertise in the area.

Taking this approach, the court found that the adjudicator gave sufficient consideration to the material provided by Northbuild and confirmed that the adjudicator 'is not required to set out every detail of every report or other document provided by a party to the adjudication'.

Penfold Projects Pty Ltd v Securcorp Limited [2011] QDC 77

Significance

A payment claim must be served on the party liable to make the payment under a construction contract unless an express contractual provision provides otherwise.

Facts

Penfold Projects Pty Ltd, a trade contractor (**Penfolds**) and Securcorp Limited, the principal (*Securcorp*) entered into a contract for the landscaping of a unit development in Townsville (*contract*). Matrix Projects (Qld) Pty Ltd (**Matrix**) was also a party to the contract as the construction manager.

Clause 37.1 of the contract required Penfolds to submit progress claims under the contract to Matrix as Securcorp's agent. Clause 20 provided that Matrix acted as Securcorp's agent except where otherwise provided.

Clause 37.2 of the contract required Matrix to provide a progress certificate to Penfolds and Securcorp upon receiving a progress claim.

Clause 7 of the contract required that notices be addressed or delivered to the relevant address in the contract in order to effect service of a notice. The contract contained addresses for both Matrix and Securcorp.

In December 2010, Penfolds sent by email a 'progress claim made under the Building and Construction Industry Payments Act 2004' to Matrix. In January 2011, Penfolds sent a further progress claim endorsed under the Qld Act.

Matrix did not provide progress certificates to Penfolds or Securcorp in respect of the progress claims as required by clause 37.2 of the contract. Securcorp did not serve any payment schedules or pay any of the amounts claimed in respect of those payment claims.

Penfolds brought an originating application seeking orders that Securcorp pay the amounts claimed as a debt owing under section 19(2) of the Qld Act.

Securcorp contended Penfolds had failed to serve the payment claims as required by section 17(1), which requires a payment claim be served on the person who, under the construction contract concerned, is or may be liable to make payment. Securcorp submitted the parties had not agreed to treat progress claims under clause 37.1 of the contract as payment claims under the Qld Act.

Penfolds argued that it had satisfied its service requirements under the Qld Act as clause 20 of the contract permitted payment claims to be served on Matrix and Matrix had authority to accept the payment claims on behalf of Securcorp.

Judgment

Irwin DCJ dismissed the application on the bases that:

- Penfolds had not effected service of the claims in accordance with the Qld Act; and
- he was not satisfied that the parties had agreed that service of payment claims under the Qld Act could be effected by serving progress claims on Matrix as Securcorp's authorised agent.

QCLNG Pipeline Pty Ltd v McConnell Dowell Constructors (Aust) Pty Ltd [2011] QSC 292

Significance

An accidental or erroneous omission, if significant, could render an adjudication decision void. This case distinguishes a number of New South Wales authorities which held that an accidental or erroneous omission by an adjudicator does not amount to a failure to comply with the New South Wales equivalent of the Act.

Facts

QCLNG Pipeline Pty Ltd (**QCLNG**) engaged McConnell Dowell Constructors (Aust) Pty Ltd (**MDC**) to design and construct a gas pipeline in Central Queensland.

MDC made a payment claim for $87,249,587.

The adjudicator decided that MDC was entitled to be paid $86,832,133 on the bases that:

- MDC had substantially complied with its contractual obligations to provide detailed estimates regarding a proposed variation within a prescribed time; and
- QCLNG had not satisfied him that the claim should fail because QCLNG had not provided details of the allegation of non-compliance.

Decision

P Lyons J held that the adjudicator's decision was void due to the adjudicator's failure to properly consider the requirements of the variation clause. He held that the adjudicator had failed to carry out an 'active process of intellectual engagement' in relation to a matter mandated by section 26(2) of the Qld Act, namely the construction contract. His Honour found that the adjudicator had failed to comply with an essential requirement of the Qld Act for a valid decision.

Spankie and Ors v James Trowse Constructions Pty Ltd [2010] QCA 355

Significance

The respondent was entitled to make a further payment claim from a new reference date in respect of the amount included in its earlier payment claim where there had been no valid adjudication decision made in respect of that earlier payment claim.

Facts

Mr and Mrs Spankie (**Spankie**) entered into a construction contract with James Trowse Constructions Pty Ltd (**James Trowse**).

On 1 September 2009 James Trowse served Spankie with payment claim 14. Payment claim 14 was referred to adjudication under the Qld Act and an adjudication decision was delivered on 2 November 2009. On 19 May 2010 McMurdo J declared that the adjudication decision was void.

James Trowse did not withdraw payment claim 14 under section 32 of the Qld Act following the adjudication decision being declared void.

On 4 June 2010 James Trowse served Spankie with payment claim 16. Payment claim 16 claimed only an unpaid amount that had been part of the larger amount claimed in payment claim 14 for work done prior to that payment claim.

McMurdo J at first instance rejected Spankie's contention that the Qld Act precluded the making of successive payment claims for identical amounts for the same work where the second payment claim was made after a further reference date had arisen.

His Honour also rejected Spankie's argument that section 32 excluded Spankie's right to make a subsequent payment claim for an amount the subject of the void adjudication determination.

Decision

The Court of Appeal upheld McMurdo J's decision and found that the Qld Act entitles a contractor to a progress payment whether or not work was done in that month.

The court also commented on the operation of section 32, saying it does no more than define the rights of James Trowse in respect of a new adjudication application based upon the earlier payment claim. It does not conflict with the provisions which permit the making of a subsequent payment claim in relation to a different reference date.

Syntech Resources Pty Ltd v Peter Campbell Earthmoving (Aust) Pty Ltd [2011] QSC 293

Significance

An adjudicator must consider submissions properly made by a claimant or respondent in support of its payment claim or payment schedule: section 26(2)(d). Where an adjudicator wishes to exclude such a submission on any basis, the proper course is to invite further submissions from the parties in regards to the issue: section 25(4).

Facts

Peter Campbell Earthmoving (Aust) Pty Ltd (**PC Earthmoving**) entered into a contract with Syntech Resources Pty Ltd (**Syntech**) for the wet hire of heavy earth moving equipment.

PC Earthmoving delivered a payment claim to Syntech claiming $813,672.14.

Syntech delivered its payment schedule contending that no payment was due to PC Earthmoving on the bases that the claimed moneys were not payable under the contract and that PC Earthmoving had been overpaid. The claim proceeded to adjudication.

Syntech included spreadsheets explaining the basis for its calculations with its adjudication response.

The adjudicator noted that:

- the spreadsheets had not, but should have, been provided to PC Earthmoving as part of Syntech's payment schedule;
- as a consequence, PC Earthmoving had been denied the opportunity of replying in a detailed and meaningful way; and
- if he accepted or considered the spreadsheets, PC Earthmoving could be potentially denied natural justice.

The adjudicator refused to consider the spreadsheets.

Syntech applied to have the adjudicator's decision be declared void on the basis that the adjudicator:

- was required to consider the spreadsheets by reason of section 26(2) of the Act; and
- had denied Syntech natural justice by deciding that he would exclude the spreadsheets when PC Earthmoving had not contended for that course and the adjudicator did not otherwise give Syntech an opportunity to make submissions about it.

Decision

Daubney J held that the adjudicator's decision was void on the basis of jurisdictional error.

Section 26(2)(d) compelled the adjudicator to take into account all submissions properly made in support of the payment schedule.

His Honour found that the adjudicator did not make a determination that the tendering of the spreadsheets was not a 'submission properly made'. The spreadsheets were not alternative reasons for opposing the claim but were explanatory. By failing to take the

spreadsheets into account, the adjudicator failed to consider a matter which the Act compelled him to.

Daubney J further held that the adjudicator's unilateral exclusion of the spreadsheets on the basis that it denied PC Earthmoving natural justice was an error of law as it denied Syntech natural justice. Prior to making any decision on exclusion, the proper course would have been to invite further submissions from both parties in relation to the issue under section 25(4) of the Act.

T & M Buckley P/L v 57 Moss Rd P/L [2010] QCA 355

Significance

The Queensland Court of Appeal provided further guidance on the degree to which construction work needs to be identified in a payment claim.

Facts

T & M Buckley Pty Ltd (**Buckley**) made a payment claim which comprised the following items:

- sediment control tests. This item referred to a document with further particulars which was not attached;
- suspension costs. While the basis for the calculation of the costs was disclosed, the claim did not contain an explanation as to how the figures on which the calculation was based were obtained; and
- interest on late payments.

The primary judge held that, but for the interest claim, the claim was not formulated with the precision and particularity reasonably sufficient to apprise the parties of the real issues in the dispute. His Honour ordered summary judgment in respect of the interest component.

Buckley cross-appealed on the basis that his Honour erred in law by applying an erroneous test to the question of whether the payment claim complied with section 17(2) of the Qld Act.

Decision

The Court of Appeal allowed Buckley's cross-appeal.

The Court found that the description relating to the sediment control tests was sufficient and that the failure to attach particulars did not equate to non-compliance with section 17(2). Similarly, although Buckley did not explain in every detail the basis of the suspension costs, they were sufficiently identified for the purposes of section 17(2).

VK Property Group Pty Ltd and Ors v AAD Design Pty Ltd and Anor [2011] QSC 54

Significance

A claimant is not precluded from making a payment claim for an unpaid amount claimed in a previous claim where the merits of that prior claim were not determined by an adjudicator.

Facts

VK Property Group Pty Ltd and Conias Properties Pty Ltd (**VK Property**) engaged A A D Design Pty Ltd (**AAD Design**) as a built environment designer to submit a development application for a unit complex at Sunnybank Hills.

AAD Design made three payment claims pursuant to the Qld Act. VK Property disputed the validity of the service of claim 1, which AAD Design accepted.

Claim 2 included two variations that were previously claimed. An adjudicator found that claim 2 was invalid because it included claims for services provided after the reference date for the payment claim.

Claim 3 included the same items as claim 2 and a claim for interest. In the payment schedule, VK Property contended that claim 3 was invalid for the following reasons:

- it was an abuse of process as the same items had been previously adjudicated upon in claim 2;
- issue estoppel prevented re-agitation of the claim;
- section 17(5) prohibited the bringing of a second claim in respect of the same reference date; and
- claims 1 and 2 were relevantly identical to claim 3.

Claim 3 was referred to adjudication. The adjudicator rejected VK Property's contention and decided that claim 3 was not a re-agitation. The adjudicator decided he did not have the authority to determine whether the claim was an abuse of process.

VK Property applied for orders that the adjudicator's decision be set aside for alleged jurisdictional error, specifically: abuse of process, issue

estoppel, denial of natural justice and failure to give attention to the Anshun principle.

Judgment

Boddice J dismissed the application. His Honour held VK Property failed to establish that the adjudicator made any jurisdictional error.

Boddice J held that the effect of section 17(6) is that section 17(5) does not preclude a claimant from re-agitating a payment claim for an unpaid amount claimed in a previous claim where the merits of that claim have not been determined by an adjudicator.

His Honour held that issue estoppel arises only where the issue sought to be re-agitated has been previously determined. His Honour held that no issue estoppel arose in relation to claim 2 because the merits of that claim had not been determined.

Vantage Holdings Pty Ltd v JHC Developments Group Pty Ltd [2011] QSC 155

Significance

A party to a building contract may concurrently seek to enforce its rights to recover payment of progress claims under the Qld Act and pursuant to the contract.

Facts

Vantage Holdings Pty Ltd (**Vantage**) entered into multiple contracts with JHC Developments Group Pty Ltd (**JHC**) for the design and construction of several apartment complexes.

In July 2010, Vantage served notices of dispute on JHC which raised issues concerning the proper interpretation of the contracts. The dispute was referred to arbitration.

On 21 October 2010, Vantage commenced a proceeding in the Supreme Court claiming a debt owing. On 26 October, Vantage filed and served an amended statement of claim, alleging JHC had failed to deliver payment schedules in relation to the claimed amount. Vantage contended that the claimed amount was payable under the Qld Act as JHC had not delivered payment schedules.

On 24 November, JHC filed a conditional notice of intention to defend, on the basis that the proceeding should be stayed as it was the subject of arbitration. The next day, JHC filed an amended conditional notice of intention to defend, seeking transfer to the District Court as it had since paid moneys to Vantage, reducing the claimed amount.

On 2 December, Vantage applied for summary judgment for the claimed amount. JHC filed an application seeking a stay of the proceeding pursuant to section 53 Commercial Arbitration Act 1990.

Judgment

Daubney J dismissed both applications.

His Honour:

- held Vantage's application for summary judgement was premature because JHC had not served a notice of intention to defend. As JHC's notice of intention to defend was conditional, there was still time for JHC to file a notice of intention to defend under rule 139;
- held JHC's stay application was misconceived as the subject of the arbitration was the proper interpretation of the contracts regarding Vantage's entitlement to claim variations not Vantage's entitlement to recovery of the claimed amount under the Qld Act; and
- was not convinced an order should be made pursuant to section 53 Commercial Arbitration Act as the proceeding was not in respect of the matters considered by the arbitrator.

Walton Construction (Qld) Pty Ltd v Corrosion Control Technology Pty Ltd & Ors [2011] QSC 67

Significance

The termination of a construction contract extinguishes a claimant's entitlement to bring further payment claims under the Qld Act.

Facts

Walton Construction (Qld) Pty Ltd (**Walton Construction**) entered into a subcontract for painting work with Corrosion Control Technology Pty Ltd (**CCT**).

On 15 December 2009, work under the subcontract ceased. On 15 January 2010, Walton Construction terminated the subcontract. Between 15 December 2009 and 22 March 2010 CCT submitted five payment claims endorsed under the Qld Act.

CCT pursued its fifth payment claim to adjudication, and on 7 May 2010 it obtained a favourable adjudication decision.

Walton Construction challenged the adjudicator's decision and sought declaratory relief in the Supreme Court. Walton Construction submitted that the decision was void and the fifth payment claim was invalid on the bases that:

- the termination of the subcontract deprived CCT of further reference dates; and
- CCT's entitlement to make a payment claim under the Qld Act was lost upon termination.

Judgment

Lyons J upheld Walton Construction's contentions and found that the fifth payment claim was invalid and the decision in respect of it was void.

His Honour held that the subcontract dealt comprehensively with the times for making payments and the means for determining reference dates for the purposes of the Qld Act. His Honour held clause 44.10 (a common clause found in Australian Standard contracts) provided that, upon termination, the parties' rights reverted to those found at common law in respect of repudiatory conduct. Accordingly, CCT's rights to recover any outstanding moneys through the Qld Act had not survived the termination of the subcontract.

His Honour distinguished the decision in *Brodyn Pty Ltd v Davenport* [2004] NSWCA 394 on the basis that under the Qld Act a reference date must be under a construction contract, whereas the New South Wales counterpart states that a references date occurs in relation to a construction contract. His Honour held that, in relation to the Qld Act, a reference date can only occur under a construction contract, and therefore, reference dates no longer occur upon termination.

Ware Building Pty Ltd v Centre Projects Pty Limited [2011] QSC 343

Significance

The case follows the usual rule that the risk of loss in the event of an insolvency falls on the respondent.

Facts

Centre Projects Pty Limited (**Centre Projects**) was contracted to do works for Ware Building Pty Ltd (**Ware Building**).

Centre Projects obtained an adjudication order. Ware Building applied for an injunction restraining the enforcement of the order. Following initial argument, the court dismissed the application and ordered the adjudicated sum (which had been paid into court by Ware Building) be paid out to Centre Projects.

Ware Building then sought a stay of the later order on the bases that:

1. it had good prospects of success in an arbitration which was to be held shortly;
2. the imminence of an arbitration should encourage maintenance of the status quo;
3. it had worked diligently in order to initiate arbitration proceedings; and
4. if it was successful in the arbitration, its success would be rendered nugatory because Centre Projects would likely dissipate the money or become insolvent.

Judgment

The stay was refused. The judge found that there was insufficient reason to outweigh the standard legislative position under the Act that the risk of loss in the event of insolvency falls upon the head contractor or owner rather than the subcontractor or contractor.

Victoria cases

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

Director of Housing v Structx Pty Ltd T/ as Bizibuilders and Anor [2011] VSC 410

Significance

The court examined the circumstances in which the decisions of an adjudicator will be subject to judicial review, and the meaning of 'in the business of building residences' under section 7(2)(b) of the Vic Act.

Facts

On or about 15 November 2009, the Director of Housing of the State of Victoria (**the Director**) entered into an agreement with Structx Pty Ltd (**Structx**) for the construction of a number of residential units. The construction contract was comprised of an amended AS 2124-1992 construction contract, together with a number of other contract documents.

The dispute between the parties arose under the Vic Act after Structx served a payment claim for $360,311.95 on the Director. Structx argued that the Director failed to serve a payment schedule within the time required under the Vic Act and made an adjudication application. The adjudicator found in favour of Structx, determining that the Director was liable to pay Structx the amount of $293,424.13.

The Director sought judicial review of the adjudication determination. The Director argued (amongst others) that, pursuant to section 7(2)(b) of the Vic Act, the adjudicator did not have jurisdiction to make the determination because the construction contract was a domestic building contract and the Director was not in the business of building residences and, therefore, the Vic Act did not apply. Further, the Director argued that the adjudicator had erred in finding that the Superintendent's representative lacked authority to issue payment schedules and that the payment schedule did not comply with section 15(2)(d) of the Vic Act as it was not in the prescribed form.

Decision

The court found in favour of the Director.

It was held that the Director was not in the business of building residences for the purposes of section 7(2)(b) of the Vic Act. Vickery J stated that 'the mere fact that the power to build residences is conferred on the Director did not necessarily mean that the Director is in the business of building residences. Section 7(2)(b) speaks in terms of the actual business which the building owner undertakes, not whether a party in the position of the building owner has the power to undertake an activity.'

Accordingly, the adjudication determination was quashed by reason of jurisdictional error.

When considering the jurisdiction of adjudicators generally the court made reference to *Grocon Constructions Pty Ltd v Planit Cocciardi Joint Venture* (No 2), where it was observed that adjudicators appointed under the Act are 'clothed with legal authority to make binding determinations for the purposes of the Vic Act which affect the statutory rights or obligations of persons or individuals who are claimants for progress payments under the Act or who are respondents to such claims.'

It was noted that adjudicators under the Vic Act are not inferior courts within the court hierarchy and are therefore exposed to an increased risk of falling into jurisdictional error.

Vickery J considered that the determination by the adjudicator that the Director was 'in the business of building residences' for the purposes of the Vic Act was one of a mixed question of law and fact, stating 'I do not consider that the exception provided by section 7(2)(b) of the Vic Act was intended to confer on an adjudicator power to decide jurisdiction founded on questions of law or mixed questions of law and fact, which includes the power to decide the question wrongly, without attracting prerogative relief.' As such, the adjudication determination regarding section 7(2)(b) of the Vic Act was amenable to judicial review by way of certiorari.

Judicial review by way of certiorari was also available with respect to the adjudicator's findings that the superintendent's representative lacked authority to issue payment schedules and the payment schedule did not comply with section 15(2)(d) of the Vic Act. In making these findings, which were determined by

the court to lack probative evidence and misinterpret the meaning of section 15(2)(d) of the Vic Act, the adjudicator fell into error on the face of the record.

Dura (Aust) Constructions Pty Ltd v Hue Boutique Living Pty Ltd [2011] VSC 477

Significance

The court upheld a previous ruling confirming that litigation privilege extended to documents prepared in anticipation of an adjudication application under the Vic Act.

The court held that such adjudication proceedings met the definition of Australian Court under section 119 of the *Evidence Act 2008* (Vic) (**Evidence Act**).

Facts

Hue Boutique Living Pty Ltd (**Hue**) engaged Dura (Australia) Constructions Pty Ltd (**Dura**) to construct 29 residential apartments. The development was to be built on land in Richmond owned by Hue and undertaken by them as trustee of a trust in which Dura held 20% of the units, in addition to being builder.

Dura commenced proceedings against Hue in 2007 for breach of contract. This followed a series of show cause notices which ultimately led to Hue taking the works out of the hands of Dura. During the subsequent course of litigation between the parties, Dura sought to inspect a large number of documents produced by third parties in answer to subpoenas issued at the request of Dura.

Many of these documents were communications from parties such as Hue's quantity surveyor, superintendent and architect in anticipation of an adjudication application under the Vic Act. Hue alleged that these documents attracted litigation privilege under section 119 of the Evidence Act and, as such, it was under no obligation to produce them.

Decision

The court found that the adjudication-related documents enjoyed litigation privilege and did not have to be produced by Hue.

It was held that adjudication procedures under the Vic Act fell within the meaning of proceeding in section 119 of the Evidence Act and therefore qualified as documents prepared for the dominant purpose of the client being provided with professional legal services relating to... a [legal] proceeding. Accordingly, such documents enjoyed litigation privilege.

Seabay Properties Pty Ltd v Galvin Construction Pty Ltd [2011] VSC 183

Significance

In Victoria, a respondent to a payment claim is not entitled to include an excluded amount in a payment schedule, despite the absence of such prohibition in section 15 of the Vic Act. Liquidated damages are an excluded amount under section 10B(2) of the Vic Act.

Early submission of a payment claim (by one day) will not invalidate a claim made under the Vic Act. Vickery J stated that the purpose of the Vic Act is promoted by avoiding any excessive degree of technicality in the operation of its provisions.

Payment claims issued by a claimant and payment schedules issued by a respondent under the Vic Act must contain sufficient particularity. This is so that both parties are appropriately informed of the other party's case and it will enable an adjudicator to properly determine the value of a claim.

Facts

A contract for the construction of an apartment complex was entered into by Seabay Properties Pty Ltd (**Seabay**) as principal and Galvin Construction Pty Ltd (**Galvin**) as contractor.

Upon achievement of practical completion, Galvin lodged a payment claim on 28 October 2010, one day prior to the reference date on 29 October 2010. Seabay responded by providing a payment schedule refusing to pay the amount claimed by Galvin identifying variation claims as excluded amounts for the purposes of the Vic Act and deducting liquidated damages claimed to be due from Galvin to Seabay. This resulted in a deficit of $220,332.94 against Galvin with the consequence that 'Nil' was assessed as the amount due to Galvin in the payment claim.

Galvin commenced an adjudication application under the Vic Act accepting the variations as excluded amounts, but disputing the wrongful application of liquidated damages by Seabay. The adjudicator determined that Seabay should

pay Galvin $549,017 and refused to deduct the liquidated damages sought by Seabay.

Seabay challenged the adjudication determination on the following grounds:

- the payment claim incorrectly included non-claimable variations therefore the adjudicator could not determine it;
- liquidated damages were incorrectly excluded as an 'excluded amount';
- the payment claim was submitted prematurely; and
- the payment claim failed to identify work performed in the relevant claim period.

Decision

Vickery J dismissed Seabay's claim and upheld the validity of the adjudication determination. Each of the grounds of appeal was addressed separately.

Ground 1 – Incorrect inclusion of non-claimable variations

Vickery J held that the adjudicator's determination was substantially correct. The court noted that excluded amounts must not be taken into account in either a statutory payment claim (section 10B), or in an adjudicator's determination (section 23(2A)). An excluded amount includes any variation amount that is not a claimable variation. The court held that the parties agreed upon a variation amount of $210,104 prior to submission of the claim and it hence fell within the definition of claimable variation under section 10A(2) of the Vic Act. To this extent, the court affirmed the adjudicator's determination.

It should be noted that the excluded amount provisions are unique to Victoria and are not included in corresponding inter-state legislation.

Ground 2 – Incorrect exclusion of liquidated damages

The superintendent assessed liquidated damages owing from Galvin to Seabay at $770,250. Galvin disagreed with the certification, arguing that it was entitled to an extension of time. Seabay sought to deduct this figure from the claimed amount when issuing a payment schedule in response. Under section10B(2) of the Vic Act, excluded amounts include, inter alia, time-related costs and any amount claimed in damages for breach of the contract. The court held that liquidated damages are captured by this definition.

Under the Vic Act, a payment claim must not include an excluded amount (section 10(3)) and an adjudicator must not consider any 'excluded amount' when valuing a claim (section 23(2A)). However, the Vic Act does not, prima facie, prohibit the deduction of an excluded amount in a payment schedule (section 15).

Vickery J held that despite the wording of section 15, a respondent is not entitled to include an excluded amount in a payment schedule. The court determined that one of the principle purposes of the Vic Act was to maintain cash flow of claimants and create a mechanism for the respondent to pay now and argue later. Vickery J went on to state that such purposes would be defeated if a respondent was entitled to deduct liquidated damages in a payment schedule.

Ground 3 – Premature submission of payment claim

The court held that early submission of the payment claim did not render the payment claim invalid. Vickery J cited his own reasoning in *Metacorp Pty Ltd v Andeco Construction Group Pty Ltd* [2010] VSC 199 and stated that the purpose of the Vic Act is promoted by avoiding any excessive degree of technicality in the operation of its provisions, unless it is clearly necessary to resort to such an approach in order to make the provisions work as a whole, as they were intended (at 135).

It was held that Galvin had lodged the claim in good faith and distinguished this case from *F. K. Gardner & Sons Pty Ltd v Dimin Pty Ltd* [2006] 1 Qd R 10 where the court invalidated a payment claim lodged prematurely under the equivalent Queensland legislation.

Ground 4 – Failure of the payment claim to properly identify work

Finally, the court held that reasonable specificity of the work done in a payment claim is required for two reasons, being to:

- enable the respondent to a payment claim to consider and respond to it; and
- define any issues in dispute which an adjudicator must resolve.

In addition, a payment schedule issued in response to a payment claim must articulate reasons for withholding payment with sufficient precision to appraise the contractor of the case it must answer if the matter proceeds to adjudication. The court found that Galvin's claim adequately identified the work undertaken because it described the categories of work undertaken during the claim period and the percentage claimed to be complete in respect of those categories. It was further held that provision of a payment schedule by Seabay enabled the adjudicator to properly value the claim in question. As such, the adjudicator's determination was valid.

Western Australia cases

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

Georgiou Group Pty Ltd v MCC Mining (Western Australia) Pty Ltd [2011] WASAT 120

Significance

If a claimant allows an entitlement to apply for adjudication for a particular claim to expire (28 days after the payment dispute) without applying under the WA Act, it loses its entitlement to have that work determined under the Act. This position may be different in the context of a final payment claim, although the question has not yet been raised in any decisions to date.

Facts

Georgiou Group Pty Ltd (**Georgiou**) contracted with MCC Mining (Western Australia) Pty Ltd (**MCC Mining**) to construct a tailings dam at the Cape Preston iron ore development in the Pilbara region of Western Australia.

The relevant progress claims related to a variation to excavate rock fill from a quarry. It was disputed that the claim was a variation, but this was not made on strong grounds and little attention was paid to this issue in the court's decision.

The claims had been made on a month-by-month basis depending on how much rock had been excavated. All claims were rejected, and Georgiou made several applications for adjudication. The rate and the quantity was central to the determination.

Georgiou claimed for the amount excavated over the previous month in progress claim 5 and applied for adjudication. A determination was made.

Georgiou then issued progress claim 6 which included the amount excavated in progress claim 5 plus an additional 100,000 cubic metres, but did not apply for adjudication.

Georgiou then, in progress claim 7, claimed the amount in progress claim 5 (already adjudicated) and claim 6 (not adjudicated) and an extra amount for the previous month.

The adjudicator determined that it had jurisdiction to determine only the amount claimed in the previous month.

Decision

The Tribunal found that the applications, to the extent they included work for previous progress claims, should be dismissed under section 31(2)(a)(ii) of the WA Act because they were made more than 28 days after the date on which the payment dispute arose.

The Tribunal concluded that a payment dispute arose when the claim for work was not paid, or the claim had been rejected or wholly or partly disputed. The mandatory time limit within which it was thereafter necessary to make an application, non-compliance with which required it to be dismissed, would have no effect if a claim for the same work could be repeated.

The Tribunal concluded that on a proper construction of the legislation, a repeated claim for the same work is not permitted and that this is the case regardless of whether the claim had been to adjudication or not.

Perrinepod Pty Ltd v Georgiou Building Pty Ltd [2011] WASCA 217

Significance

It is now clear that the right of review by the State Administrative Tribunal (**SAT**) under the WA Act is limited to a decision to dismiss an adjudication application and does not extend to a decision not to dismiss (or to accept) an application and make a determination on the merits.

Although effectively closing the door on a respondent's ability to challenge a decision to entertain an application under section 46(1) of the WA Act, the Court of Appeal confirmed that another door is open through its comments about the availability of judicial review.

Facts

Georgiou Building Pty Ltd (**Georgiou**) applied for adjudication of a payment dispute and Perrinepod Pty Ltd (**Perrinepod**) submitted in its response, that the application should be dismissed on the grounds of the complexity of the matter, one of the bases on which an adjudicator must dismiss an application under section 31(2)(a) of the WA Act.

The adjudicator decided instead to entertain the application and made a determination in favour of the application for $1,575,912.

Perrinepod applied to the SAT seeking a review of the decision of the adjudication not to dismiss the application. That application was dismissed. The SAT concluded that its right of review was limited to a review of a decision of an adjudicator to dismiss an application without making a determination on the merits, and the application was therefore dismissed. Georgiou then appealed to the Court of Appeal on the same bases.

Decision

The question for the Court of Appeal was again, whether section 46(1) of the WA Act provided a right to apply to the SAT for review of a decision by an adjudicator not to dismiss an adjudication application. The Court of Appeal found that there was no such right and dismissed the appeal.

In coming to this finding, the Court of Appeal found that section 31(2)(a) and (b) are alternatives: there is either a decision to dismiss the application under sub-paragraph (a); or, failing that, a determination on the merits. The only type of decision that can be challenged is a decision to dismiss. There is no ability to challenge an adjudicator's decision to hear an application.

Importantly, the court suggested that common law rights to challenge a decision that are inherent in the court's may be available.

Re Graham Anstee-Brook; Ex Parte Mount Gibson Mining Ltd [2011] WASC 172

Significance

This decision confirms a distinction between a challenge grounded upon jurisdictional error in contrast to that grounded upon error of law on the face of the record, and that a right of review may be available for jurisdictional error, but not for error of law.

This decision does open the door however, for other arguments that while section 46(3) of the WA Act (limiting the right of review), might restrict the right to review for error of law on the face of the record, it may not restrict a challenge on the basis of a lack of procedural fairness.

Facts

Downer EDI Works Pty Limited (**Downer EDI**) claimed against Mount Gibson Mining Limited (**MGM**) in respect of work done on a road in the mid-west region of Western Australia. The claim was refused and Downer EDI applied for adjudication.

The adjudicator determined that MGM was required to pay Downer EDI $1,269,060.50 for rock blasting and removal costs, mostly on the basis of finding in favour of an oral agreement contended for by Downer EDI, and the rate at which Downer EDI would be paid.

MGM did not challenge the adjudicator's finding as to what passed between MGM and Downer EDI giving rise to the oral agreement, but rather that what was said could not comprise an agreement within the context of the contract, or that the maker of them had adequate authority to bind MGM.

Decision

K Martin J found that section 46(3) of the WA Act prevented a challenged based on an error of law on the face of the record (but not for jurisdictional error), 'at least until the Court of Appeal delivers its reasons for decision concerning *Perrinepod Pty Ltd v Georgiou Building Pty Ltd* …'.

However, his Honour also found that section 46(3) of the WA Act was not so clear as to be assessed as an attempt to exclude challenges based on an asserted denial of procedural fairness, and that a challenge raising denial of procedural fairness may be successful on the basis that section 46(3) was not wide enough or clear enough to exclude such a challenge.

Thiess Pty Ltd v MCC Mining (Western Australia) Pty Ltd [2011] WASC 80

Significance

The power of review granted to the State Administrative Tribunal by section 31(2)(a) of the WA Act is confined to jurisdictional error, and only a decision on the existence or otherwise of a jurisdictional fact under the WA Act is open to judicial review. What is considered to be a jurisdictional fact remains uncertain, but is not merely an error on the face of the record.

Facts

In May 2008, Thiess Pty Ltd (**Thiess**) and MCC Mining (Western Australia) Pty Ltd (**MCC Mining**) entered into a contract for the construction of part of the Sino Iron Project at Cape Preston in the Pilbara region of Western Australia.

On 17 May 2010, Thiess submitted a bundle of documents contending it was a payment claim under the Act (**Letter**). The amount claimed was not paid and Thiess applied for adjudication.

MCC Mining contended the Letter was not a payment claim within the meaning of the WA Act if it was, the application was out of time, and that the adjudicator was bound to dismiss the application under section 31(2)(a) of the WA Act.

That submission was rejected and on 3 August 2010, the adjudicator delivered a determination that MCC Mining was liable to pay the application $7,309,740.88.

Thiess sought leave to enforce the determination as a judgment of the court (as is required in Western Australia). MCC Mining opposed on the ground that the determination was 'invalid' as the adjudicator did not have jurisdiction due to:

(a) the adjudicator erred in finding that the Letter was a payment claim for the purpose of the Act, and that it was merely a further exchange in negotiations;

(b) a payment dispute had arisen in respect of each item by 9 April 2010; that is, more than 28 days before the application made its adjudication application; and

(c) the Letter contained recycled payment claims; that is, payment claims that had been previously made and not paid and in respect of which a

payment dispute had arisen well outside the 28-day period for making an adjudication application.

Decision

Corboy J considered the avenues available to an aggrieved party to a payment dispute under the Act, where an adjudicator has refused to dismiss the adjudication application, and remarked:

- it is not clear whether a party has a right to appeal a decision of the adjudicator not to dismiss an adjudication application;
- even if there is no right to appeal, a party still has the right under the general law to have an adjudicator's decision quashed if outside the jurisdiction of the adjudicator; and
- an adjudicator may not have jurisdiction to conclusively determine a jurisdictional fact.

Corboy J found that whether an adjudication application was made in time did not constitute a jurisdictional fact and consequently that Thiess was entitled to have the adjudicator's determination enforced as a judgment.

Northern Territory cases

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

K & J Burns Electrical Pty Ltd v GRD Group (NT) Pty Ltd [2011] NTSCA 1

Significance

The Court of Appeal held that for the purposes of the NT Act the 'threshold test' of compliance with the contractual payment terms needs to be met if the payment claim is to generate a payment dispute and commence the period in which an adjudication application can be brought. 'Repeat' claims may consequently be adjudicatable if the earlier claims were not validly made under the terms of the construction contract or, possibly, where the construction contract's terms provide for them.

Facts

K & J Burns Electrical P/L, 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 13 invoices to GRD for progress payments, including claimed amounts for variations. 6 of these invoices were unpaid and disputes arose in respect of alleged deductions of remedial works and liquidated damages.

Burns served GRD with a further, 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 that the earlier invoices were not valid payment claims under the contract, and considered and determined in favour of Burns on the merits of the claim for payment made by the SI.

Appeal

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 judgment, principally on the ground that the

adjudicator had made a jurisdiction error in not dismissing the application under sections 33(1)(a)(ii) and 28(1) of the NT Act, and in proceeding to a determination on the merits of the dispute.

Decision

Supreme Court Decision

The Supreme Court 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 the payment claims comprised in earlier invoices, the time for adjudicating those payment disputes had passed, and that it was a jurisdictional error for the adjudicator not to dismiss the application for having been brought outside the 90 day time limit for applying for adjudication from the (earlier) unpaid invoices.

Court of Appeal Decision

Burns appealed the Supreme Court's decision.

The Court of Appeal (Southwood J dissenting) allowed the appeal, set aside the orders of the Supreme Court and restored the determination of the adjudicator.

Southwood J maintained the position previously taken by him in *Trans Australian Constructions Pty Ltd v Nilsen (SA) Pty Ltd* that the NT Act does not require a payment claim to strictly comply with the express terms of the construction contract. He determined the earlier invoices were valid payment claims under the contract and the NT Act, and that the adjudicator had made a jurisdictional error in determining upon such of the amount claimed in the SI that included those earlier invoiced amounts.

The majority found that the adjudicator need not, when making a determination, accept as a valid payment claim anything that happens to be a claim for payment for an amount of work performed under the contract. Kelly J further found that the adjudicator's decision to proceed to a determination on the merits that the previous 13 invoices were not payment claims was not reviewable by the Court. Olsson AJ analysed the nature of the earlier unpaid invoices and determined that they were not payment claims under the construction contract as envisaged by the NT Act. Consequently, they had not triggered the 90 day period for the making of an adjudication application in respect of those earlier unpaid invoices, or thereby preclude the adjudicator proceeding to a determination of the payment claim made in the SI.

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